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Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH: International Arbitration and Its Enforcement under the New York Convention

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Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH:
International Arbitration and Its Enforcement under the New York
Convention

Cover Page Footnote

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I. Introduction

The use of arbitration has been an increasingly favored method of alternative dispute resolution for international commercial disputes.¹ Arbitration's efficiency and its inexpensive nature, particularly compared to litigation, constitute two of the primary reasons for its growing popularity.² Given the potential for the burdensome, complex, and duplicative litigation of international commercial transactions, it is no wonder that international business entities show a preference for arbitration, which provides a "faster, less expensive and more flexible" forum than litigation.³

International arbitration, however, is not free from problems.⁴ Frequently, issue is taken with the authority of the arbitrator, the legitimacy of the arbitrator's decision, or the difficulty of enforcing an international arbitral award.⁵ The Eleventh Circuit

¹ See H.R. Rep. No. 91-1181, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601 ("In the Committee's view, the provisions [9 U.S.C. § 201 et seq.] . . . will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts."); *see also* *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 638 (1985) ("As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade."). *See generally* Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 *YALE L.J.* 1049, 1049 (1961) (noting that businessmen, in general, prefer arbitration to litigation because it "combines finality of decision with speed, low expense, and flexibility").

² *See Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179-80 (11th Cir. 1981) (stating that the purpose of the New York Convention is to "relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." (citing *Wilko v. Swan*, 346 U.S. 427, 474 (1953))).

³ *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 929 (2d Cir. 1983).

⁴ *See id.* (stating that there have been problems with enforcing arbitration awards).

⁵ *See id.*

confronted such problems in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*,⁶ a case arising out of an industrial construction dispute between American corporations and a German corporation that involved torts, breach of contract, and warranty.⁷ The Eleventh Circuit had to decide an issue of first impression—whether the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) and the provisions of Chapter 2 of the Federal Arbitration Act (FAA) govern an arbitral award that was granted to a foreign corporation by an arbitral panel sitting in the United States and applying U.S. federal or state law.⁸ This issue required the Eleventh Circuit to delve into both the extensive history of the New York Convention and the accompanying background law.

The Eleventh Circuit encountered additional issues. It had to decide whether the admission of expert testimony and technical support conformed to the adopted rules of the arbitration agreement.⁹ The Eleventh Circuit examined whether a defense existed against enforcement based on “arbitrary and capricious” grounds.¹⁰ The court also considered whether the award of prejudgment interest was proper in an arbitration proceeding.¹¹ Finally, the Eleventh Circuit reviewed the district court’s imposition of Rule 11 sanctions against M.A.N. Gutehoffnungshutte GmbH.¹²

⁶ 141 F.3d 1434 (11th Cir. 1998).

⁷ See *id.* at 1437-39; *Nitram, Inc. v. Industrial Risk Insurers*, 848 F. Supp. 162, 164 (M.D. Fla. 1994).

⁸ See *Industrial Risk Insurers*, 141 F.3d at 1440; see generally Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, Pub. L. No. 91-368, § 1, July 31, 1970, 84 Stat. 692 (amended 1970) (codified at 9 U.S.C. §§ 201-208 (1998)) [hereinafter The New York Convention] (“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”).

⁹ See *Industrial Risk Insurers*, 141 F.3d. at 1442-43.

¹⁰ *Id.* at 1445-46.

¹¹ See *id.* at 1446-47.

¹² See *id.* at 1447-48.

The Eleventh Circuit held that the federal district court for the Middle District of Florida correctly denied petitioners' motion to vacate an international commercial arbitration award and remanded the issue of prejudgment interest for reconsideration.¹³ In addition, it reversed the district court's imposition of Rule 11 sanctions.¹⁴ Furthermore, the holding in *Industrial Risk Insurers* highlights the strong presumption among the circuits in favor of arbitrating international transactional disputes.¹⁵ The Eleventh Circuit's holding also underscores the immense latitude given to the arbitration process.¹⁶

Part II of this Note discusses the facts and the procedural history of *Industrial Risk Insurers*, the Eleventh Circuit's holding, and the reasoning stated by the Court.¹⁷ Part III analyzes the background law upon which the Eleventh Circuit relied.¹⁸ Part IV discusses the significance of the case in light of the background law.¹⁹ Finally, Part V concludes that the Eleventh Circuit's holding, although consistent with precedent, is not wholly satisfactory.²⁰ Of particular concern for the international commercial community, the *Industrial Risk Insurers* decision appears to indicate that the Eleventh Circuit views an international arbitration settlement to be acceptable regardless of the means by which it was reached.²¹

II. Statement of the Case

A. The Facts of the Case

Industrial Risk Insurers involved a complex commercial dispute. In 1985 Nitram, Inc., a Florida manufacturer, contracted with Barnard and Burk Group (BBG), a Texas corporation, for the

¹³ See *id.* at 1437.

¹⁴ See *id.*

¹⁵ See *id.* at 1440.

¹⁶ See *id.*

¹⁷ See *infra* notes 22-95 and accompanying text.

¹⁸ See *infra* notes 96-350 and accompanying text.

¹⁹ See *infra* notes 351-417 and accompanying text.

²⁰ See *infra* notes 418-21 and accompanying text.

²¹ See *infra* notes 418-22 and accompanying text.

installation of a tail pipe expander in Nitram's nitric acid plant.²² In turn, BBG assigned Barnard and Burk Engineers and Construction, Inc., a Louisiana corporation, to do the design engineering work for the installation.²³ BBG then contracted with ISI, another Louisiana corporation, to do the construction for the installation.²⁴

Barnard and Burk assigned to Maschinenfabrik Augsburg-Nurnberg AG (MAN AG), a German manufacturer, the duty of providing the tail pipe expander.²⁵ M.A.N. Gutehoffnungshutte GmbH (MAN GHH), as the successor-in-interest to MAN AG, was responsible for the design, manufacturing, and delivery of the expander to Barnard and Burk, which would be in charge of the piping for the expander.²⁶ In addition, MAN GHH contracted to provide technical support for the installation process.²⁷

Problems began after the installation of the tail pipe expander in late 1984 and early 1985.²⁸ In January 1985 a wreck occurred when Nitram attempted to crank the expander.²⁹ The wreck deformed the machinery, destroying the seals around the piping.³⁰ Parts of the expander were returned to Germany for repairs and modifications.³¹ In March 1985 a second attempt to start the turbine expander resulted in another wreck.³² The machine was rebuilt, and subsequent attempts to start the expander proved successful.³³ Nevertheless, the two wrecks in 1985 resulted in significant downtime and millions of dollars in losses.³⁴

²² See *Industrial Risk Insurers*, 141 F.3d at 1437.

²³ See *id.* at 1438.

²⁴ See *id.* Barnard and Burk, Barnard and Burk Engineers and Construction, Inc., and ISI are hereinafter known as "Barnard and Burk."

²⁵ See *Industrial Risk Insurers*, 141 F.3d at 1438.

²⁶ See *id.*

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.*

Nitram had purchased risk insurance from Industrial Risk Insurers (IRI), a Connecticut corporation that provides business risk insurance to large corporations.³⁵ IRI refused to compensate Nitram for the first wreck, claiming that because Barnard and Burk's poor design and defective piping caused the damage, the losses were not covered by Nitram's policy.³⁶ The second wreck, however, was partially covered by Nitram's policy.³⁷

In October 1985 Nitram sued IRI and Barnard and Burk, alleging "that one of them had to pay for the remaining losses from the second wreck."³⁸ IRI cross-claimed to recover money from Barnard and Burk for damages already paid to Nitram resulting from the second wreck.³⁹ The parties removed the case from state court to the United States District Court for the Middle District of Florida, which maintained jurisdiction on diversity grounds.⁴⁰ Barnard and Burk counter-claimed against Nitram for breach of contract.⁴¹ Barnard and Burk also filed a third-party claim against MAN GHH, alleging that MAN GHH's faulty expander, and not Barnard and Burk's design, caused the wrecks.⁴²

Nitram settled with IRI who, as a result, subrogated its claims against Barnard and Burk to Nitram's pre-existing ones.⁴³ In April 1987 MAN GHH moved to compel arbitration of Barnard and Burk's claims pursuant to the arbitration clause in MAN GHH's contract with Barnard and Burk.⁴⁴ According to the clause, arbitration would follow the American Arbitration Association guidelines and Florida law.⁴⁵ The arbitration would be binding.⁴⁶ In July 1987 the district court ordered arbitration of Barnard and

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.*

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ *See id.* at 1438-39.

⁴⁶ *See id.* at 1439.

Burk's third-party claim against MAN GHH, pursuant to the provision in the contract between the parties.⁴⁷

In December 1987 Nitram amended its complaint to make tort and breach of warranty claims directly against MAN GHH, claiming that the expander was defective, poorly designed, and inadequately manufactured.⁴⁸ Nitram also demanded indemnification if found liable to Barnard and Burk.⁴⁹ IRI added a cross-claim against MAN GHH.⁵⁰ In August 1988 the district court ordered arbitration of these additional claims.⁵¹

In the interim, Barnard and Burk settled with Nitram and IRI.⁵² Three conflicts, however, remained for the arbitrator: (1) the claim Barnard and Burk filed against MAN GHH; (2) Nitram's claim against MAN GHH; and (3) IRI's claim against MAN GHH as Nitram's subrogee.⁵³ All three disputes revolved around the central issue of liability—whether it was MAN GHH's expander or Barnard and Burk's design and piping that caused the wrecks.⁵⁴

In March 1993 Barnard and Burk moved for Rule 11 sanctions against MAN GHH, alleging that MAN GHH had tried to relitigate the matter of arbitral venue.⁵⁵ In July 1993 the district court found that venue had already been decided and, thus, imposed sanctions against MAN GHH.⁵⁶ In May 1993 the arbitration panel ruled in favor of MAN GHH, stating that Barnard and Burk's design and piping caused the two wrecks, not MAN GHH's expander.⁵⁷ The arbitral panel then awarded MAN GHH costs and conversion rate compensation.⁵⁸

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See id.* at 1438.

⁵⁰ *See id.* at 1439.

⁵¹ *See id.*

⁵² *See id.*

⁵³ *See id.*

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *See id.*

Barnard and Burk, pursuant to the arbitration award, moved for the district court to vacate the award on the grounds that the arbitrators' decision was "arbitrary and capricious."⁵⁹ It also argued that the panel improperly admitted unfairly prejudicial expert testimony and evidence.⁶⁰ Barnard and Burk further claimed that the costs award and conversion rate compensation should be vacated.⁶¹ The district court denied Barnard and Burk's motion to vacate the arbitration panel's decision and affirmed the award.⁶²

B. The District Court Holding

The district court, which had authority to vacate or confirm the arbitration award, found its standard of review in Chapter 1 of the FAA, 9 U.S.C. §§ 1-16, requiring the court to uphold and enforce the arbitrator's decision unless grounds for vacating it are both raised and substantiated.⁶³ The district court held that the arbitration panel's decision to call its own expert witness who once had been retained by the respondent IRI to examine and redesign the expander after the first wreck in January 1985 was not so prejudicial as to require vacating the award.⁶⁴ It found, moreover, that the submission of this expert witness' report was neither unreasonable nor unfairly prejudicial so as to justify vacating the arbitral award.⁶⁵ The district court also stated that the

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *See id.*

⁶² *See id.*

⁶³ *See Nitram, Inc. v. Industrial Risk Insurers*, 848 F. Supp. 162, 165 (M.D. Fla. 1994); *see also* 9 U.S.C. § 10(a)-(e) (1998) (indicating that a district court may only vacate an award if the award was "procured by corruption, fraud, or undue means," or if the arbitrator was engaged in "misconduct," or if the arbitrator exceeded his power).

⁶⁴ *See Nitram, Inc.*, 848 F. Supp. at 165-66 (stating that plenty of opportunity was given for cross-examination and that the expert witness testimony was not the only piece of evidence considered by the arbitration panel to suggest that Barnard and Burk, Nitram, or IRI was prejudiced).

⁶⁵ *See id.* at 166 (noting that arbitration is not bound by traditional rules of procedure or evidence). The district court further stated that it would not review the arbitration award *de novo* because of the deference shown to arbitral awards. *See id.* at 165. The district court stated that the award would not be vacated because the respondents failed to indicate a specific public policy that was being violated as a result

arbitrators' determination that Barnard and Burk's defective piping installation caused the two wrecks was not arbitrary and capricious and did not violate any expressed public policy.⁶⁶ Lastly, the district court held that the arbitration panel's award of costs was not arbitrary or capricious because the respondents failed to show how the award was a "wholesale departure from the law" or that the award was not based upon the arbitration provision of the contract.⁶⁷

C. *The Eleventh Circuit Decision*

This case came before the Eleventh Circuit on the presumption that it was based on diversity grounds.⁶⁸ The Eleventh Circuit reviewed the district court's motion of denial and addressed four questions posed by Barnard and Burk.⁶⁹ Barnard and Burk specifically asked the Court to consider: (1) whether the arbitrators failed to carry out arbitration proceedings in strict conformity with the arbitration clause in the parties' agreement;⁷⁰ (2) whether the award should be vacated because of the admission of expert witness testimony and of a technical report;⁷¹ (3) whether the district court abused its discretion in deciding that the arbitration awards were not "arbitrary and capricious";⁷² and (4)

of the admissions. *See id.* at 166.

⁶⁶ *See id.* at 166-67.

⁶⁷ *Id.* ("An Award is arbitrary and capricious only if a legal ground for the arbitrators decision cannot be inferred from the facts of the case... [and] if the reasoning is so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." (citing *Safeway Stores v. American Bakery and Confectionery Workers, Local 111*, 390 F.2d 79, 82 (5th Cir. 1968)).

⁶⁸ *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1439-40 (11th Cir. 1998).

⁶⁹ *See id.* at 1439.

⁷⁰ *See id.* In response to the petitioner's argument that the arbitration panel's failure to conduct the international arbitration in conformity with the parties' agreement required the district court to vacate the arbitration award, the Eleventh Circuit held that the panel acted in accordance with the rules of the American Arbitration Association (AAA), which are "intentionally written loosely, in order to allow arbitrators to resolve disputes without the many procedural requirements of litigation." *Id.* at 1443-44.

⁷¹ *See id.* at 1439. The Eleventh Circuit did not find admission of the evidence or the testimony to be in violation of the AAA rules, nor did the testimony violate public policy as outlined in the New York Convention. *See id.* at 1443.

⁷² *Id.* at 1439. As to the appellant's argument that the arbitral award should be

whether the cost awards and conversion rate compensation should also be vacated with the arbitral award.⁷³

The Eleventh Circuit *sua sponte* examined the source of its jurisdiction,⁷⁴ and reviewed *de novo* the district court's decision.⁷⁵ The court concluded that an arbitral award rendered within the United States, under American law, falls within the boundaries of the New York Convention and is therefore governed by Chapter 2 of the FAA when one of the parties involved has its domicile or principal place of business in a foreign state.⁷⁶ The Eleventh Circuit held that it had federal subject matter jurisdiction pursuant to the New York Convention, not diversity jurisdiction.⁷⁷ The Eleventh Circuit supported its finding by stating that MAN GHH's arbitration award fell under the auspices of the New York Convention.⁷⁸ The court indicated that the award was "non-domestic" because it was made under the "legal framework" of a foreign country.⁷⁹ Specifically, the award was granted to MAN GHH, a German corporation, by an American arbitration panel in Tampa, Florida.⁸⁰ The award, therefore, was "non-domestic."⁸¹

The court also stated that the panel's decision to admit into evidence the technical report and expert witness testimony came

vacated because the decision of the panel to grant the award was "arbitrary and capricious," the Eleventh Circuit found no basis for such a defense within Chapter 2 of the FAA. *Id.* at 1443.

⁷³ *See id.* at 1439.

⁷⁴ *See id.*

⁷⁵ *See id.* at 1443.

⁷⁶ *See id.* at 1441.

⁷⁷ *See id.* at 1439-43; *see also* 9 U.S.C. § 203 (1998) ("The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding."). The district court, in essence, did not go beyond Chapter 1 of the FAA and rested its jurisdiction in diversity. This plain error, however, could have been avoided had the district court looked to Chapter 2 of the FAA, which clearly provides the district court with original subject matter jurisdiction. *See* 9 U.S.C. § 203.

⁷⁸ *See Industrial Risk Insurers*, 141 F.3d at 1440-41.

⁷⁹ *Id.*; *see also* The New York Convention, art. I, *reprinted in* note following 9 U.S.C.S. § 201 (1971) ("[The New York Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.").

⁸⁰ *See Industrial Risk Insurers*, 141 F.3d at 1441.

⁸¹ *Id.*

within the boundaries of the American Arbitration Act and, therefore, was not a violation of public policy.⁸² The Eleventh Circuit noted that the appellants failed to cite any rule of civil procedure or evidence or case law that established a prohibition on "side-switching" as it pertained to the facts of this case.⁸³ The court, furthermore, reiterated that arbitration procedures do not follow the strict structures of normal civil litigation.⁸⁴ Instead, arbitration enjoys great latitude in the name of efficiency.⁸⁵

In addition, the Eleventh Circuit held that there was no "arbitrary and capricious" defense available in Chapter 2 of the FAA to vacate the arbitration award.⁸⁶ The Eleventh Circuit concluded that "arbitrary and capricious" did not fall within the seven exclusive, enumerated defenses against enforcement of international awards.⁸⁷ It interpreted the absence of such language to be a conscious decision by Congress, and therefore refused to expand the statute's reach.⁸⁸ The Eleventh Circuit, moreover, stated that, contrary to the district court's ruling, federal law permitted the award of prejudgment interest as an equitable remedy, and remanded this issue for determination by the district court.⁸⁹ The Eleventh Circuit reasoned that awarding prejudgment interest is at the discretion of the court and should be granted absent any reason to the contrary.⁹⁰ Furthermore, because the Eleventh Circuit held that Chapter 2 of the FAA controlled, federal law, not state law, dictated the entitlement and rate of prejudgment interest.⁹¹ The district court failed to exercise its discretion to

⁸² *See id.* at 1443-45 (stating that arbitration proceedings do not follow the normal constraints of litigation's rules of evidence and procedure (quoting *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992), *overruled on other grounds by* *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995))).

⁸³ *Id.* at 1444-45.

⁸⁴ *See id.* at 1443-44.

⁸⁵ *See id.*; *see, e.g.*, AMERICAN ARBITRATION ASS'N R. 3.

⁸⁶ *Industrial Risk Insurers*, 141 F.3d at 1445-46.

⁸⁷ *Id.* at 1446.

⁸⁸ *See id.*

⁸⁹ *See id.* at 1446-47.

⁹⁰ *See id.*

⁹¹ *See id.* at 1447.

determine whether or not to grant the interest award.⁹²

Finally, the Eleventh Circuit ruled that the district court abused its discretion by improperly granting Rule 11 sanctions and reversed the district court's decision on this issue.⁹³ MAN GHH's motion for a preliminary injunction limiting the scope of arbitration was grounded in the record and, therefore, was not frivolous.⁹⁴ The Eleventh Circuit characterized as clear error the district court's determination that MAN GHH's motion was baseless.⁹⁵

III. Background Law

In deciding *Industrial Risk Insurers*, the Eleventh Circuit faced fundamental problems that have plagued the procedure and enforcement of international arbitration. The Eleventh Circuit addressed several issues ranging from jurisdictional authority to sanctions.⁹⁶ In order to carry out its analysis, the Eleventh Circuit relied heavily on its own precedent.⁹⁷ In addition, the court examined other circuits' opinions and turned to the Supreme Court for guidance on the history, judicial interpretation, congressional intent, and application of the New York Convention, adopted by the United States through Chapter 2 of the Federal Arbitration Act.⁹⁸

A. *History and Interpretation of the New York Convention*

To understand fully the implications of *Industrial Risk Insurers*, it is necessary to examine the focal statutory provision, the New York Convention, ratified under 9 U.S.C. §§ 201 to 208. The New York Convention was assembled to rectify numerous problems⁹⁹ created by the 1923 Geneva Protocol on Arbitration

⁹² See *id.*

⁹³ See *id.* at 1447-50.

⁹⁴ See *id.* at 1450.

⁹⁵ See *id.*

⁹⁶ See *Industrial Risk Insurers*, 141 F.3d at 1439.

⁹⁷ See *id.* at 1442-50.

⁹⁸ See *id.* at 1440-47.

⁹⁹ For a more elaborate discussion of the problems which arose from the two previous treaties, the Geneva Protocol on Arbitration Clauses and the Geneva

Clauses¹⁰⁰ and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.¹⁰¹ The initial drafters intended the New York Convention to govern the enforcement of non-domestic arbitration awards.¹⁰² Disputes arose during the New York Convention as to the interpretation of what would constitute a "foreign award."¹⁰³ After much deliberation, however, the Convention concluded with a substantial number of countries acceding to the agreement.¹⁰⁴ House Report 1181 indicated that the New York Convention would be dealt with and exercised in the United States under Chapter 2 of the FAA.¹⁰⁵ In addition, House Report 1181 suggested that the adoption of the New York Convention would "serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts."¹⁰⁶ The courts have complied with the legislative history, and have adhered to the purpose of the New York Convention by exercising restrained discretion and, by an overwhelming majority, affirming arbitration agreements and arbitral awards under the guidance of Chapter 2 of the FAA, 9 U.S.C. §§ 201-208.¹⁰⁷

Convention on the Execution of Foreign Arbitral Awards, see Paolo Contini, *International Commercial Arbitration*, 8 AM. J. COMP. L. 283, 288-90 (1959).

¹⁰⁰ See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 930 (2d Cir. 1983) (citing the Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157).

¹⁰¹ See *Bergesen*, 710 F.2d at 930 (citing the Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301).

¹⁰² See *Bergesen*, 710 F.2d at 931.

¹⁰³ *Id.* A "foreign award" designation triggers the application of the New York Convention, which was created to "encourage the recognition and enforcement of international arbitration awards." *Id.* at 932 (quoting *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

¹⁰⁴ See *Bergesen*, 710 F.2d at 931-32; see also generally Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961) (discussing the deliberation process of the New York Convention and the benefits of accession to the United States).

¹⁰⁵ See H.R. Rep. No. 91-1181, at 2 (1970), reprinted in 1970 U.S.C.C.A.N. 3601.

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); see *infra* notes 111-17 and accompanying text (discussing the distinction between Chapters 1 and 2 of the FAA); *infra* notes 160-61 and accompanying text

B. Jurisdiction

Prior to *Industrial Risk Insurers*, the Eleventh Circuit had not resolved the issue of whether foreign arbitration awards made within the United States, under American federal or state law, were enforceable under the New York Convention via Chapter 2 of the FAA.¹⁰⁸ Thus, the Eleventh Circuit looked to decisions from other circuits to interpret the statutory language of the FAA.¹⁰⁹ It then turned its analysis to the role of the courts in upholding arbitration awards granted under the provisions of the FAA and the New York Convention.¹¹⁰

In order to determine whether Chapter 1 or Chapter 2 of the FAA controls arbitration proceedings, a court must determine whether the arbitration falls within the categories covered by the New York Convention.¹¹¹ The Eleventh Circuit in *Industrial Risk Insurers* examined cases, such as the Second Circuit's decision in *Bergesen v. Joseph Muller Corp.*, which held that the New York Convention only applied to "non-domestic" awards.¹¹² This definition of "non-domestic" derives from Article I(1) of the New York Convention. Article I(1) provides two instances where the court will recognize and enforce arbitration awards—those that are made in a country other than the state where enforcement is sought, and those that are not considered domestic in the country where recognition and enforcement are sought.¹¹³ In other words, Chapter 2 controls international awards.¹¹⁴

(discussing Chapter 1's incorporation into Chapter 2 of the FAA). Chapter 1 of the FAA, 9 U.S.C. §§ 1-16, contains the general provisions of the FAA. See 9 U.S.C. §§ 1-16 (1998). Chapter 2 is the codification of the New York Convention. See generally *Bergesen*, 710 F.2d at 929 (tracing the history of the New York Convention).

¹⁰⁸ See *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998).

¹⁰⁹ See *id.* at 1441.

¹¹⁰ See *id.* at 1439-42.

¹¹¹ See *id.* at 1440.

¹¹² *Bergesen*, 710 F.2d at 932.

¹¹³ See The New York Convention, art. I(1), reprinted in note following 9 U.S.C.S. § 201 (1971).

¹¹⁴ However, Chapter 2 was not created to be exclusive from the other provisions of the FAA. See 9 U.S.C. § 208 (1998). Chapter 2, in 9 U.S.C. § 208, incorporates Chapter 1 of the FAA, which covers the general provisions of arbitration to the extent that Chapter 1 does not conflict with Chapter 2. See *id.* ("Chapter 1 applies to actions

Furthermore, depending on which chapter of the FAA controls, the district court either will have diversity jurisdiction or original subject matter jurisdiction. To elaborate, Congress under Chapter 2 has conferred original federal subject matter jurisdiction to United States district courts.¹¹⁵ The federal courts, therefore, are not required to rely on state law.¹¹⁶ However, under Chapter 1 of the FAA, the federal district courts have not been granted original subject matter jurisdiction. Thus, a party to a domestic arbitration agreement who wishes to have a federal district court hear its case must base jurisdiction on diversity. Even then, the district court will be working under the framework of state arbitration laws. Chapter 1 only dictates that a federal district court "must grant" an order confirming the arbitration award, unless the award is vacated, modified, or corrected.¹¹⁷

The Eleventh Circuit turned to the First, Second, Seventh, and Ninth Circuits for guidance in the interpretation and application of the New York Convention.¹¹⁸ These circuits have overwhelmingly accepted the strong presumption in favor of arbitration for international disputes.¹¹⁹ For example, although dealing with Chapter 1 of the FAA, the Eleventh Circuit's *Ultracashmere House, Ltd. v. Meyer*¹²⁰ decision illustrates the courts' strict

and proceedings brought under this chapter [2] to the extent that chapter is not in conflict with this chapter or the [New York] Convention as ratified by the United States.").

¹¹⁵ See H.R. Rep. No. 91-1182, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3601 ("Section 203 gives *original jurisdiction* over any action or proceeding falling under the Convention to the district courts of the United States *regardless* of the amount in controversy." (emphasis added)).

¹¹⁶ Federal courts may want to look to state law for guidance. For example, in *Industrial Risk Insurers*, the Eleventh Circuit could have looked to Florida law to determine whether or not to grant prejudgment interest. See *Industrial Risk Insurers*, 141 F.3d at 1447.

¹¹⁷ 9 U.S.C. § 9 (1998) ("[A]ny party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order."); see also *supra* note 65 (discussing the district court's inability to grant de novo review).

¹¹⁸ See *Industrial Risk Insurers*, 141 F.3d at 1441.

¹¹⁹ See, e.g., *Jain v. de Mere*, 51 F.3d 686 (7th Cir. 1995) (stating that the New York Convention specifies that any commercial international arbitration falls within the New York Convention).

¹²⁰ 664 F.2d 1176 (11th Cir. 1981), *overruled by* *Baltin v. Alaron Trading Corp.*,

affirmation of arbitration agreements and awards.¹²¹ The court stated that the purpose of the FAA is to provide parties with an alternative to litigation that would provide a speedier and less expensive resolution.¹²² The Eleventh Circuit also noted that the FAA, combined with a federal law that upholds contractual commercial agreements to arbitrate, would preempt any state common law rule that prohibits the enforcement of arbitration agreements.¹²³

The Eleventh Circuit looked to other cases to examine how a court might find the existence of an arbitration agreement and to what extent must the court uphold this agreement. For example, in *Ledee v. Ceramiche Ragno*,¹²⁴ the First Circuit held that as long as no evidence indicated that the arbitration agreement was “null and void, inoperative or incapable of being performed” under the auspices of the New York Convention, the parties were required to submit their disputes to arbitration.¹²⁵ The First Circuit, furthermore, delineated a four-part test to resolve the issue of whether a conflict must be submitted to arbitration in accordance with Chapter 2, the New York Convention: “(1) Is there an agreement in writing to arbitrate the subject of the dispute?”¹²⁶ “(2) Does the agreement provide for arbitration in the territory of a

128 F.3d 1466 (11th Cir. 1997), *petition for cert. filed*, May 26, 1998.

¹²¹ See *id.* at 1180 (“The Act thus overrules the common law precedent prohibiting enforcement of arbitration agreements and creates a national law favoring such agreements.”).

¹²² See *id.* at 1179-80 (citing *Wilko v. Swan*, 346 U.S. 427 (1953)); see also generally G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 888 (1995) (stating that the New York Convention as enforced through the FAA provides a forum in which businesses can settle disputes without being subjected to high standards of judicial review).

¹²³ See *Ultracashmere House, Ltd.*, 664 F.2d at 1180 (citing 9 U.S.C. § 2 (1998)). “Federal and state courts alike are bound, under the supremacy clause, to enforce the Act’s substantive provisions.” See *id.* (citing *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406-07 (2d Cir. 1959), *cert. denied*, 346 U.S. 801).

¹²⁴ 684 F.2d 184 (1st Cir. 1982).

¹²⁵ *Id.* at 187; The New York Convention, art. II (3), *reprinted in* note following 9 U.S.C.S. § 201 (1971).

¹²⁶ *Ledee*, 684 F.2d at 186 (citing The New York Convention, art. II(1), II(2)); see also The New York Convention, art. II(1), *reprinted in* note following 9 U.S.C.S. § 201 (1971) (requiring each signatory State to recognize a written arbitration agreement).

signatory of the Convention?";¹²⁷ "(3) Does the agreement arise out of a legal relationship, whether contractual or not, which is considered as commercial?";¹²⁸ and "(4) Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?"¹²⁹ If the district court answers each of these four questions affirmatively, then the court is required to order the arbitration to proceed, and the arbitration will be governed by Chapter 2 of the FAA.¹³⁰

The First Circuit's "*Ledee* test" exemplifies the relatively broad interpretation given to the New York Convention. Conversely, the First Circuit's conclusion that an agreement should not be enforced only when it is found to be "null and void" was construed narrowly.¹³¹ The First Circuit indicated that "null and void" should only apply to situations "such as fraud, mistake, duress, and waiver" because those instances can be applied in a neutral, international backdrop.¹³² This narrow interpretation reiterates the purpose behind the New York Convention: to "unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced."¹³³

One year later, the Second Circuit decided *Bergesen v. Joseph Muller Corp.*,¹³⁴ in which it held that a U.S. district court under the authority of the New York Convention had the ability to enforce an arbitration award between two foreign entities.¹³⁵ The Second

¹²⁷ *Ledee*, 684 F.2d at 186 (citing The New York Convention, art. I(1), I(3); 9 U.S.C. § 206 (1998)).

¹²⁸ *Ledee*, 684 F.2d at 187 (citing The New York Convention, art. I(3); 9 U.S.C. § 202 (1998)).

¹²⁹ *Ledee*, 684 F.2d at 187 (citing 9 U.S.C. § 202).

¹³⁰ *See Ledee*, 684 F.2d at 187 (citing The New York Convention, art. II(3)).

¹³¹ *Ledee*, 684 F.2d at 187.

¹³² *Id.* (citing *I.T.A.D. Assoc., Inc. v. Podar Bros.*, 636 F.2d 75 (4th Cir.1981); *see also Ledee*, 684 F.2d at 187 n.3 (indicating that the First Circuit's decision accords with other appellate courts such as the Second and Third Circuits)).

¹³³ *Ledee*, 684 F.2d at 187 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 n.10 (1974)).

¹³⁴ 710 F.2d 928 (2d Cir. 1983).

¹³⁵ *See id.* at 933 (citing *Sumitomo Corp. v. Parakopi Compania Martimia, S.A.*, 477 F. Supp. 737, 740-41 (S.D.N.Y.1979), *aff'd mem.*, 620 F.2d 286 (2d Cir. 1980)).

Circuit analyzed the meaning of “awards not considered as domestic.”¹³⁶ The court concluded that awards considered “non-domestic” do not need to be made abroad; instead, they are “non-domestic” because they are in accordance with foreign law or involve alien parties.¹³⁷ The Second Circuit favored this broad interpretation because it viewed the expansive reading as facilitating the purpose of the treaty.¹³⁸

In 1985 the Supreme Court in an antitrust dispute, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, outlined a two-step inquiry to aid the courts in determining whether a contest must be submitted to arbitration: “whether the parties’ agreement to arbitrate reached the statutory issues, and then, upon finding it did, considering whether legal constraints external to the parties’ agreement foreclosed the arbitration of those claims.”¹³⁹ The Supreme Court indicated that since arbitration provisions are like any other contract, the parties’ intentions control.¹⁴⁰ The presumption is that if there is a written arbitration agreement, then arbitration of the parties’ claims would be required.¹⁴¹ The Supreme Court, however, also stated that those intentions are given a more generous construction when pertaining to arbitration.¹⁴² The Supreme Court went as far as to say that it construed an arbitration clause to include the disputes at issue “without pausing at the source in a state statute of the rights asserted by the parties resisting arbitration.”¹⁴³ The Court noted that the

concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of

¹³⁶ *Bergesen*, 710 F.2d at 930-32.

¹³⁷ *Id.* at 932.

¹³⁸ *See id.* The purpose of the treaty was “to encourage the recognition and enforcement of international arbitration awards.” *Id.* (citing *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

¹³⁹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

¹⁴⁰ *See id.* at 626.

¹⁴¹ *See id.* at 625-28.

¹⁴² *See id.* at 626.

¹⁴³ *Id.* at 627 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15, 15 n.7 (1984)).

the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.¹⁴⁴

In other words, the Supreme Court recognized the possibility of inconsistencies when taking the forum into consideration. This aspect was crucial in the Eleventh Circuit's decision that the district court had original jurisdiction, not diversity jurisdiction, as provided for in the FAA.¹⁴⁵

By concluding that it had subject matter jurisdiction, the Eleventh Circuit was not required to apply state law, as would be the case in diversity. Instead, it was permitted to apply federal law, specifically Chapter 2 of the FAA, to the arbitration agreement and award.¹⁴⁶ Through the enabling legislation of the FAA, the New York Convention became the "highest law of the land."¹⁴⁷ The New York Convention goes beyond the scope of the FAA's Chapter 1, for it gives the district courts authority to enforce an international arbitration agreement, even if it is beyond the boundaries of the United States.¹⁴⁸

The Supreme Court highlighted the major concerns of Congress in passing the statutory provisions of Chapter 2 of the FAA: " 'to enforce private agreements into which parties had entered,' a concern which 'requires that we rigorously enforce agreements to arbitrate.'"¹⁴⁹ The breadth of such a strong presumption for arbitration is based not only upon the wishes of

¹⁴⁴ *Mitsubishi Motors Corp.*, 473 U.S. at 629.

¹⁴⁵ *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1439-40 (11th Cir. 1998).

¹⁴⁶ *See id.*

¹⁴⁷ *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (PEMEX)*, 767 F.2d 1140, 1145 (5th Cir. 1985).

¹⁴⁸ *See id.* at 1145-46; *see also* 9 U.S.C. § 206 (1998) (stating that a court that has subject matter jurisdiction under Chapter 2 may enforce the arbitration agreement at any place, "whether that place is within or without the United States").

¹⁴⁹ *Mitsubishi Motor Corp.*, 473 U.S. at 625-26 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)). The Supreme Court also expressed the need for states to embrace the practice of international arbitration in order for its benefits to take a strong hold. *See id.* at 638-39. It aptly noted: "[I]t will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration." *Id.* at 639.

the parties but also in the interest of international comity.¹⁵⁰ The Supreme Court, moreover, emphasized the compulsion towards enforcement; to do otherwise would “damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.”¹⁵¹ Justice Stevens, in his dissenting opinion in *Mitsubishi Motor Corp.*, summarized the general purpose of international arbitration: “Like any other mechanism for resolving controversies, international arbitration will only succeed if it is realistically limited to tasks it is capable of performing well—the prompt and inexpensive resolution of essentially contractual disputes between commercial partners.”¹⁵²

Following close behind the Supreme Court precedent of *Mitsubishi*, the Fifth Circuit, in *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex)*,¹⁵³ went on to state that through Congress's powers and federal law, the Convention would take

¹⁵⁰ *See id.* at 626-30 (“agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting.” (quoting *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13-14 (1972))). The Supreme Court indicated that this strong favoritism to enforce arbitration agreements applies to domestic as well as foreign arbitration. *See generally id.* at 631 (“And at least since this Nation's accession in 1970 to the Convention . . . and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy [the presumption in favor of enforcing arbitral awards] applies with special force in the field of international commerce.”). It stated that the Federal Arbitration Act, as a whole, “creates a body of federal substantive law establishing and regulating the *duty to honor an agreement to arbitrate* (emphasis added).” *Id.* at 625 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)).

¹⁵¹ *Mitsubishi Motor Corp.*, 473 U.S. at 631 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-17 (1974)).

¹⁵² *Id.* at 665 (Stevens, J., dissenting). Justice Stevens, however, disagreed with the majority in its approach to evaluating the Court of Appeals holding. *See id.* at 641 (Stevens, J., dissenting). Specifically, Justice Stevens believed that the majority's conclusion was based on the Court's favoritism for arbitration and obscure “notions of international comity” which were primarily based on the simple fact that the automobiles involved in *Mitsubishi Motor Corp.* were made in Japan. *Id.* (Stevens, J., dissenting). Justice Stevens seemed to imply that the Court went too far in its attempt to widen the scope of arbitration and its enforcement. *See generally id.* at 665 (Stevens, J., dissenting) (“But just as it is improper to subordinate the public interest in enforcement of antitrust policy to the private interest in resolving commercial disputes, so is it equally unwise to allow a vision of world unity to distort the importance of the selection of the proper forum for resolving this dispute.”).

¹⁵³ 767 F.2d 1140 (5th Cir. 1985).

precedent over “all prior inconsistent rules of law.”¹⁵⁴ The case involved damages resulting from an oil spill in the Gulf of Mexico, in which all the issues were consolidated into one proceeding and where one party sought to enforce an arbitration clause.¹⁵⁵ The Fifth Circuit held that, because the arbitration falls under the New York Convention, it had subject matter jurisdiction over an appeal from the district court’s order refusing to require arbitration of the dispute.¹⁵⁶ The presumption is that upon finding an arbitration agreement, arbitration should be upheld unless it can be shown with “positive assurance” that an arbitration clause can be interpreted not to include the disputed issue.¹⁵⁷ The Fifth Circuit, therefore, provided a general rule that stated, “[W]henver the scope of an arbitration clause is in question, the court should construe the clause in favor of arbitration.”¹⁵⁸

The Fifth Circuit, in addition, stated in unequivocal language, “This Convention is the supreme law of the land Any law or decision prior in time to this express undertaking must be construed as consistent with the Convention or set aside by it.”¹⁵⁹ The New York Convention incorporates Chapter 1 of the Federal Arbitration Act through the enabling legislation of 9 U.S.C. § 208.¹⁶⁰ The New York Convention’s reach, however, is greater than the FAA because it can also compel arbitration outside of the United States under Chapter 2 of the FAA, 9 U.S.C. § 206.¹⁶¹

¹⁵⁴ *Id.* at 1145 (“The Convention was negotiated pursuant to the Constitution’s Treaty power. Congress then adopted enabling legislation to make the Convention the *highest law of the land*. (emphasis added)”).

¹⁵⁵ *See id.* at 1142-43.

¹⁵⁶ *See id.* at 1149; *see also* 9 U.S.C. § 203 (1998) (specifying that the courts have “original jurisdiction” over any actions falling under the New York Convention).

¹⁵⁷ *Sedco, Inc.*, 767 F.2d at 1145 (quoting *Commerce Park of DFW Freeport v. Mardian Constr. Co.*, 729 F.2d 334, 338 (5th Cir. 1984) (quoting *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979))).

¹⁵⁸ *Sedco, Inc.*, 767 F.2d at 1145 (citing *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960)).

¹⁵⁹ *Sedco, Inc.*, 767 F.2d at 1148.

¹⁶⁰ *See* 9 U.S.C. § 208 (1998).

¹⁶¹ *See Sedco, Inc.*, 767 F.2d at 1146. “A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the [arbitration] agreement at any place . . . whether that place is *within or without the United States* (emphasis added).” 9 U.S.C. § 206 (1998).

Sedco, Inc. demonstrated how the FAA provides little opportunity for the district court to exercise discretion.¹⁶² The Fifth Circuit also noted that the Supreme Court has mandated that if there is any doubt concerning the scope of arbitrability, the court should find in favor of arbitration.¹⁶³

Several years after the Fifth Circuit holding in *Sedco, Inc.*, the Ninth Circuit, in *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*,¹⁶⁴ emphasized three requirements for original jurisdiction before it could be conferred upon a federal district court pursuant to the New York Convention.¹⁶⁵ According to the plain meaning of the New York Convention, the court must find that the award arose from a “legal relationship,” that the relationship was “commercial in nature,” and was “not entirely domestic in scope.”¹⁶⁶ The Ninth Circuit upheld an arbitration award in favor of Iran against an American corporation even though there was no arbitration agreement between Iran and the corporation and even though the award was not made pursuant to any national arbitration law.¹⁶⁷ The court reasoned that the Algiers Accords drawn between Iran and the United States acted as the written arbitration agreement, thus meeting the requirements of Articles II and IV of the New York Convention.¹⁶⁸

In *Allied-Bruce Terminix Cos., Inc. v. Dobson*,¹⁶⁹ the Supreme Court also dealt with the statutory interpretation of the FAA and determined whether the FAA should be read expansively or restrictively.¹⁷⁰ The court held that the basic purpose of the FAA is

¹⁶² See *Sedco, Inc.*, 767 F.2d at 1147.

¹⁶³ See *id.* at 1147-48 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1982)). The Supreme Court has held that a court must compel arbitration of arbitrable claims when a motion to compel arbitration is requested. See *id.* at 1147 n.20 (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985)).

¹⁶⁴ 887 F.2d 1357 (9th Cir. 1989).

¹⁶⁵ See *id.* at 1362.

¹⁶⁶ *Id.* (interpreting 9 U.S.C. § 202 (1998)).

¹⁶⁷ See *id.* at 1357.

¹⁶⁸ See *id.* at 1363-64.

¹⁶⁹ 513 U.S. 265 (1995).

¹⁷⁰ See *id.* at 268. Although *Allied-Bruce Terminix Co., Inc.* dealt with the statutory interpretation of 9 U.S.C. § 2, Chapter 1 of the FAA, because Chapter 2 incorporates Chapter 1 by reference, it seems appropriate to discuss the Supreme Court's analysis of

“to overcome courts’ refusals to enforce agreements to arbitrate.”¹⁷¹ The FAA preempts state law, and states cannot adopt laws that would invalidate the FAA.¹⁷²

The Supreme Court evaluated the specific language of Chapter 1 so that it could identify the FAA’s reach.¹⁷³ The Supreme Court primarily focused on the language in 9 U.S.C. § 2, which states that the FAA covers transactions that “involve commerce” and contains provisions subjecting the transaction to arbitration.¹⁷⁴ The term “involve” is broad and is the functional equivalent of “affecting.”¹⁷⁵ This interpretation reflects expansive congressional intent.¹⁷⁶ The Supreme Court expressed the belief that an expansive interpretation is in accordance with the broad scope of the Commerce Clause, which provides Congress with ample authority to regulate interstate and, likewise, international commercial transactions.¹⁷⁷ In addition, the statutory language places the FAA on the same playing field as other contract terms.¹⁷⁸ Taking these two factors together, the wide latitude the FAA chapters bestow on the arbitration process emerges. A narrow interpretation would go against the FAA’s purpose, and would create a “new, unfamiliar test lying somewhere in a no-man’s land between ‘in commerce’ and ‘affecting commerce,’ thereby unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it.”¹⁷⁹

§ 2. See 9 U.S.C. § 208 (1998).

¹⁷¹ *Allied-Bruce Terminix Co., Inc.*, 513 U.S. at 270 (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989)).

¹⁷² See *Allied-Bruce Terminix Co., Inc.*, 513 U.S. at 272 (citing *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984)).

¹⁷³ See *Allied-Bruce Terminix Co., Inc.*, 513 U.S. at 272-77.

¹⁷⁴ *Id.* at 268.

¹⁷⁵ *Id.* at 273-74.

¹⁷⁶ See *id.* at 274.

¹⁷⁷ See *id.* (citing *Perry v. Thomas*, 482 U.S. 483, 490 (1987)); U.S. CONST. art. 1, § 8, cl. 3. The Supreme Court’s analogy between the FAA and the Commerce Clause seems to be an attempt on the Supreme Court’s part to reiterate the congressional intent of giving arbitration proceedings a wide berth.

¹⁷⁸ See *Allied-Bruce Terminix Co., Inc.*, 513 U.S. at 275 (citing *Scherk v. Alberto-Culver Co.* 417 U.S. 506, 511 (1974)).

¹⁷⁹ *Allied-Bruce Terminix Co., Inc.*, 513 U.S. at 275. However, the Supreme Court was not unanimous in its holding. See *id.* at 284-97 (Scalia, J., dissenting; Thomas, J.,

Only several months after the Supreme Court's decision in *Allied-Bruce Terminix Co., Inc.*, the Seventh Circuit, in *Jain v. De Mere*, was presented with an issue of first impression.¹⁸⁰ It was asked to decide whether a federal court had the authority to compel arbitration between two foreign entities when the arbitration agreement did not clearly specify a location for the arbitration or a method of selecting an arbitrator.¹⁸¹ The Seventh Circuit remarked that any commercial arbitral agreement falls within the scope of the convention so long as it is not solely between two United States citizens, involves property within the United States, and has no reasonable relationship with another foreign entity.¹⁸² The Seventh Circuit held that a court could order arbitration even though the contract did not specify a place of arbitration.¹⁸³ Even when a contract is unclear, the courts have generally upheld the arbitration.¹⁸⁴

The Seventh Circuit, in *Jain v. De Mere*, moreover, illustrates how Chapters 1 and 2 of the FAA work in tandem.¹⁸⁵ Specifically, the Seventh Circuit held that, even where a contract does not specify a place for arbitration or a method of choosing an

dissenting). “[T]he FAA treats arbitration simply as one means of resolving disputes that lie within the jurisdiction of the federal courts; it makes clear that the breach of a covered arbitration agreement does not itself provide any independent basis for such jurisdiction.” *Id.* at 291 (Thomas, J., dissenting). This perspective of the dissenting justices would reappear in *First Options of Chicago, Inc. v. Kaplan*, which effectively overrules the Eleventh Circuit's decision in *Robbins v. Day*. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995); see also *infra* notes 192-204 and accompanying text (discussing the Supreme Court decision in *First Options of Chicago, Inc. v. Kaplan*).

¹⁸⁰ See *Jain v. De Mere*, 51 F.3d 686, 688 (7th Cir.), *reh'g denied and cert. denied*, 516 U.S. 914 (1995).

¹⁸¹ See *id.*

¹⁸² See *id.* at 689 (holding that a suit to compel arbitration met the requirements of Chapter 2 of the FAA when the parties are involved in a commercial transaction but are not United States citizens). The Seventh Circuit also stated that jurisdiction need only be based in Chapter 2 of the FAA in which the federal question does not go beyond arbitration. See *id.*

¹⁸³ See *id.* at 686. The district court for the Northern District of Illinois held that although it had jurisdiction under Chapter 1 and 2, the FAA did not provide the district court with the authority to compel arbitration because the arbitration agreement failed to specify a location for the arbitration and a method to select an arbitrator. See *id.* at 688.

¹⁸⁴ See *id.* at 688.

¹⁸⁵ See *id.* at 689-90.

arbitrator, a court has authority to order arbitration in its own district when jurisdiction rested solely on Chapter 2.¹⁸⁶ The Seventh Circuit stated that in order for the court to compel arbitration under Chapter 2, the agreement must state a place where the arbitration is to be held.¹⁸⁷ In *Jain*, however, the parties did not specify a specific location.¹⁸⁸ Nevertheless, the omission did not mean that the court lost the ability to enforce the agreement.

The Seventh Circuit noted in its analysis that 9 U.S.C. § 208 incorporates Chapter 1 of the FAA to the extent that it does not conflict with the New York Convention or Chapter 2.¹⁸⁹ It therefore based its authority to compel arbitration in 9 U.S.C. § 4, which "requires a court to compel arbitration in its own district when no other forum is specified."¹⁹⁰ The Seventh Circuit concluded that the jurisdictional limits of 9 U.S.C. § 4 would not prevent the court from compelling arbitration where the court may not have subject matter jurisdiction independent of the arbitration agreement.¹⁹¹ The way in which the Seventh Circuit interpreted the provisions of Chapters 1 and 2 so that they would work harmoniously reiterates the strong presumption in favor of arbitration.

In 1995 the Supreme Court, in *First Options of Chicago, Inc. v. Kaplan*,¹⁹² had to determine the standard of review to be applied to a question of arbitrability.¹⁹³ The Supreme Court held

¹⁸⁶ See *id.* at 689-92. For a discussion of how Chapter 2 of the FAA, by incorporating 9 U.S.C. § 4, permits a court to order arbitration in its own district if the parties failed to identify an arbitration locale, see *infra* notes 189-91 and accompanying text.

¹⁸⁷ See *id.* at 689.

¹⁸⁸ See *id.* 9 U.S.C. § 206 specifically states that a court that has jurisdiction, pursuant to the fact that the action falls under the New York Convention, may compel arbitration at the selected location, in accordance with the arbitration agreement. See 9 U.S.C. § 206 (1998).

¹⁸⁹ See *Jain*, 51 F.3d at 689.

¹⁹⁰ *Id.* at 690 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lauer*, 49 F.3d 323, 327 (7th Cir. 1995)).

¹⁹¹ See *id.* at 690-92.

¹⁹² 514 U.S. 938 (1995).

¹⁹³ See *id.* at 940.

unanimously that a court of appeals should apply ordinary state law principles of contracts when evaluating issues of arbitrability but should decide questions of law de novo.¹⁹⁴ The Court, in addition, stated that a court of appeals should apply an ordinary standard of review when reviewing a district court's decision to uphold an arbitration award.¹⁹⁵ The Supreme Court indicated that the Eleventh Circuit was in the erroneous minority of circuits that held that the standard of review should be an "abuse of discretion" standard.¹⁹⁶ In effect, the Supreme Court's holding in *First Options of Chicago, Inc.* overrules the Eleventh Circuit's holding in *Robbins v. Day* on this point.¹⁹⁷ The Supreme Court, therefore, set forth the standard of review that district courts are to use when faced with a motion to vacate an arbitration award. The Supreme Court indicated that, although courts are to grant arbitrators a considerable amount of latitude, this does not mean that the appellate courts should give "extra leeway" to the district courts which uphold arbitration decisions.¹⁹⁸ Instead, the Court stated that the review should proceed under the same standard as if a court were deliberating over whether the parties had agreed to submit the issue to arbitration— an ordinary standard of review.¹⁹⁹

¹⁹⁴ See *id.* at 948. The Supreme Court also noted that courts should not assume that the parties have agreed to arbitrate arbitrability unless both parties have clearly indicated that they have made such an agreement. See *id.* at 939. This holding demonstrates how arbitration agreements are to be read like any other contract and should be enforced in the same manner.

¹⁹⁵ See *id.* at 939. Although the discussion of arbitrability is important, it is not an issue raised in *Industrial Risk Insurers*. This portion of the Supreme Court's opinion, discussing the standard of review for motions of vacation of arbitral awards, is the most relevant issue as it pertains to the analysis of *Industrial Risk Insurers*. Therefore, the other issues raised in *First Options of Chicago, Inc.* will not be discussed in great detail.

¹⁹⁶ *Id.* at 948.

¹⁹⁷ See *id.*; see also *Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992), overruled by *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (stating that when a district court denies vacation of an arbitration award, the standard of review should be an "abuse of discretion").

¹⁹⁸ *First Options of Chicago, Inc.*, 514 U.S. at 948-49 (indicating that the FAA is silent on the matter of standard of review).

¹⁹⁹ See *id.* at 947-48. The Supreme Court explained that an "ordinary standard" is one in which the court will accept findings of fact that are not "clearly erroneous" but review questions of law de novo. *Id.*; see *supra* note 194 and accompanying text. The Supreme Court indicated that a court of appeals' approach to a district court's decision

It is important to note, however, that the FAA is silent when it comes to standard of review.²⁰⁰ According to the Supreme Court, the standard of review may differ depending on who decides the issue of arbitrability.²⁰¹ Specifically, when there is a dispute over whether the parties had originally agreed to arbitration, a court will normally review the dispute of arbitrability under an ordinary standard of review.²⁰² If the parties agreed to arbitration then they are still allowed to ask the court for review, although the scope is narrowed considerably.²⁰³ In such a situation, a court will rarely set aside an arbitrator's decisions.²⁰⁴

The Eleventh Circuit looked at precedent as recent as September of 1997 when the Second Circuit, in *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, confirmed an arbitration award arising from an international licensing agreement.²⁰⁵ The Second Circuit highlighted the bifurcated nature of the New York Convention.²⁰⁶ The standard of review as applied

"should depend upon 'the respective institutional advantages of trial and appellate courts,' not upon what standard of review will more likely produce a particular substantive result." *First Options of Chicago, Inc.*, 514 U.S. at 947-48 (quoting *Salve Regina College v. Russell*, 499 U.S. 225, 231-33 (1991)).

²⁰⁰ *See id.* at 949.

²⁰¹ *See id.* at 942.

²⁰² *See id.*

²⁰³ *See id.* If the arbitration agreement covers a domestic dispute, the parties are bound by the arbitrator's decision unless the moving party can show that the award was "procured by corruption, fraud, or undue means." 9 U.S.C. § 10 (1998). If the arbitration agreement is international in nature, the parties are also bound by the decision unless the contesting party can show one of the enumerated defenses in the New York Convention Article V. *See* The New York Convention art. V, *reprinted in* note following 9 U.S.C.S. § 201 (1971).

²⁰⁴ *See First Options of Chicago, Inc.*, 514 U.S. at 942 (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (stating that parties will be bound by an arbitrator's decision if it is not in "manifest disregard" of the law). The Supreme Court also stated that district and appellate courts should give considerable discretionary power to the arbitrator in deciding an arbitration issue. *See id.* at 948. The Eleventh Circuit, therefore, is not necessarily going against the standard set by the Supreme Court; instead, it seems to be undertaking interpretative license in its application of the standard of review. Essentially, the Eleventh Circuit is applying the "abuse of discretion" review in terms of the arbitrator's decision making and not the district court's decision to affirm an award.

²⁰⁵ *See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 16-17 (2d Cir. 1997).

²⁰⁶ *See id.* at 22.

to arbitration awards depends upon what is being specifically reviewed.²⁰⁷ The New York Convention provides that if review is “in the state in which, or under the law of which, the award is made,” the courts will be given great discretion in setting aside or modifying the award in accordance with that state’s arbitration laws.²⁰⁸ However, when a motion to compel enforcement of the award is brought in a foreign state, the grounds for refusal are limited to the defenses provided in Article V of the New York Convention, thus providing limited discretion to the courts.²⁰⁹ The Second Circuit also indicated that the reason for a limited review of arbitral awards is to avoid “undermining the goals of arbitration”—to settle disputes efficiently and to avoid the expenses of litigation.²¹⁰

C. The Enumerated Defenses and Evidentiary Issues

Article V of the New York Convention provides seven enumerated defenses against the enforcement of arbitration awards.²¹¹ Unless one of these defenses is raised and established, the court must confirm the arbitration award.²¹² The New York Convention places the burden of proof on “the party defending against enforcement.”²¹³ The statutory provision sets forth the

²⁰⁷ *See id.*

²⁰⁸ *Id.* at 23.

²⁰⁹ *See id.*

²¹⁰ *Id.* (quoting *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993)).

²¹¹ *See* The New York Convention, art. V, *reprinted in* note following 9 U.S.C.S. § 201 (1971). The New York Convention, in whole, is incorporated into Chapter 2 of the FAA. *See generally* 9 U.S.C. §§ 201-208 (West 1998) (“The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”).

²¹² *See* 9 U.S.C. § 207 (1998). Prior to arbitration proceedings, a party may use as a defense that the parties did not agree to arbitrate the given dispute. *See supra* notes 139-41 and accompanying text (discussing how arbitration agreements dictate the context and procedure of the arbitration). However, once the arbitration has been completed and the arbitrator has handed down the decision, a court is highly unlikely to change the results without a contestant raising one of the defenses in the New York Convention. *See supra* notes 203-04 and accompanying text.

²¹³ *Imperial Ethiopian Gov’t v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976) (citing *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de*

defenses, which are available to a party challenging enforcement.²¹⁴ The circuit courts generally have held that the parties contesting the arbitral award are strictly limited to the defenses that are given in the FAA.²¹⁵ Thus, the Eleventh Circuit had to decide whether the contentions raised by the appellants were drawn from one of the seven defenses.²¹⁶

Although seven specific defenses are enumerated in Article V of the New York Convention, the Eleventh Circuit in *Industrial Risk Insurers* focused on Articles V(1)(d)²¹⁷ and V(2)(b)²¹⁸ as the two possible defenses that could be applicable to the case.²¹⁹ Given this limited scope, the Eleventh Circuit only examined background law applicable to these two particular defenses and set aside discussion of the other five defenses for a later, more

L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974)).

²¹⁴ See The New York Convention, art. V, *reprinted in* note following 9 U.S.C.S. § 201 (1971).

²¹⁵ See, e.g., *Parsons & Whittemore Overseas Co., Inc.*, 508 F.2d at 973 (stating that the New York Convention limits a party's defenses against enforcement of an arbitral award to the seven defenses set forth under Article V and that the burden of proof rests in the party raising the defense (citing *Contini*, *supra* note 99, at 299)).

²¹⁶ See *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441-42 (11th Cir. 1998).

²¹⁷ Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: . . . (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

The New York Convention, art. V(1)(d), *reprinted in* note following 9 U.S.C.S. § 201 (1971).

²¹⁸ Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." *Id.* art. V(2)(b).

²¹⁹ See *Industrial Risk Insurers*, 141 F.3d at 1442; see also The New York Convention, art. V(1)(d), art. V(2)(b), *reprinted in* note following 9 U.S.C.S. § 201 (1971) (stating that an arbitration award may be vacated on the grounds that the arbitrator or the arbitration procedure was "not in accordance with the agreement of the parties" or the recognition of the arbitral award would be "contrary to the public policy of that country").

appropriate context.²²⁰ The appellants argued that the district court had to vacate the international arbitral award because the procedure was “not in accordance with the agreement of the parties.”²²¹ They also contended that the district court should have refused to enforce the arbitration award because enforcement of it would be “contrary to the public policy of that country.”²²²

1. Admission of Evidence—in Accordance With the Agreement?

The appellants in *Industrial Risk Insurers* argued that the arbitrator observed procedures that were not in accordance with the agreement between the parties and, therefore, the award should be vacated.²²³ However, the Eleventh Circuit in *Industrial Risk Insurers* noted that the parties to the arbitration agreement had decided upon the American Arbitration Association’s guidelines to dictate the procedure of the arbitration.²²⁴ Rule 3 of the AAA guidelines allows the parties in an international commercial arbitration to exchange documentary evidence or lists of witnesses.²²⁵ Furthermore, Rule 3 states that in international cases, the parties should be able to anticipate what will occur in the arbitration hearing.²²⁶ “By cooperating in an exchange of relevant information, the parties can avoid unnecessary delays.”²²⁷

It is clear that by adopting a broad interpretation of the AAA’s rules, parties are permitted a great deal of latitude in their

²²⁰ See *Industrial Risk Insurers*, 141 F.3d at 1442-43, 1443 n.10.

²²¹ *Id.* at 1442; The New York Convention, art. V(1)(d), reprinted in note following 9 U.S.C.S. § 201 (1971).

²²² *Industrial Risk Insurers*, 141 F.3d at 1442; The New York Convention, art. V(2)(b), reprinted in note following 9 U.S.C.S. § 201 (1971).

²²³ See *Industrial Risk Insurers*, 141 F.3d at 1442. Barnard and Burk stated that the arbitration panel should not have considered the technical report because the report was submitted for review too close to the beginning of the arbitration proceedings, thus violating the agreed-upon rules of the American Arbitration Association. See *id.* The appellants also argued that the arbitration panel should not have permitted an expert witness to testify because of the possible threat of “side-switching.” *Id.* at 1444.

²²⁴ See *id.* at 1442.

²²⁵ See *id.* at 1443.

²²⁶ See *id.*

²²⁷ *Id.*

evidentiary proceedings. Specifically, deadlines do not constrain them. As the Eleventh Circuit noted, "arbitrators are left wide discretion to require the exchange of evidence, and to admit or exclude evidence, how and when they see fit."²²⁸ The New York Convention, moreover, remains silent on the matter of timing with regard to evidentiary issues.²²⁹ The only "insufficient notice" defense stated in the New York Convention pertains to the selection of an arbitrator under Article V(1)(b), which states that a party has a defense against enforcement if the party can prove that it was "not given proper notice of the appointment of the arbitrator or of the arbitration proceeding."²³⁰ The appellants, however, did not offer this enumerated defense, nor was such a defense evident from the record.²³¹

The Eleventh Circuit attacked the appellants' contention by examining case law dealing with the issue of admitting evidence into an arbitration proceeding.²³² The Eleventh Circuit, for example, turned to the Fifth Circuit's decision in *Grovner v. Georgia-Pacific Corp.*, which clearly stated that arbitration proceedings are not required to follow "all the niceties of federal courts" and only need to provide the parties with a "fundamentally fair" hearing.²³³ Although the holding was effectively overruled in *First Option of Chicago, Inc.*,²³⁴ the Eleventh Circuit, in *Robbins v. Day*, clearly illustrated the flexibility of an arbitration proceeding.²³⁵ For instance, the Eleventh Circuit stated that an arbitrator is granted "wide latitude" in carrying out the arbitration

²²⁸ *Id.* at 1444.

²²⁹ See The New York Convention, art. V, reprinted in note following 9 U.S.C.S. § 201 (1971) (outlining available defenses against enforcement of arbitral award).

²³⁰ *Id.* art. V(1)(b).

²³¹ See *Industrial Risk Insurers*, 141 F.3d at 1442-43.

²³² See *id.* at 1443-45.

²³³ *Grovner v. Georgia-Pacific Corp.*, 625 F.2d 1289, 1290 (5th Cir. 1980) (citing *Wells v. Southern Airways, Inc.*, 616 F.2d 107 (5th Cir. 1980)).

²³⁴ See *supra* notes 192-99 and accompanying text (discussing *First Options of Chicago, Inc. v. Kaplan*'s holding that the standard of review is an "ordinary standard," not an "abuse of discretion" standard, therefore effectively overruling the standard as provided for in *Robbins v. Day*).

²³⁵ See *Robbins v. Day*, 954 F.2d 679 (11th Cir. 1992), overruled by *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

proceedings.²³⁶ In addition, the Eleventh Circuit noted that the arbitrator is not required to hear all pieces of evidence.²³⁷ The arbitrator need only allow each party “the opportunity to present its argument and evidence.”²³⁸ Although the point made in *Robbins* speaks to the exclusion of evidence, the Eleventh Circuit relied in part on this case to support its inclusion of the TUV report.²³⁹

2. Admission of Expert Testimony—Violation of “Public Policy”?

Another issue raised in *Industrial Risk Insurers* was whether the arbitrator wrongfully admitted the testimony of an expert witness who once worked with the opposing party.²⁴⁰ The Eleventh Circuit noted that the appellants did not cite to rules of procedure or evidence for its contention.²⁴¹ Instead, the appellants turned to rules of professional conduct, which deal with attorney-client privilege, work product, and conflict of interest issues.²⁴² The Eleventh Circuit examined precedent from numerous districts.²⁴³

The Tenth Circuit, in *Durflinger v. Artiles*, ruled that the issue of relevancy lies within the discretion of the court.²⁴⁴ The Tenth Circuit, furthermore, stated that decisions concerning testimonial relevancy and competency of a witness will be reversed only upon

²³⁶ *Id.* at 685.

²³⁷ *See id.*

²³⁸ *Id.* (citing *Forsythe Int'l, S.A. v. Gibbs Oil Co.*, 915 F.2d 1017, 1022 (5th Cir. 1990)).

²³⁹ *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998) (stating that the admission of the report by the arbitration panel was not a failure of the panel to adhere to the party's arbitration agreement). The TUV report was a technical report detailing the causes of the mechanical malfunctions written by the German technical institute Rheinisch-Westfalischer Technischer Uberwachung Verein. *See id.* at 1442.

²⁴⁰ *See id.* at 1444-45.

²⁴¹ *See id.*

²⁴² *See id.*

²⁴³ *See id.*

²⁴⁴ *See Durflinger v. Artiles*, 727 F.2d 888, 890 (10th Cir. 1984).

a showing that the trial judge abused his discretionary powers.²⁴⁵ In *Geralnes B.V. v. City of Greenwood Village*,²⁴⁶ the Colorado district court denied a motion for disqualification of counsel because of the "convoluted" path by which counsel could have obtained information.²⁴⁷ The district court, moreover, stated that it was the movant's burden to show that the opposing party's counsel should be disqualified.²⁴⁸ The movants, however, failed to show that opposing counsel owed any duty to them when it interviewed two attorneys who once represented the movants' predecessors in interest.²⁴⁹

The Eleventh Circuit examined another district court holding in *MMR/Wallace Powers & Industrial, Inc. v. Thames Associates*, in which an attorney's ex parte contacts with a former employee of an adversary required his disqualification as counsel.²⁵⁰ The district court stated that the federal courts had inherent authority to discipline attorneys who engaged in professional misconduct inconsistent with the ethical standards of the bar.²⁵¹ The court elaborated that an attorney may not "side-switch" where he represented a client in an action "substantially related to matters wherein the attorney had previously acted on behalf of his present adversary."²⁵² The appellants in *Industrial Risk Insurers* also looked at *Rentclub, Inc. v. Transamerica Rental Finance Corp.* in which the district court for the Middle District of Florida held that an attorney would be disqualified from a lawsuit upon evidence that the attorney had paid the opposing party's former employee to disclose confidential information.²⁵³ The district court, in addition,

²⁴⁵ See *id.*

²⁴⁶ 609 F. Supp. 191 (D. Colo. 1985).

²⁴⁷ *Id.* at 193-94. The District Court noted that the "trail of corporate entities, through which plaintiffs claim successorship to Denver Technological Center, Inc. and William Pauls, is exceedingly convoluted." *Id.*

²⁴⁸ See *id.* at 193.

²⁴⁹ See *id.*

²⁵⁰ See *MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, 714 (D. Conn. 1991).

²⁵¹ See *id.* at 717 (citing *In re Snyder*, 472 U.S. 634, 645 n.6 (1985)).

²⁵² *Id.* at 719.

²⁵³ See *Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 811 F. Supp. 651, 654

cited to a two-prong test of disqualification outlined by the Eleventh Circuit in *Norton v. Tallahassee Memorial Hospital*.²⁵⁴ The court indicated that a “reasonable possibility” is enough to trigger the balancing test by which the court determines whether the harm to the reputation of the bar outweighs the social interest in allowing a party to keep its counsel.²⁵⁵

As indicated by the Eleventh Circuit, these cases dealing with issues of attorney-client privilege and confidentiality of work product, in general, do not deal directly with *Industrial Risk Insurers*, which concerns a district court’s confirmation of an international arbitration award.²⁵⁶ If one were to draw an analogy, however, between the appellants’ argument that the arbitration panel erred in admitting the expert testimony and the discussion of “side-switching” in *MMR/Wallace Power & Industrial, Inc.*,²⁵⁷ one could argue that “side-switching” is not permitted. Nevertheless, the situation as described in *MMR/Wallace Power & Industrial, Inc.* does not mirror the arbitration proceeding.²⁵⁸ The Eleventh

(M.D. Fla. 1992).

²⁵⁴ See *Norton v. Tallahassee Mem’l Hosp.*, 689 F.2d 938, 941 (11th Cir. 1982). First, there must be a “reasonable possibility” that an identifiable impropriety occurred, but specific proof is not necessary. *Rentclub, Inc.*, 811 F. Supp. at 654. Second, the court must undergo a balancing test where the likelihood of “public suspicion must outweigh the social interest” of continuing counsel’s participation in the suit. *Id.*

²⁵⁵ *Rentclub, Inc.*, 811 F. Supp. at 654.

²⁵⁶ See *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444-45 (11th Cir. 1998).

²⁵⁷ See *MMR/Wallace Power & Indus., Inc.*, 764 F. Supp. at 719.

²⁵⁸ The circumstances in *MMR/Wallace Power & Indus., Inc.* are distinguishable from those in *Industrial Risk Insurers*. Specifically, the issue in *MMR/Wallace Power & Indus., Inc.* was whether an attorney’s use of confidential information obtained during his past representation of his present adversary is permissible. See *MMR/Wallace Power & Indus., Inc.*, 764 F. Supp. at 719. The Colorado district court concluded that this constituted “side-switching,” and, thus, the court had to disqualify the attorney. *Id.* The situation in *Industrial Risk Insurers*, however, is different on several points. First, the Eleventh Circuit noted that Federal Rule of Civil Procedure 26 does not apply to arbitration proceedings unless the parties agree to it. See *Industrial Risk Insurers*, 141 F.3d at 1445, 1445 n.15. Second, attorney-client privilege was not the central issue in *Industrial Risk Insurers* because Barnard and Burk had not alleged that the expert witness had divulged any privileged information. See *id.* at 1445. Furthermore, the testimony did not rely on confidential work-product or information about litigation strategy. See *id.* Finally, the expert witness was not called by either party but by the arbitration panel, itself. See *id.*

Circuit made note of this discrepancy and chose to fall back on the defenses of the New York Convention and their application.²⁵⁹

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Supreme Court reviewed the defenses against arbitral awards.²⁶⁰ Specifically, the Supreme Court noted that “[t]he Convention reserves to each signatory country the right to refuse enforcement of an award where the ‘recognition or enforcement of the award would be contrary to the public policy of that country.’”²⁶¹ The award is only reviewable when the party wishing to vacate the award raises a defense.²⁶² The Supreme Court in *Mitsubishi* noted that substantive review of the enforcement of an arbitral award’s enforcement should be minimal.²⁶³ The only mechanism in place to refute enforcement of an award lies in Article V of the New York Convention.²⁶⁴

The Eleventh Circuit stated in *Drummond Coal Co. v. United Mine Workers, District 20*²⁶⁵ that in order to establish that a domestic arbitration award was a violation of “public policy,” the moving party had to show the award violated an “explicit public policy.”²⁶⁶ This “explicit public policy” needs to be “well-defined

²⁵⁹ See *Industrial Risk Insurers*, 141 F.3d at 1445.

²⁶⁰ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638-39 (1985).

²⁶¹ *Id.* at 638.

²⁶² See *id.* at 656-67 (Stevens, J., dissenting) (“Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207, and the rudimentary procedures which make arbitration so desirable in the context of a private dispute often mean that the record is so inadequate that the arbitrator’s decision is virtually unreviewable.”).

²⁶³ See *id.* at 638. The dissent in *Mitsubishi* argued that to rest the holding completely on the federal policy favoring arbitration reaches beyond what the FAA and the New York Convention is permitted to hear. See *id.* at 641 (Stevens, J., dissenting) (“[The Supreme Court] rests almost exclusively on the federal policy favoring arbitration of commercial disputes and *vague notions* of international comity.” (emphasis added)). Justice Stevens noted in his dissent that in order for an international arbitration to serve its purpose and to be successful, it cannot be applied too broadly. See *id.* at 665 (Stevens, J., dissenting). It must be limited to the tasks it is “capable of performing well.” *Id.* (Stevens, J., dissenting).

²⁶⁴ See The New York Convention, art. V, reprinted in note following 9 U.S.C.S. § 201 (1971).

²⁶⁵ 748 F.2d 1495 (11th Cir. 1984).

²⁶⁶ *Id.* at 1499 (quoting *W.R. Grace & Co. v. Local Union 759, Int’l Union of the*

and dominant.”²⁶⁷ It needs to be ascertainable “by reference to the laws and legal precedent,” not derived from some general consideration of public interests.²⁶⁸ Although *Drummond Coal Co.* was a domestic arbitration, other courts have recognized the “public policy” defense’s applicability to international arbitration.²⁶⁹

A decade earlier, the Second Circuit had applied the notion of a “public policy” defense to the international arbitration context in *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l’Industrie du Papier (RAKTA)*.²⁷⁰ The Second Circuit cited to the legislative history of Article V(2)(b) of the New York Convention, which indicated that the Convention’s predecessor described a “public policy” defense as needing to demonstrate that the awards were “contrary to principles of law” and were “violative of fundamental principles of law.”²⁷¹ The Second Circuit also cited to numerous commentators who illustrated conflicting views.²⁷² The Second Circuit, however, decided to probe into the history of the New York Convention and found that an expansive reading of the “public policy” defense against the confirmation of arbitral awards would be inconsistent with the New York Convention’s purpose of expediting resolutions to international commercial disputes.²⁷³

United Rubber, Cork, Linoleum & Plastic Workers of America, 461 U.S. 757, 766 (1983).

²⁶⁷ An earlier Supreme Court decision stated that any defense against a contract (including arbitration agreements) arguing that the contract should be held unenforceable because it would violate public policy would be permitted only when the violation is of a “well-defined,” “explicit public policy.” *W.R. Grace & Co.*, 461 U.S. at 766.

²⁶⁸ *Id.*

²⁶⁹ See *infra* notes 270-73 and accompanying text.

²⁷⁰ 508 F.2d 969, 974 (2d Cir. 1974).

²⁷¹ *Id.* at 973 (citing the Geneva Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1997, 92 L.N.T.S. 301).

²⁷² See *id.* (citing Contini, *supra* note 99, at 304; Quigley, *supra* note 1, at 1070-71). Contini’s view was that the absence of specific language speaking to the meaning of “public policy” should be construed to mean a narrowing of the defense. See *Parsons & Whittemore Overseas Co., Inc.*, 508 F.2d at 973. Quigley’s view was the exact opposite. He stated that the omission of specific language should be interpreted to mean that the “public policy” defense under Article V(2)(b) is to be read broadly. See *id.*

²⁷³ See *Parsons & Whittemore Overseas Co., Inc.*, 508 F.2d at 973-74. The Second Circuit believed that the “public policy” defense should be construed as narrowly as

The Sixth Circuit stated, in *M & C Corp. v. Erwin Behr GmbH & Co., KG*,²⁷⁴ that the New York Convention “lists the exclusive grounds justifying refusal to recognize an arbitral award.”²⁷⁵ Furthermore, the party moving to refuse the arbitration award must find its grounds within the enumerated defenses or within the FAA to the extent that the provisions do not conflict with the New York Convention.²⁷⁶ Although the FAA has an implied “manifest disregard of the law” defense, the New York Convention contains no such language.²⁷⁷ Such a defense, therefore, cannot be grounds to vacate an arbitration award.²⁷⁸

The Eleventh Circuit, in *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, resolved this issue of whether the admission of expert witness testimony violated “fundamental principles of fairness and professional conduct.”²⁷⁹ It stated that the attorney-client privilege and work-product cases that the petitioners cited were not applicable to their situation.²⁸⁰ The Eleventh Circuit even stated that if it were to give the appellants the benefit of the doubt and presume that there was a rule against “side-switching,” the parties would have had to agree to apply

possible and would deny an arbitration award only when “enforcement would violate the forum state’s most basic notions of morality and justice.” *Id.* at 974.

²⁷⁴ 87 F.3d 844 (6th Cir. 1996).

²⁷⁵ *Id.* at 851 (holding that the appellate court was without jurisdiction to refuse to confirm an arbitral award on the grounds that the arbitrator showed a manifest disregard for the law).

²⁷⁶ *See id.*; 9 U.S.C. § 208 (1998).

²⁷⁷ *M & C Corp.*, 87 F.3d at 850-51 (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds by* *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)). In addition, as in any contractual relationship, authority and guidance is derived from the contract itself. Thus, in this case, the arbitrator’s authority is derived from the arbitration agreement. *See Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991). Furthermore, in the nature of contractual law, the parties may specify the particular arbitration rules to be abided by during the proceedings, and these rules set forth in the agreement would be incorporated to the extent that they do not conflict with the provisions of the agreement itself. *See id.* at 831-32.

²⁷⁸ *See M & C Corp.*, 87 F.3d at 851.

²⁷⁹ *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998).

²⁸⁰ *See id.* at 1445.

such a rule.²⁸¹ Furthermore, the Eleventh Circuit concluded that the “public policy” defense will only be applied when the appellants make a clear showing that there is some “explicit public policy” that is “well-defined” and is supported by legal precedent.²⁸² Such a defense must be narrowly construed in order to preserve the purpose of international arbitration.²⁸³

3. *Whether or Not There Is a Defense of “Arbitrary and Capricious”*

The courts generally have held that a great degree of deference should be given to the goals of the New York Convention and to the arbitrator’s decision-making abilities.²⁸⁴ Therefore, in order to show that the arbitrator’s decision should be vacated, the party raising the defense against enforcement must derive its defense from those provided within the appropriate statutory provisions.²⁸⁵ The Eleventh Circuit has indicated that some federal courts have derived other defenses apart from 9 U.S.C. § 10.²⁸⁶ Specifically, these courts have allowed two non-statutory defenses: one where the arbitrator’s decision was “arbitrary and capricious”,²⁸⁷ and another where the arbitrator showed a “manifest disregard for the law.”²⁸⁸

An award may be considered “arbitrary and capricious” if the basis for the arbitrator’s decision could not be derived from the

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ *See id.*; *see also supra* notes 270-73 and accompanying text (discussing the New York Convention’s public policy defense under Article V(2)(b)).

²⁸⁴ *See Robbins v. Day*, 954 F.2d 679, 682 (11th Cir. 1992), *overruled by* *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (citing *Booth v. Hume Publ’g, Inc.*, 902 F.2d 925, 931-32 (11th Cir. 1990)).

²⁸⁵ *See Robbins*, 954 F.2d at 682-83; 9 U.S.C. § 10 (1998) (covering domestic arbitration); The New York Convention, art. V, *reprinted in* note following 9 U.S.C.S. § 201 (1971) (applying to international arbitration).

²⁸⁶ *See Robbins*, 954 F.2d at 683 (citing *O.R. Securities, Inc. v. Prof’l Planning Assoc.*, 857 F.2d 742, 746 (11th Cir. 1988)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986).

²⁸⁷ *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1458 (11th Cir. 1997).

²⁸⁸ *Robbins*, 954 F.2d at 683.

facts of the case.²⁸⁹ If such a finding is made, an award that is deemed "arbitrary and capricious" need not be upheld.²⁹⁰ Some courts may interpret the phrase "arbitrary and capricious" also to mean an award that is completely "irrational."²⁹¹ An arbitral award may also be vacated on the non-statutory grounds that the arbitrator manifestly disregarded the law.²⁹² In order to get relief on these grounds, the party moving to vacate must show that the arbitrator knew the applicable law and explicitly disregarded it.²⁹³ The Sixth Circuit, for example, has stated that "in order to constitute a manifest disregard of the law," the issue on review must be "obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator."²⁹⁴ In either case, "arbitrary and capricious" or "manifest disregard of the law," it is rare to vacate an arbitral award on such grounds.²⁹⁵ Generally, when parties agree to arbitration, they essentially are agreeing "to accept whatever reasonable uncertainties might arise from the process."²⁹⁶ In foreign arbitral awards, moreover, the parties are confined by the mandates of the New York Convention and Chapter 2 of the FAA.²⁹⁷

²⁸⁹ See *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 1410, 1413 (11th Cir. 1990).

²⁹⁰ See *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992).

²⁹¹ *Drummond Coal Co. v. United Mine Workers of America*, Dist. 20, 748 F.2d 1495, 1497 (11th Cir. 1984).

²⁹² See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953)).

²⁹³ See *Raiford*, 903 F.2d at 1412.

²⁹⁴ *M & C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 851 (6th Cir. 1996) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986)).

²⁹⁵ See *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir. 1992) (citing *Advest Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990)). "An arbitration board that incorrectly interprets the law has not manifestly disregarded it. It has simply made a legal mistake. To manifestly disregard the law, one must be conscious of the law and deliberately ignore it." *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1461 (11th Cir. 1997) (citing *O.R. Sec. v. Prof'l Planning Assoc., Inc.*, 857 F.2d 742, 747 (11th Cir. 1988)).

²⁹⁶ *Raiford*, 903 F.2d at 1413.

²⁹⁷ See *The New York Convention*, art. V, reprinted in note following 9 U.S.C.S.

In 1990 the Eleventh Circuit in *Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* stated that domestic arbitral awards may be vacated for several distinct reasons.²⁹⁸ Five categories of defenses against confirmation of an arbitral award are provided in 9 U.S.C. 10.²⁹⁹ The Eleventh Circuit noted, however, that several federal courts, including the Tenth and Second Circuits, have also come to recognize non-statutory grounds for vacation.³⁰⁰ Specifically, numerous circuits have mentioned two similar defenses, a “manifest disregard of the law,” and an “arbitrary and capricious” defense against upholding arbitration awards.³⁰¹

The Eleventh Circuit defined “manifest disregard of the law” as “more than error or misunderstanding with respect of the law.”³⁰² In its holding the Eleventh Circuit provided a three-step analysis to determine whether an arbitrator manifestly disregarded the law.³⁰³ First, the party moving to vacate must show that the error was so blatant that the arbitrator would instantaneously perceive it.³⁰⁴ Second, the party must show that the arbitrator was aware of the proper legal standard but blatantly disregarded it in granting the award.³⁰⁵ Finally, the intentional disregard of the law must be apparent in the arbitration record.³⁰⁶ The Eleventh Circuit, however, noted that it has never adopted this defense because such a standard would never be applicable due to the fact that arbitrators are not required to, and rarely do, give reasons for their awards.³⁰⁷ In addition, the Eleventh Circuit provided a definition

§ 201 (1971); *see also supra* notes 211-83 and accompanying text (discussing the enumerated defenses of the New York Convention).

²⁹⁸ *See Raiford*, 903 F.2d at 1412.

²⁹⁹ *See* 9 U.S.C. § 10 (1998).

³⁰⁰ *See, e.g., Raiford*, 903 F.2d at 1412 (citing *Jenkins v. Prudential-Bache Secs., Inc.*, 847 F.2d 631 (10th Cir. 1988); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 808 F.2d at 930 (2d Cir. 1986)).

³⁰¹ *Raiford*, 903 F.2d at 1412.

³⁰² *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 808 F.2d at 933).

³⁰³ *See id.*

³⁰⁴ *See id.* at 1412-13 (citing *O.R. Secs., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 747 (11th Cir. 1988)).

³⁰⁵ *See id.*

³⁰⁶ *See id.* at 1412-13.

³⁰⁷ *See id.* at 1413. The Eleventh Circuit indicated that arbitration proceedings are

of "arbitrary and capricious" in its decision in *Raiford*.³⁰⁸ The court indicated that an award is arbitrary and capricious if the grounds for the arbitrator's decision "cannot be inferred from the facts of the case."³⁰⁹

In *Brown v. Rauscher Pierce Refsnes, Inc.*,³¹⁰ the Eleventh Circuit elaborated on its "arbitrary and capricious" defense for vacating domestic arbitral awards.³¹¹ Not only did the Eleventh Circuit apply its holdings in its previous decisions, but the court also applied another reason to vacate an award on grounds that it was "arbitrary and capricious."³¹² It stated that a court may also refuse to uphold an arbitral award if the award is "not grounded in the contract which provides for the arbitration."³¹³

Although courts have recognized the existence of these alternative defenses in domestic awards,³¹⁴ the New York Convention places a limit on their application in foreign arbitral awards.³¹⁵ Illustratively, 9 U.S.C. § 207 indicates that a federal court must confirm an arbitration award unless the court finds grounds for refusal of the enforcement specified in the New York Convention.³¹⁶ The New York Convention clearly states that

"summary in nature," which goes to the appeal of arbitration's expediency. *Id.* (citing *Legion Ins. Co. v. Insurance Gen. Agency, Inc.*, 822 F.2d 541, 543 (5th Cir. 1987)). *But see* *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1460 (stating that every circuit, except the Fifth, has allowed the argument of the arbitrator's "manifest disregard of the law" as a reason to review an arbitral decision).

³⁰⁸ *Raiford*, 903 F.2d at 1413.

³⁰⁹ *Id.* (quoting *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 894 (2d Cir. 1985)); *see also* *Ainsworth v. Skurnick*, 960 F.2d 939, 941 (11th Cir. 1992), *cert. denied*, 507 U.S. 915 (1993) (holding that an award that is arbitrary and capricious is not required to be enforced by the courts).

³¹⁰ 994 F.2d 775 (11th Cir. 1993).

³¹¹ *See id.* at 781.

³¹² *Id.* The first reason was that the award demonstrated a "wholesale departure from the law." *Id.* (citing *Ainsworth*, 960 F.2d at 941).

³¹³ *Id.* (citing *United States Postal Serv. v. National Ass'n of Letter Carriers*, 847 F.2d 775, 778 (11th Cir. 1988)).

³¹⁴ *See* *Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1458 (11th Cir. 1997).

³¹⁵ *See* *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).

³¹⁶ *See* 9 U.S.C. § 207 (1998).

enforcement of the arbitration award may be refused only if the party moving to vacate proves one of the enumerated defenses.³¹⁷ The New York Convention does not indicate that these non-statutory defenses are to be included in the exclusive list of already provided for defenses.³¹⁸ Thus, taking the narrow interpretations of “manifest disregard of the law” and “arbitrary and capricious,” in conjunction with the restrictive language of the New York Convention, it will be a rare occurrence when one of these non-statutory defenses is used to defend against confirmation of an arbitral award.³¹⁹

D. Prejudgment Interest

In *Industrial Risk Insurers*, M.A.N GHH, on cross-appeal, contested the district court’s refusal to grant M.A.N GHH prejudgment interest.³²⁰ Thus, the Eleventh Circuit examined this issue as well, basing its authority on Chapter 2 of the FAA, the New York Convention.³²¹

Although this issue was not within the context of an international arbitration proceeding, the Eleventh Circuit had analyzed this issue previously in *Osterneck v. E.T. Barwick Industries, Inc.*,³²² in which the court held that prejudgment interest

³¹⁷ See The New York Convention, art. V, reprinted in note following 9 U.S.C.S. § 201 (1971).

³¹⁸ Given the process of statutory interpretation, the clear omission of an “arbitrary and capricious” or a “manifest disregard of the law” defense may be understood to be a decisive one.

³¹⁹ The probability that the “manifest disregard of the law” defense or the “arbitrary and capricious” defense would be accepted as a defense in an international arbitration is especially low considering the language of 9 U.S.C. § 208, which incorporates Chapter 1 only to the extent that it does not conflict with Chapter 2 or the New York Convention. See 9 U.S.C.A. § 208 (1998). This probability is cut down to virtually zero when one looks at the restrictive language in 9 U.S.C. § 207, which states that a court “shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” 9 U.S.C. § 207 (1998).

³²⁰ See *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1446 (11th Cir. 1998); see generally John Y. Gotanda, *Awarding Interest in International Arbitrations*, 90 AM. J. INT’L L. 40 (1996) (discussing the problems involved in awarding compensatory interest in international arbitration proceedings).

³²¹ See *id.*

³²² 825 F.2d 1521 (11th Cir. 1987).

was proper, given the weight of the equities.³²³ The Eleventh Circuit, relying on precedent from the Fifth Circuit stated, "prejudgment interest . . . is a question of fairness resting within the District Court's sound discretion."³²⁴ Furthermore, the award of prejudgment interest cannot be punitive in nature; rather it is a compensatory measure and is determinable upon the assessment of the equities.³²⁵

Other cases, however, have addressed the application of prejudgment interest in the arbitration context. For example, the Second Circuit in *Waterside Ocean Navigation Co. v. International Navigation Ltd.* held that prejudgment interest is permitted in actions under the New York Convention with regard to the enforcement of arbitral awards.³²⁶ The Second Circuit drew strong parallels between a district court's ability to award prejudgment interest under the context of formal litigation and awards under the auspices of the New York Convention.³²⁷

The Second Circuit indicated three reasons to uphold prejudgment interest in arbitration. First, the Second Circuit stated that in cases arising under federal law, granting of prejudgment interest is left to the discretion of the courts.³²⁸ Because this action is within the New York Convention and is, therefore, "under the laws and treaties of the United States," the district court has the power to award prejudgment interest.³²⁹ Second, because the Convention remains silent on the issue, the Second Circuit interpreted the silence to indicate that the Convention does not explicitly forbid such awards.³³⁰ The Second Circuit's third suggestion was that the reasons for awarding prejudgment interest in litigation are equally applicable for awards in arbitration

³²³ See *id.* at 1536.

³²⁴ *Id.* (quoting *Wolf v. Frank*, 477 F.2d 467, 479 (5th Cir. 1973)).

³²⁵ See *id.*

³²⁶ See *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 153-54 (2d Cir. 1984).

³²⁷ See *id.*

³²⁸ See *id.* at 153.

³²⁹ *Id.* at 154 (quoting 9 U.S.C. § 203 (West 1998)).

³³⁰ See *Waterside Ocean Navigation Co.*, 737 F.2d at 154.

proceedings.³³¹

In 1990 the district court of Delaware succinctly articulated a four-factor inquiry as to whether a district court exercised its discretion to award prejudgment interest in an international arbitration.³³² According to *National Oil Corp. v. Libyan Sun Oil Co.*, the court must consider: “(1) whether the claimant has been less than diligent in prosecuting the action; (2) whether the defendant has been unjustly enriched; (3) whether an award would be compensatory” rather than punitive; and “(4) whether countervailing equitable considerations ‘mandate’ against a surcharge.”³³³ Generally, absent clear reasons to the contrary, prejudgment interest should be granted to make the injured party whole again.³³⁴

E. Rule 11 Sanctions

In *Industrial Risk Insurers*, MAN GHH challenged the district court’s imposition of Rule 11 sanctions for MAN GHH’s motion for preliminary injunction.³³⁵ Barnard and Burk had argued that MAN GHH’s motion was an “improper attempt to relitigate an issue.”³³⁶ MAN GHH, however, contended that the district court erred in finding that there was no support in the record for MAN GHH’s claims.³³⁷ To resolve this issue, the Eleventh Circuit relied on cases related to the aforementioned dispute.³³⁸

³³¹ *See id.* One of the main reasons to grant prejudgment interest is to make whole the party who was financially injured by its adversary. *See id.* The Eleventh Circuit adheres to the view that prejudgment interest is not a punitive measure but a compensatory one. *See Insurance Co. of N. Am. v. M/V Ocean Lynx, a/k/a M/V Ocean Link*, 901 F.2d 934, 942 (11th Cir. 1990) (citing *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987)).

³³² *See National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 821 (D. Del. 1990).

³³³ *Id.* (citing *Feather v. United Mine Workers of Am.*, 711 F.2d 530, 540 (3d Cir. 1983)).

³³⁴ *See id.* at 821-22 (citing *Waterside Ocean Navigation Co.*, 737 F.2d at 154).

³³⁵ *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1447-48 (11th Cir. 1998); FED. R. CIV. P. 11(b).

³³⁶ *Industrial Risk Insurers*, 141 F.3d at 1449.

³³⁷ *See id.*

³³⁸ *See infra* notes 339-50 and accompanying text (discussing the application of

The Eleventh Circuit first looked to case law discussing the general framework of Rule 11 sanctions.³³⁹ “The purpose of Rule 11 is to reduce frivolous claims, defenses or motions and to deter meritless maneuvers, thus avoiding unnecessary delay and expense in litigation.”³⁴⁰ In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, the Supreme Court reasoned that the purpose of the FAA is to enforce privately negotiated arbitration agreements, not to “mandate the arbitration of all claims.”³⁴¹ Furthermore, because the arbitration agreement is to be granted the authority of a contract, the parties to the arbitration should be given the freedom to designate the terms under which they will arbitrate.³⁴² In another decision, *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, the Supreme Court stated that the purpose of the FAA was to make arbitration agreements enforceable in federal courts.³⁴³

In *Industrial Risk Insurers*, the Eleventh Circuit found that the district court’s order to compel arbitration was based on the parties’ design contract arbitration clause.³⁴⁴ Any issues that the

Rule 11 sanctions). The Eleventh Circuit found that the district court abused its discretion when it applied Rule 11 sanctions. See *Industrial Risk Insurers*, 141 F.3d at 1449.

³³⁹ See *id.* at 1448. When the court is confronted with a motion for Rule 11 sanctions, the court must first ask whether the party’s claims are frivolous. See *Worldwide Primates, Inc. v. McGreal*, 87 F.3d 1252, 1254 (11th Cir. 1996) (citing *Jones v. International Riding Helmets, Ltd.*, 49 F.3d 692, 694 (11th Cir. 1995)). If the court has determined that they are, then the court must then determine whether the person who signed the pleadings was aware of the frivolity. See *id.* Furthermore, if the attorney failed to make a reasonable inquiry, then the court must impose Rule 11 sanctions. See *id.* The purpose of the Rule 11 sanction, moreover, is to deter claims that have no factual or legal basis. See *Davis v. Carl*, 906 F.2d 533, 538 (11th Cir. 1990).

³⁴⁰ *Pierce v. Commercial Warehouse*, 142 F.R.D. 687, 691 (M.D. Fla. 1992)(citing *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987)).

³⁴¹ *Id.* at 472. The FAA does not require parties to arbitrate issues that have not been agreed upon, nor does the FAA prevent the parties from excluding issues. See *id.* at 478.

³⁴² See *id.* at 472.

³⁴³ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 422 (1967). But see *id.* at 422 (Black, J., dissenting) (discussing that the FAA was not meant to create a body of federal substantive law that would be so broad as to preclude the powers of state courts to interpret contracts).

³⁴⁴ See *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1449-50 (11th Cir. 1998).

parties wished to submit to arbitration that arose from the service contracts were outside of the purview of the district court's jurisdiction.³⁴⁵ The district court, therefore, could not compel arbitration of these claims, and the arbitration panel heard these claims outside of the district court's command.³⁴⁶

The case law preceding *Industrial Risk Insurers* reflects the circuits' varying degrees of compliance with the congressional purpose behind accession to the New York Convention. Some circuit courts reflected a more deferential treatment of the New York Convention by applying an "abuse of discretion" standard when faced with appeals from district courts in the matter of arbitral awards.³⁴⁷ However, other circuits exercised a less restrained look at arbitration.³⁴⁸ The Supreme Court itself seemed to be split on the matter, as illustrated in *Mitsubishi Motor Corp.*³⁴⁹ In all the case law, however, the congressional intent and purpose are clear. The New York Convention is intended not only to provide a different forum to resolve international commercial disputes but also to provide a faster, easier and more economical method of resolution.³⁵⁰

IV. Significance of the Case

Prior to *Industrial Risk Insurers*, courts upheld arbitral awards on the grounds that the congressional intent favored arbitration of international commercial transactions over litigation,³⁵¹ and the United States' accession to the New York Convention was meant to "encourage the recognition and enforcement of international arbitral awards."³⁵² In *Industrial Risk Insurers*, the Eleventh

³⁴⁵ See *id.* at 1450.

³⁴⁶ See *id.*

³⁴⁷ See *Robbins v. Day*, 954 F.2d 679, 681 (11th Cir. 1992).

³⁴⁸ See, e.g., *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941 (1995) (noting that the Third Circuit applied a de novo standard of review in this case).

³⁴⁹ See *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (illustrating that "the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal").

³⁵⁰ See *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179 (11th Cir. 1981).

³⁵¹ See *Mitsubishi Motor Corp.*, 473 U.S. at 638-40.

³⁵² *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983).

Circuit reemphasized the need to give great deference to arbitration awards, not only in the interest of international comity, but also in the interest of reducing caseloads in the judicial system and providing an alternative to resolving commercial disputes.³⁵³ By denying the appellants the “arbitrary and capricious” defense, the Eleventh Circuit drove home the notion that courts, in general, show a strong favoritism for arbitration by clearly indicating that parties seeking to vacate an international award are strictly limited to the enumerated defenses of the New York Convention.³⁵⁴

A. History and Statutory Interpretation

Industrial Risk Insurers provides a look into the history and purpose of the New York Convention through the lens of Chapter 2 of the FAA. The Eleventh Circuit examined the congressional intent of the New York Convention and found that its purpose was to encourage the recognition of international arbitral awards, and to provide a more efficient and economical forum for dispute resolution.³⁵⁵ Furthermore, in order to uphold the purpose of the New York Convention, the Eleventh Circuit construed the New York Convention and its counterpart in 9 U.S.C. §§ 201-208 to be carried out unequivocally. As indicated by prior courts, Chapter 2 establishes a very strong presumption in favor of arbitrating international commercial disputes.³⁵⁶ In addition, to further the legislative purpose, the statute created original federal subject matter jurisdiction over actions arising under the New York Convention.³⁵⁷ By giving the courts subject matter jurisdiction, the New York Convention and the FAA provide them with the authority to make those federal provisions the “highest law of the land,” preempting any prior conflicting laws.³⁵⁸ Furthermore, it

³⁵³ See *Ultracashmere House, Ltd.*, 664 F.2d at 1179.

³⁵⁴ See *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445-46 (11th Cir. 1998).

³⁵⁵ See *id.* at 1440.

³⁵⁶ See *id.* (citing *Mitsubishi Motor Corp.*, 473 U.S. at 638-40).

³⁵⁷ See *id.*; see also 9 U.S.C. § 203 (1998) (“The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.”).

³⁵⁸ *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex)*, 767 F.2d

gives the courts the ability to “unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in signatory countries.”³⁵⁹ The Eleventh Circuit readily adopted these provisions and adamantly trumpeted the enforcement of arbitration awards by construing motions to vacate quite narrowly, requiring its district courts to do the same.³⁶⁰

B. Jurisdiction

The Eleventh Circuit inquired sua sponte into the source of its jurisdiction.³⁶¹ According to the New York Convention, sections of Chapter 2 of the FAA confer original jurisdiction upon the district courts to hear international arbitration cases.³⁶² The Eleventh Circuit concisely outlined the scope of the New York Convention. Specifically, the New York Convention covers any arbitration agreement or arbitral award that arises from a commercial transaction that is not entirely between citizens of the United States.³⁶³ Such commercial transactions occur when the transaction involves property outside of the United States or some other reasonable relationship with other foreign states.³⁶⁴

In contrast, Chapter 1 of the FAA does not have such language conferring federal subject matter jurisdiction upon the courts.³⁶⁵

1140, 1145-46 (5th Cir. 1985). The New York Convention, in effect, replicates the FAA. *See id.* The FAA, moreover, was instituted to overcome common law hostility towards arbitration that was due in part to the state court’s perception of being “ousted” from its jurisdiction. *See* H.R. Rep. No. 96, 68th Cong., 1st Sess., at 1 (1924).

³⁵⁹ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Another congressional intent of the New York Convention and the FAA was to assure that the signatory countries would enforce the parties’ arbitration agreement and not “diminish the mutually binding nature” of the agreements. *Id.*

³⁶⁰ *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1439-41 (11th Cir. 1998).

³⁶¹ *See id.* at 1439.

³⁶² *See* 9 U.S.C. § 203 (1998). 9 U.S.C. § 203 provides: “An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have *original jurisdiction* over such an action or proceeding, regardless of the amount in controversy.” *Id.* (emphasis added).

³⁶³ *See* 9 U.S.C. § 202 (1998).

³⁶⁴ *See Jain v. de Mere*, 51 F.3d 686, 689 (7th Cir. 1995).

³⁶⁵ *See generally* 9 U.S.C. §§ 1-16 (1998) (providing the general provisions of the FAA).

Instead, 9 U.S.C. § 9 states that the “court *must grant* such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.”³⁶⁶ Therefore, when the court is under the authority of Chapter 1 of the FAA, it does not hold original jurisdiction; rather, it only holds the power to vacate or modify an award pursuant to 9 U.S.C. §§ 10 and 11 of Chapter 1.³⁶⁷ Specifically, the appellate court decides questions of law de novo, regardless of whether the district court has vacated or affirmed an arbitration award.³⁶⁸

The Eleventh Circuit looked to the First, Second, Seventh, and Ninth Circuits. Some held that “non-domestic” arbitration agreements and awards were controlled by the New York Convention because “they were made within the legal framework of another country.”³⁶⁹ According to the Eleventh Circuit, the district court erroneously based its jurisdiction on diversity and applied Chapter 1 of the FAA, which covers domestic arbitration.³⁷⁰ The Eleventh Circuit undertook an extensive analysis to determine this issue of first impression: whether the New York Convention and the provision of Chapter 2 of the FAA must be applied to an arbitration agreement and award granted to a foreign entity by an arbitration panel sitting in the United States and applying American federal or state law.³⁷¹ By examining abundant case law supporting the notion that the purpose of the New York Convention was to “encourage the recognition and enforcement of international arbitral awards,” the Eleventh Circuit reached the conclusion that the New York Convention and Chapter

³⁶⁶ 9 U.S.C. § 9 (1998) (emphasis added).

³⁶⁷ *See id.*

³⁶⁸ *See* First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947-49 (1995).

³⁶⁹ *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998) (citing *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983)).

³⁷⁰ *See id.* at 1440. Due to the district court’s conclusion that its authority to hear the case was derived from diversity jurisdiction, the district court held that its review of the international arbitration proceedings was grounded in Chapter 1 of the Federal Arbitration Act, codified in 9 U.S.C. §§ 1-16 in 1994. *See id.* at 1439-40; *see also generally* 9 U.S.C. §§ 1-16 (1998) (indicating general provisions of the FAA).

³⁷¹ *See Industrial Risk Insurers*, 141 F.3d at 1440.

2 of the FAA govern such an international arbitral award.³⁷²

The Eleventh Circuit went through a systematic parsing of the New York Convention's language as set forth in 9 U.S.C. § 201 et seq. The court recognized that Chapter 2 of the FAA created original federal subject matter jurisdiction over actions arising under the New York Convention.³⁷³ The Eleventh Circuit then examined what was meant to encompass "actions arising under" the New York Convention. In so doing, the Eleventh Circuit investigated the meaning of "non-domestic."³⁷⁴ Specifically, the Eleventh Circuit looked at 9 U.S.C. § 202, which states that arbitration awards arising out of commercial transactions are under the New York Convention except those that are domestic, *i.e.*, between citizens of the United States.³⁷⁵ The Eleventh Circuit took steps to clarify the meaning of "non-domestic." It established that arbitration awards are "non-domestic" so long as the award is not entirely between citizens of the United States.³⁷⁶

Moreover, with its *Industrial Risk Insurers* decision, the Eleventh Circuit finally joined the First, Second, Seventh, and Ninth Circuits to hold a broad understanding of the meaning of "non-domestic." Specifically, the Eleventh Circuit held that "non-domestic" awards are those that are made between parties that are not completely United States citizens, and it conceded that "non-domestic" can be interpreted to mean those awards that were made within the legal framework of another country.³⁷⁷

The Eleventh Circuit, in its holding in *Industrial Risk Insurers*, clarified the district court's apparent confusion in its assumption of diversity jurisdiction.³⁷⁸ Upon establishing the source of

³⁷² *Id.* (quoting *Bergesen*, 710 F.2d at 932).

³⁷³ *See id.* at 1440; 9 U.S.C. § 203.

³⁷⁴ *Industrial Risk Insurers*, 141 F.3d at 1440-41.

³⁷⁵ *See* 9 U.S.C. § 202 (1998).

³⁷⁶ *Industrial Risk Insurers*, 141 F.3d at 1440-41.

³⁷⁷ *Id.* (citing *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983)).

³⁷⁸ *See id.* at 1446. It appeared that the district court took the parties' motion that its case should be heard in the federal court on grounds of diversity. Thus, the district court presumably stopped its analysis at that point and did not inquire further into the nature of the arbitration agreement. However, the appellate court viewed the source of jurisdiction as an obvious threshold matter and inquired *sua sponte*. *See id.* at 1439-40 (citing *Miscott Corp. v. Zaremba Walden Co.*, 848 F.2d 1190, 1192 (11th Cir. 1988)).

jurisdiction, the Eleventh Circuit made the definitive statement that an arbitration award that is made within the United States, under American law, which is granted to a foreign corporation is under the authority of the New York Convention.³⁷⁹

C. Enumerated Defenses

The Eleventh Circuit's holding in *Industrial Risk Insurers* reiterated the strong presumption in favor of arbitration. By holding that a party seeking to vacate an arbitral award is limited to the enumerated defenses of Article V, the Eleventh Circuit did not permit any leeway for the "arbitrary and capricious" defense to be incorporated into one of the seven defenses of the New York Convention.³⁸⁰ Furthermore, the Eleventh Circuit seemed to take a "plain language" approach to the Convention and construed the New York Convention's defenses as narrowly as possible.³⁸¹ The court's interpretations favor arbitration and the reduction of the risk of vacating arbitral awards.³⁸²

The Eleventh Circuit clearly indicated, however, that there are differences between litigation and arbitration procedure.³⁸³ Where litigation is confined by rules of procedure and evidence, arbitration enjoys the opportunity to structure its proceedings in accordance with the parties' wishes.³⁸⁴ The Eleventh Circuit stated that an arbitration proceeding need not follow all the formalities of

³⁷⁹ See *id.* at 1441. Another aspect of this issue is the parties themselves. This case seems not only to deal with the jurisdictional issue but also a simple "permutation-combination" perspective of party citizenship with respect to the location of the arbitration.

³⁸⁰ See *Industrial Risk Insurers*, 141 F.3d at 1446.

³⁸¹ *Id.* at 1445 (stating that if concerns of breach of client confidentiality or work product were raised by the admission of the expert testimony, the court could not consider such matters unless they fell under one of the enumerated defenses of the New York Convention).

³⁸² It appears that the court read Article V of the New York Convention to mean that a party seeking to vacate an award must find a basis to vacate only under one of the seven enumerated defenses. See the New York Convention, art. V, reprinted in note following 9 U.S.C.S. § 201 (1971).

³⁸³ See *id.* at 1443-44.

³⁸⁴ See *id.*

litigation, and need only provide a “fundamentally fair hearing.”³⁸⁵ The Eleventh Circuit interpreted the AAA Rules, which the parties agreed to use in their arbitration, to provide arbitrators with a great deal of discretion in the exchange of evidence.³⁸⁶ Therefore, the Eleventh Circuit created a precedent that will not only broaden the scope of arbitration but also relax the standards within the proceedings themselves.

Furthermore, the Eleventh Circuit addressed the evidentiary issue of whether to permit testimony of an expert witness who was once retained by the opposing party.³⁸⁷ The Eleventh Circuit examined the supporting case law that the appellants presented to the court. The cases were limited to Federal Rule of Civil Procedure 26,³⁸⁸ attorney-client privilege, and confidentiality of work product.³⁸⁹ The Eleventh Circuit concluded that the combined effect of the rules is to stifle a party’s ability to utilize the opposing party’s expert witness.³⁹⁰ However, the Eleventh Circuit asserted that it would not apply a “blanket rule” against “side-switching.”³⁹¹ To legitimize its position, the Eleventh Circuit noted that the expert did not divulge any privileged information, nor did the expert rely upon any confidential work product in his testimony.³⁹² In addition, the Eleventh Circuit drew distinctions between a witness being called by a party and a witness being called by the arbitration panel itself.³⁹³ The appellants had relied

³⁸⁵ *Id.* at 1443 (quoting *Grovner v. Georgia-Pacific*, 625 F.2d 1289, 1290 (5th Cir. Unit B 1980)). The Eleventh Circuit mentioned that the appellants were attempting to attack the admitted evidence on grounds that the admissions made the proceedings “fundamentally unfair.” *Id.* at 1442-43. However the court indicated that this was not the case because the appellants had plenty of opportunity to rebut the report and testimony and did so. *See id.* at 1444 n.11.

³⁸⁶ *See id.* at 1443 (“the AAA will make arrangements for the exchange of documentary evidence”).

³⁸⁷ *See id.* at 1444.

³⁸⁸ *See* FED. R. CIV. P. 26 (providing general provisions that govern the process of disclosure and the duty to disclose).

³⁸⁹ *See id.* at 1444-45.

³⁹⁰ *See id.* at 1445.

³⁹¹ *Id.*

³⁹² *See id.* at 1445.

³⁹³ *See id.*

upon cases where the opposing parties called the controversial witness; however, in *Industrial Risk Insurers*, the arbitration panel called the expert witness itself.³⁹⁴ The Eleventh Circuit seemed to resolve the "side-switching" dispute on a technicality. But for the arbitration panel calling the expert witness, the witness would have been deemed to have "side-switched," which is not permitted.³⁹⁵

The Eleventh Circuit seemed to have an uncompromising position on this matter. Nevertheless, the Eleventh Circuit apparently wanted to bolster its foundation even more.³⁹⁶ Thus, the Eleventh Circuit also turned to the New York Convention for legitimization.³⁹⁷ The Eleventh Circuit relied on the seven grounds for refusing to enforce an arbitration award.³⁹⁸ According to the Eleventh Circuit, in order to vacate the district court's order affirming the award, the admissions would have to fall within one of the seven defenses.³⁹⁹ Although the Eleventh Circuit had originally recognized a few non-statutory defenses, the court would apply them so narrowly as to make them virtually useless.⁴⁰⁰ The substantive defenses, therefore, lie solely within the New

³⁹⁴ *See id.*

³⁹⁵ *See MMR/Wallace Power & Indus., Inc. v. Thames Assocs.*, 764 F. Supp. 712, 719 (D. Conn. 1991).

³⁹⁶ *See Industrial Risk Insurers*, 141 F.3d at 1445.

³⁹⁷ *See id.*

³⁹⁸ *See id.*; *see also* The New York Convention, art. V, *reprinted in* note following 9 U.S.C.S. § 201 (1971) (listing the defenses to the enforcement of an international arbitral award).

³⁹⁹ *See Industrial Risk Insurers*, 141 F.3d at 1445. This holding seems to indicate a bit of uncertainty on the part of the Eleventh Circuit. To elaborate, the Eleventh Circuit seemed initially to ground its decision in the fact that there is no "blanket rule" against "side-switching." *See id.* at 1444. However, the Eleventh Circuit then seemed to doubt itself and searched for other precedent to refute the appellant's contentions. *See id.* at 1445. In its opinion, the Eleventh Circuit stated that even if there were a rule disallowing side-switching, it would not control the arbitration proceedings unless the parties agreed to it. *See id.* (citing *Szuts v. Dean Witter Reynolds, Inc.*, 931 F.2d 830, 831 (11th Cir. 1991)). This logic seems to indicate that the Eleventh Circuit is asking all parties to arbitration to indicate specifically all the rules that should be included in the proceeding; otherwise their absence will be interpreted to mean that they do not apply at all.

⁴⁰⁰ *See Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 1462 (11th Cir. 1997).

York Convention and within Chapter 1 of the FAA to the extent that it does not conflict with the New York Convention.⁴⁰¹

D. Prejudgment Interest

The precedent indicates that granting prejudgment interest in international arbitral awards is not dictated by any federal statute; instead, it is at the discretion of the court.⁴⁰² The courts, moreover, have shown a trend of awarding prejudgment interest so long as there is no reason not to award such compensation.⁴⁰³ The Eleventh Circuit clearly stated that the award of prejudgment interest is compensatory, not punitive, in nature.⁴⁰⁴ Furthermore, it noted that because the district court had original federal subject matter jurisdiction, not diversity jurisdiction, the district court did not need to follow state law.⁴⁰⁵ Instead, the district court was guided by federal law, which permits prejudgment interest in the awarding of post-arbitral awards.⁴⁰⁶ The Eleventh Circuit's decision in *Industrial Risk Insurers* on the matter of prejudgment interest once again illustrates that international arbitration enjoys great procedural latitude.⁴⁰⁷

⁴⁰¹ See The New York Convention, art. V, reprinted in note following 9 U.S.C.S. § 201 (1971); see also 9 U.S.C. § 208 (1998) (indicating that Chapter 1 is incorporated into Chapter 2 to the extent that it does not conflict).

⁴⁰² See, e.g. *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1987); see also *supra* notes 324-29 and accompanying text (discussing awarding prejudgment interest at the discretion of the court).

⁴⁰³ See *Waterside Ocean Navigation Co.*, 737 F.2d at 153-54.

⁴⁰⁴ See *Industrial Risk Insurers*, 141 F.3d at 1446-47.

⁴⁰⁵ See *id.* at 1446.

⁴⁰⁶ See *id.*

⁴⁰⁷ See, e.g., *Waterside Ocean Navigation Co.*, 737 F.2d at 153-54 (“We do not see why pre-judgment interest should not be available in actions brought under the [New York] Convention. In these days in which all of us feel the effects of inflation, it is almost unnecessary to reiterate that only if such interest is awarded will a person wrongfully deprived of his money be made whole for the loss.”). See also Gotanda, *supra* note 320, at 50 (discussing several approaches to the process of awarding interest). In addition to looking at the arbitration agreement for guidance, the “arbitrator can decide the issue in accordance with general principles of international law or on the basis of fairness and reasonableness.” *Id.*

E. Rule 11 Sanctions

Finally, the Eleventh Circuit analyzed the application of Rule 11 sanctions.⁴⁰⁸ The Eleventh Circuit applied the sanction analysis to the context of arbitration proceedings.⁴⁰⁹ This application helped create a guideline for the district courts to follow. Specifically, the Eleventh Circuit, by holding that the district court's authority was limited to compelling the parties to arbitrate, indicates that the parties are the masters of their arbitration.⁴¹⁰ In other words, unless the parties specify that certain claims are to be arbitrated, the court cannot impose arbitration of those issues.⁴¹¹

The Eleventh Circuit clarified the court's role in the imposition of Rule 11 sanctions as they pertain to arbitration awards.⁴¹² The Eleventh Circuit highlighted the powers given to the arbitrator, which are not necessarily congruently held by the district court.⁴¹³ When an arbitrator agrees to hear claims raised in the arbitration proceeding, these claims are reviewed outside the reach of the district court.⁴¹⁴ The Eleventh Circuit reiterated the notion that the parties are the only ones who can dictate what issues are considered arbitrable under the arbitration agreement.⁴¹⁵ The

⁴⁰⁸ See *id.* at 1447-48.

⁴⁰⁹ See *id.* at 1446-47 (citing *Waterside Ocean Navigation Co.*, 737 F.2d at 153-54). The Eleventh Circuit cited to cases where prejudgment interest was considered appropriate in international arbitration as well as domestic arbitration. See *id.* at 1447 (citing *Fort Hill Builders, Inc. v. National Grand Mutual Ins. Co.*, 866 F.2d 11, 14 (1st Cir. 1989) (holding that post-award, prejudgment interest is appropriate in domestic arbitral awards)).

⁴¹⁰ Parties need only arbitrate an issue when they have agreed to submit their conflict to arbitration proceedings. See *Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989). In addition, the parties dictate within the arbitration agreement which issues will or will not be subject to arbitration. See *id.*

⁴¹¹ See *id.* at 1450; see also *supra* note 194 (discussing the Supreme Court's holding that an issue cannot be deemed arbitrable unless the parties had agreed to it).

⁴¹² See *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1447-50 (11th Cir. 1998).

⁴¹³ See, e.g., *Robbins v. Day*, 954 F.2d 679, 685 (11th Cir. 1992) (discussing the latitude given to an arbitrator to conduct an arbitration proceeding); see *Industrial Risk Insurers*, 141 F.3d at 1443-44.

⁴¹⁴ See *id.* at 1450.

⁴¹⁵ See *Volt Info. Sciences, Inc.*, 489 U.S. at 478; *Industrial Risk Insurers*, 141 F.3d

courts have little discretion to decide arbitrability.⁴¹⁶ As one court noted, the FAA is designed to make arbitration agreements enforceable, but it is not designed to do more than that.⁴¹⁷

V. Conclusion

The Eleventh Circuit examined the background law pertaining to the statutory issues raised in the case and applied them to the particular fact pattern of *Industrial Risk Insurers*.⁴¹⁸ It took great pains to apply cases that addressed issues under Chapter 1 of the FAA to a Chapter 2 case. Through this cross-application, the court illustrated the relative complementary natures of Chapters 1 and 2 of the Federal Arbitration Act. The Eleventh Circuit's application and interpretation of the New York Convention and the relevant statutory provisions paint a "step-by-step" analysis format.

Specifically, a court must first examine whether an arbitration agreement exists between the disputing parties. Second, if there is an agreement, the court must enforce it. The terms of the arbitration agreement, as in any contract, control the proceeding. Third, the court must examine whether or not the arbitration is considered "domestic" or "non-domestic." If it is determined to be "domestic" in nature, *i.e.*, a dispute between citizens of the United States, then Chapter 1 of the FAA controls. The federal courts that hear these cases on review are, therefore, hearing them upon diversity jurisdiction, and must apply state law. However, if the dispute is considered "non-domestic," Chapter 2 of the FAA controls, which grants original federal subject matter jurisdiction upon the federal courts to hear such matters. In this instance, the courts may review these cases *de novo*.

The legislative history has indicated a strong presumption favoring arbitration of commercial disputes and, in particular, international commercial disputes. Congress has expressed this favoritism given arbitration's comparative ease, economy, and efficiency to litigation. The holding in *Industrial Risk Insurers*

at 1450.

⁴¹⁶ See *Industrial Risk Insurers*, 141 F.3d at 1449-50.

⁴¹⁷ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). Until an arbitration agreement is brought before the court by correct pleadings, the court may not enforce the agreement. See *id.*

⁴¹⁸ See *supra* notes 22-95 and accompanying text.

underscores the strong presumption in favor of arbitration of international commercial transactional disputes. The Eleventh Circuit's decision is in accordance with the extensive and applicable precedent. The expansive reading of the New York Convention facilitates an increased application of international arbitration, which provides more freedom for the parties involved as well as a greater chance of reaching some sort of resolution.⁴¹⁹ Although other circuits may previously have been uncertain of the reach of the New York Convention, the Eleventh Circuit freed the district courts to wield their authority to uphold arbitration decisions as much as possible.

The Eleventh Circuit seems to be looking backward in time to its holding in *Robbins v. Day* in which the court held that the standard of review for an arbitration under Chapter 1 is "abuse of discretion." This limited review obviously allows courts the leeway to confirm arbitration awards. However, the Eleventh Circuit was overruled by the Supreme Court in *First Options of Chicago, Inc.*, which stated that the standard of review should be an "ordinary standard of review." The Supreme Court, in holding that the review is to be "ordinary" and not "abuse of discretion," was not abandoning the liberal favoritism for arbitration. Instead, it attempted to bridle this favoritism. Given this holding, the Eleventh Circuit should have tempered its zealous confirmation of arbitral awards and its broad presumptive interpretation of arbitration agreements. The Eleventh Circuit, however, did not seem to be complying to the extent that the Supreme Court may have liked.

The Eleventh Circuit's extreme favoritism for arbitration, which is carried out with few guidelines and provides the arbitration panel with an immense amount of discretion, does not provide a strong "checks and balances" system to protect against "arbitrary and capricious" decision-making. The courts seem so eager to affirm arbitral awards that they construe the enumerated defenses extremely narrowly and do not permit any other plausible

⁴¹⁹ See generally, G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 888 (1995) (discussing the significant contributions of the New York Convention to dispute resolution of international commercial transactions).

defenses that may vacate the arbitral award. The goal of international arbitration, as interpreted by many courts (especially the Eleventh Circuit) seems to be the settlement in and of itself, rather than on the process of reaching settlement. There seems to be a complete disregard of the consequences.⁴²⁰ The Eleventh Circuit, in upholding the arbitral award and dismissing the argument of “arbitrary and capricious action,” appears to be proclaiming that the ends justify the means.⁴²¹ In certain instances, this theory may be a legitimate one; nevertheless, it is not flawless. A solution to this problem does not seem to be evident from the case law or from Congress. Until a better solution arises, the only apparent method to deal with an international commercial dispute is to apply this broad arbitration practice so as to avoid many of the countervailing issues involved, such as conflict of laws, duplicative litigation, and adverse effects on international comity.

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⁴²⁰ See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995). The Supreme Court noted in *First Options of Chicago, Inc.* that the basic objective of upholding arbitration agreements is “not to resolve disputes in the quickest manner, no matter what the parties’ wishes” but to ensure that the arbitration agreements are conducted according to their contractual terms. *Id.*

⁴²¹ See *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1445-46 (11th Cir. 1998). The Eleventh Circuit may have to dismiss the “arbitrary and capricious” defense on the grounds that the petitioner failed to show that the arbitrator’s decision was based on a complete disregard of the law and therefore, “arbitrary and capricious.” *Id.* However, the Eleventh Circuit, in addition to dismissing the party’s argument, dismissed this plausible defense all together. See *id.* The Eleventh Circuit stated, in effect, that regardless of the facts and circumstances of the case, such a defense is not permitted because it is not one of the seven enumerated defenses of the New York Convention. See the New York Convention, art. V, reprinted in note following 9 U.S.C.S. § 201 (1971).

