

*Federal Judicial Center
International Litigation Guide*

**International Commercial Arbitration:
A Guide for U.S. Judges**

2012

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International Litigation Guide*

International Commercial Arbitration: A Guide for U.S. Judges

S.I. Strong

Federal Judicial Center
2012

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I. Introduction

International commercial arbitration has become a widely popular means of resolving international disputes, and U.S. courts are being asked to resolve matters relating to international arbitration with increasing frequency.¹ This is a particularly complex area of law, not only because of the interaction between domestic and international law, but also because of the jurisdictional interplay between U.S. courts, foreign courts, and the arbitral tribunal.

The biggest challenge for U.S. federal judges adjudicating international arbitral issues is understanding how the dispute at bar fits into the context of the dispute resolution process as a whole. U.S. courts will not have jurisdiction over the entire dispute, but will be called upon to resolve discrete legal issues. It is helpful for judges to be familiar with the international arbitral regime as a whole as well as the relevant issues in U.S. law.

Rather than providing a comprehensive discussion of international commercial arbitration, this guide offers a practical overview of issues related to international commercial arbitration that commonly arise in a U.S. federal court. Limitations of space mean that a great deal has been left out of this discussion. Quite often the guide skips over basic propositions of U.S. law on arbitration in order to focus more heavily on elements that are unique to the international realm. The purpose is to identify a useful framework for analysis.

The unique nature of the subject matter requires a somewhat different textual approach than is typically used in this sort of publication. Because international arbitration is modeled on code-based legal systems as much as it is on common-law-based traditions, this guide includes a more detailed treatment of treaty provisions and international law, and places less emphasis on U.S. case law than normally is the case.

Part II sets the discussion in context by describing the differences between international commercial arbitration and other dispute resolution mechanisms, including domestic arbitration. Part III describes a

1. See S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 J. Disp. Resol. 1, 2–3 (2012) (citing statistics) [hereinafter Strong, *Border Skirmishes*].

number of fundamental concepts that are critical to understanding how an individual motion or ancillary dispute relates to the rest of the process. This part also gives a basic outline of the U.S. statutory approach to international commercial arbitration.

Part IV addresses the various procedural motions that are associated with international commercial arbitration. The discussion is arranged chronologically, beginning with issues that arise in court prior to or at the initiation of the arbitration before moving on to issues that arise during and after the arbitration. Part V discusses a few special issues related to who may be a party in an international commercial arbitration. These issues, which encompass non-signatories, multiparty proceedings, and state parties, can arise at any time.

Part VI offers some closing observations. Following this discussion are suggestions for further reading, a glossary, and five appendices. Three of the appendices contain legislative materials that are frequently referenced in the text, and two of the appendices summarize in graphic form key information regarding international commercial arbitration.

The guide is structured to provide readers with a basic understanding of the fundamental principles of international commercial arbitration before addressing specific matters that arise on a motion-by-motion basis. While it may be tempting to flip straight to the section that addresses the dispute at issue, the primary challenge for judges in this area of law is understanding how a particular dispute fits within the larger dispute resolution process. Unlike litigation, which involves a single judge from beginning to end, or domestic arbitration, which involves only a single court, international commercial arbitration can involve multiple courts in addition to the arbitral tribunal. Therefore, it may be helpful for judges to review Parts II and III before moving on to one of the sections in Part IV, thereby taking advantage of the numerous cross-references to help provide context. Judges can read Part V when one of the special issues noted therein arises.

II. Differences Between International Commercial Arbitration and Other Forms of Arbitration

Arbitration is not a one-size-fits-all proposition. Different types of disputes give rise to distinct variations in both policy and procedure. It therefore is important to differentiate between the various types of

proceedings so as to avoid any misconceptions about the nature of international commercial arbitration.

A. Distinguishing International Commercial Arbitration from International Investment Arbitration

Although both international commercial arbitration and international investment (alternatively called “investor-state” or “treaty”) arbitration are international, they derive their authority from two fundamentally different sources and therefore reflect a number of basic dissimilarities.

International commercial arbitration is a private dispute resolution mechanism that relies heavily on the agreement of the parties, both as a means of demonstrating consent to arbitration and with respect to the structure of the proceedings. In contrast, international investment arbitration is a treaty-based procedure that is rooted in public international law. Consent to international investment arbitration is demonstrated by states rather than private parties, at least in the first instance, and must be found in each particular proceeding through reliance on one of the hundreds of bilateral investment treaties (BITs), multilateral investment treaties (MITs), or investment protection agreements (IPAs) that are currently in place worldwide. The most well-known instrument on international investment arbitration is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,² more commonly known as the ICSID Convention or the Washington Convention. Procedures in each individual dispute are dictated by the terms of the governing investment treaty.³

Because treaty-based arbitration is a public law mechanism, it gives rise to practical and jurisprudential issues that do not exist in the private law world of international commercial arbitration. This guide addresses only international commercial arbitration, not investment arbitration under the ICSID Convention or any applicable BIT, MIT, or IPA.

2. See Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1720, 575 U.N.T.S. 159.

3. See Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* (2008); Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001).

B. Comparing International Commercial Arbitration with Other Forms of Dispute Resolution

International commercial arbitration also differs from domestic arbitration and litigation.

1. International commercial arbitration and domestic arbitration

The U.S. courts have recognized this country's robust pro-arbitration policy.⁴ The U.S. Supreme Court has indicated that international commercial arbitration is to be treated even more favorably than domestic arbitration, stating that

[the] concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of 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.⁵

There are several differences between international and domestic arbitration at the procedural level. For example, international commercial arbitration typically involves

- sophisticated, specialized counsel for both parties (as opposed to domestic consumer, employment, and securities arbitration, which may proceed without counsel for one or both of the parties);
- highly qualified arbitrators with years of experience in international law and practice (as opposed to securities arbitration, which uses "public" arbitrators who lack any insider knowledge of the securities industry, or other forms of arbitration, which may not necessarily use lawyers as arbitrators);
- strict policies requiring arbitrators to disclose conflicts of interest, including previous contacts with the parties or with counsel (as opposed to labor and employment arbitration, which can experience difficulties arising from perceptions regarding arbitrator bias concerning "repeat players");

4. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

5. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (emphasis added).

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- arbitration agreements negotiated by sophisticated players at arm's length (as opposed to consumer or employment arbitration, which can involve contracts of adhesion signed by laypersons with no real understanding of arbitration or its alternatives);
- highly formal procedures, often dictated by detailed institutional rules of procedure and requiring extensive pre- and post-hearing written submissions, and involving days, if not weeks, of hearings (as opposed to consumer, labor, and employment arbitration, which use very little in the way of written submissions and evidence, and which emphasize short and informal hearings);
- complex legal claims involving large sums of money, often ranging in the millions or billions of dollars (as opposed to consumer, labor, and employment arbitration, which often involve simple legal issues and small amounts in dispute); and
- extensive reliance on statutes, judicial precedents, international treaties, and other legal authorities (as opposed to consumer, labor, and employment arbitration, which often involve less complex questions of substantive and procedural law).

2. International commercial arbitration and international litigation

International commercial arbitration also reflects certain distinct qualities when compared with international litigation. For example, international commercial arbitration provides

- an effective and reliable means of enforcing foreign arbitral awards through use of various international treaties (as opposed to international litigation, which requires U.S. parties to rely primarily on unpredictable principles of international comity, since the United States is not a party to any multilateral agreements on the enforcement of civil judgments);
- a faster route to the final determination of the matter as a result of limited judicial review (as opposed to international litigation, which can involve multiple appeals and the possible need for enforcement in various jurisdictions through the comity-based procedure noted above);
- a single forum in which to resolve disputes (as opposed to international litigation, which can involve multiple proceedings

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in different jurisdictions, particularly in cases in which there is no enforceable choice of forum clause);

- neutral decision makers free from national or political prejudices (as opposed to international litigation, which can subject parties to bias (or perceived bias) from national courts that favor their own citizens);
- adjudication by persons with extensive experience in international law and commerce (as opposed to international litigation, which may not involve decision makers who are expert in complex commercial matters or international trade); and
- a purposeful and time-tested blend of common law and civil law procedures (as opposed to international litigation, which typically gives one party a home-court advantage in terms of procedure).

Some in the legal community find international litigation in national courts so problematic that arbitration no longer is considered an “alternative” means of resolving disputes in the international commercial realm. Instead, arbitration has become the only realistic method of resolving disputes arising out of cross-border transactions.

The cornerstone of the international arbitral regime is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,⁶ more commonly known as the New York Convention. With 147 state parties, the New York Convention revolutionized global commerce by creating a neutral, reputable, and effective means of resolving international legal disputes. Although several other international treaties on arbitration exist, the only other one that U.S. courts will regularly encounter is the Inter-American Convention on International Commercial Arbitration of 1975,⁷ more commonly known as the Panama Convention.

Both the New York and Panama Conventions have been incorporated into domestic U.S. law through the Federal Arbitration Act

6. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518 [hereinafter New York Convention].

7. See Inter-American Convention on International Commercial Arbitration of 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) [hereinafter Panama Convention].

(FAA).⁸ The two treaties, which are similar in many ways, are to be applied uniformly.⁹ For this reason, much of the discussion in this guide refers only to the New York Convention, although the principles typically apply equally to the Panama Convention.

Given its vast geographic scope, the New York Convention arises more frequently in U.S. practice than the Panama Convention does. However, when both treaties apply, the Panama Convention takes precedence if a majority of the parties to the arbitration agreement are from countries that have ratified or acceded to the Panama Convention and also are members of the Organization of American States.¹⁰

III. Fundamental Concepts in International Commercial Arbitration

Although this guide focuses on matters that arise in U.S. federal courts, it is necessary to provide some general background information about arbitral procedure to demonstrate how and why certain disputes end up in court in the first place. Putting judicial disputes in context can illustrate why international law requires national courts to adopt certain standards or procedures. This part provides a brief introduction to the fundamental concepts in international commercial arbitration, laying the groundwork for later discussion.

A. Institutional Arbitration Versus Ad Hoc Procedures

Although there is no requirement that an international commercial arbitration be administered by an arbitral institution, parties often find it useful to seek the assistance of one of the many organizations specializing in the resolution of international disputes. These organizations, which may be based in the United States or elsewhere, typically provide two different services.

First, arbitral institutions administer arbitrations, providing a variety of types of practical assistance to the parties. For example, an arbitral institution can help with the selection of the arbitral tribunal, con-

8. See 9 U.S.C. § 201 (2012) (the New York Convention); see also *id.* § 301 (the Panama Convention).

9. See House Report No. 501, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678; *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 71 (D.D.C. 2011); Gary B. Born, *International Commercial Arbitration* 104 n.615 (2009).

10. See 9 U.S.C. § 308.

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sider challenges to individual arbitrators, and facilitate communications between the parties and the tribunal. Second, arbitral institutions publish procedural rules for use in individual arbitrations. These rules offer a number of benefits, including neutrality, consistency, and predictability. Published rules typically allow for a great deal of flexibility and discretion on the part of the arbitral tribunal while also providing time-tested solutions to problems that routinely arise in international disputes.

Arbitrations that are not administered by an institutional body proceed ad hoc. Some ad hoc arbitrations are truly independent of institutional influence, with all procedures determined by the parties and/or arbitrators themselves. However, it can be both risky and time-consuming for parties to design a complete set of individualized procedures. Therefore, parties can decide to adopt procedural rules published by an arbitral institution, without having the institution administer the proceeding. These arbitrations still are referred to as ad hoc proceedings, even though they are governed by published procedural rules.

Parties in international commercial arbitration are free to adopt virtually any type of rule set that they like. Procedural rules need not be specifically designed for use in an international dispute, nor must any institution that administers the proceeding be based in a country that has a connection to the parties, the arbitration, or the dispute.

As the use of international commercial arbitration has grown, so, too, has the number of procedural rules available to parties. While some of these rules are of recent origin, others have been in place for decades. Some of the more well-established and well-respected arbitral rule sets include those published by

- the International Chamber of Commerce (ICC);
- the London Court of International Arbitration (LCIA);
- the Swiss Chambers of Commerce; and
- the Stockholm Chamber of Commerce (SCC).

More recent arrivals on the international scene include rules published by

- the China International Economic and Trade Arbitration Center (CIETAC); and

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- the International Centre for Dispute Resolution (ICDR), which is associated with the American Arbitration Association (AAA).

Each of these organizations' arbitration rules can be obtained from their websites.

Not every set of arbitral rules is associated with an arbitral institution. For example, the United Nations Commission on International Trade Law (UNCITRAL) promulgated its own set of arbitral rules in 1976 (amended in 2010) even though UNCITRAL does not administer arbitrations.¹¹

The UNCITRAL Arbitration Rules were developed specifically for use in ad hoc proceedings and were instrumental in helping standardize international arbitral procedures worldwide. The rules were also innovative, particularly with respect to provisions regarding situations in which the parties were having difficulties in selecting or challenging an arbitrator. According to both the new and amended rules, the Secretary General of the Permanent Court of Arbitration at The Hague may designate an appointing authority to assist with the selection or challenge of arbitrators in cases in which the parties cannot agree on an appropriate procedure themselves. This approach eliminates the need for judicial assistance in the area of arbitrator challenges and selection.

B. Sources of Legal Authority

International commercial arbitration draws upon a diverse mix of legal authorities. Some of these authorities are promulgated by various state entities and are thus “public,” while other authorities arise from the agreement of the parties and are thus “private.” Both forms of authority are central to the arbitration process and must be taken into consideration by both judges and arbitrators. However, not every type of authority is relevant to every issue.

11. See UNCITRAL Arbitration Rules, G.A. Res. 31/98, UNCITRAL, 31st Sess., Supp. No. 17 at 34, U.N. Doc. A/31/17 (Apr. 28, 1976), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>; UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (as revised in 2010), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

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International commercial arbitration also involves a number of legal authorities that are not used in litigation. Some materials that are familiar from litigation may be used differently in proceedings related to international arbitration. This unique approach to legal authorities arises not only because of the high degree of party autonomy in arbitration, but also because of the specific way in which international commercial arbitration melds practices and procedures found in both the common and civil law.

The following subsections provide a brief summary of how legal materials are used in international commercial arbitration. The discussion also provides insights into some of the fundamental principles of international commercial arbitration.

1. Substantive law

Arbitration and litigation address the substance of legal disputes in very similar ways. Arbitral tribunals use the law or legal principle that is chosen by the parties or, in the absence of party agreement, the law or legal principle that the tribunal determines to be appropriate, typically through the application of standard choice of law (i.e., conflict of law) analyses. In this respect, tribunals' actions are very similar to those of courts.¹²

However, international commercial arbitration differs from other forms of adjudication in that international commercial arbitration allows the parties or the arbitrators to decide that the substance of the dispute is not to be governed by the law of a particular country but instead by reference to general principles of law, such as those found in the *lex mercatoria* or encompassed in the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts.¹³ Substantive disputes also may be governed by the United Nations Convention on Contracts for the International Sale of Goods (sometimes known as the Vienna Convention for the

12. See *Gibson Guitar Corp. v. MEC Imp. Handelsgesellschaft GmbH*, 198 F.3d 245 (table), No. 98-6046, 1999 WL 1073651, at *3 (6th Cir. Nov. 17, 1999) (noting that the arbitration agreement gave the arbitrator the power to make choice of law determinations).

13. See UNIDROIT Principles of International Commercial Contracts, art. 1.6(2), UNIDROIT Principles 2004, available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

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International Sale of Goods, but more commonly referred to as the CISG), which is a self-executing treaty under U.S. law that applies automatically to transactions involving the international sale of goods between parties who reside in contracting states.¹⁴

Although parties can opt out of the CISG, some do not. This can lead to surprises, since the CISG differs in several key regards from Article 2 of the Uniform Commercial Code (UCC), the provision that governs domestic sales of goods and that is often (erroneously) assumed to apply in international matters.¹⁵

Because parties usually want their disputes to be determined in accordance with international commercial practices and principles, it is not uncommon for one of these internationally oriented legal regimes (i.e., the UNIDROIT Principles or the CISG) to apply. In such cases, courts have very limited ability to review the arbitrators' determinations regarding the choice of substantive law, since matters involving choice of law are for the arbitral tribunal to decide.¹⁶

Applying general or transnational principles of law should not be confused with deciding a matter primarily by reference to certain equitable principles. Most arbitral rules and statutes now forbid arbitrators to decide a dispute on this basis except with the express permission of the parties. Absent this express authority, arbitral tribunals follow the governing legal principles, although those principles may, of course, involve equitable considerations.

Different substantive laws may apply to different aspects of an arbitral proceeding. For example, the law that governs the issue of the validity of an arbitration agreement might be different from the law that governs the merits of the dispute. It is therefore important to distinguish between the different legal issues under discussion and apply the law that is appropriate to each of those issues.

14. See United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1984), 1489 U.N.T.S. 3, available at http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html; Christopher C. Kokoruda, *The U.N. Convention on Contracts for the International Sale of Goods—It's Not Your Father's Uniform Commercial Code*, 85 Fla. B.J. 103, 103 (June 2011).

15. See U.C.C., art. 2 (2011); Kokoruda, *supra* note 14, at 103.

16. See *Zurich Ins. Co. v. Ennia Gen. Ins. Co.*, 882 F. Supp. 1438, 1440 (S.D.N.Y. 1995).

2. Procedural law

Identifying and applying the appropriate procedural law is a much more difficult task in international commercial arbitration than it is in international litigation. There is a wide variety of legal authorities from which to choose, and it can be difficult to determine which authority governs which procedural issue.

The process is further complicated by the fact that there are some procedures that are entirely internal to the arbitration itself and some procedures that involve interactions between the arbitral tribunal and the court. No single law governs all of these issues, nor can a single interpretive rule be followed in all instances. Instead, it is often best to consider procedural disputes on a motion-by-motion basis.¹⁷

Courts and arbitrators rely on seven different types of authority to determine procedural issues in international commercial arbitration, namely:

- international conventions and treaties;
- national statutes on arbitration;
- case law;
- arbitral rules;
- agreements between the parties;
- arbitral awards; and
- scholarly works (treatises, monographs, and articles).

The following discussion defines each of these authorities in international commercial arbitration and describes how they are used.

a. International conventions and treaties

The United States has ratified two treaties concerning international commercial arbitration: the New York Convention and the Panama Convention.¹⁸ Both instruments address the recognition and enforcement of foreign arbitral awards, which means that these treaties are cited regularly in international enforcement proceedings in U.S. courts. The two conventions apply not only to arbitrations seated outside of the United States but also to certain arbitrations seated within the United States.¹⁹

17. See *infra* notes 109–361 and accompanying text.

18. See New York Convention, *supra* note 6; Panama Convention, *supra* note 7.

19. See *infra* notes 50–82 and accompanying text.

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Although the primary purpose of the New York and Panama Conventions is to outline the means of enforcing certain types of arbitral awards, these treaties apply in other proceedings as well. Parties seeking to compel arbitration often rely on language found in Article II(1) of the New York Convention indicating that a court “shall” refer a dispute to arbitration if the dispute falls within the scope of the convention.

The New York and Panama Conventions have been incorporated into domestic U.S. law through Chapters 2 and 3 of the FAA, respectively.²⁰ As such, the two conventions not only constitute binding federal law but also reflect the international treaty obligations of the United States.²¹ This dual role is important to remember, for there is a “very specific interest of the federal government in ensuring that its treaty obligation to enforce arbitration agreements covered by the Convention finds reliable, consistent interpretation in our nation’s courts.”²²

When construing the New York and Panama Conventions, U.S. courts must look beyond domestic policies and practices, and take international norms into consideration. This approach is necessary because the primary purpose of the two conventions is to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”²³

There is one important difference between the New York and Panama Conventions. Article 3 of the Panama Convention states that the

20. See 9 U.S.C. §§ 201, 301.

21. See *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008).

22. *Certain Underwriters at Lloyd’s London v. Argonaut Ins. Co.*, 500 F.3d 571, 579 (7th Cir. 2007).

23. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (discussing New York Convention); see also House Report No. 501, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678 (requiring New York and Panama Conventions to be construed in a similar manner). The International Council for Commercial Arbitration (ICCA) has compiled a judge’s guide to the interpretation of the New York Convention. See International Council for Commercial Arbitration, ICCA’s Guide to the Interpretation of the 1958 New York Convention (created with the assistance of the Permanent Court of Arbitration at the Peace Palace, The Hague), available at http://www.arbitration-icca.org/publications/NYC_Guide.html.

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arbitrators shall adopt the procedural rules of the Inter-American Commercial Arbitration Commission in any case in which the parties have not made an express agreement regarding the governing procedural rules.²⁴ Thus, in cases involving the Panama Convention, a U.S. court could be required to consult the Panama Convention to determine or confirm the appropriate procedure. The New York Convention has no analogue.

b. National statutes on arbitration

As important as international treaties on arbitration are, they concern a very limited number of issues. More extensive guidance can be found in national statutes on arbitration. The United States' national statute on arbitration is the Federal Arbitration Act (FAA).²⁵ However, U.S. judges may need to consider the arbitration laws of other nations on occasion.²⁶ Questions regarding the circumstances in which foreign law applies are best handled on a motion-by-motion basis and are discussed in *infra* Part IV.

National laws on arbitration address a broader range of subjects than international treaties do, but most are nevertheless limited in scope. These statutes focus primarily on the relationship between the court and the arbitration, rather than on the procedures to be used during the arbitration itself. National statutes cannot be considered analogous to codes of evidence or civil procedure, since laws on arbitration typically do not address many of the procedures internal to arbitration. Instead, these statutes constitute the primary source of authority for questions regarding whether and to what extent a court is competent to undertake certain actions relating to an international commercial arbitration.

Sometimes the national arbitration law resolves an issue independently, without requiring the court to have recourse to any other source of law. Other times, national arbitration provisions may need to

24. See Panama Convention, *supra* note 7, art. 3; Inter-American Commercial Arbitration Commission Rules of Procedure, as amended April 1, 2002, 22 C.F.R. pt. 194, app. A.

25. See 9 U.S.C. §§ 1–307.

26. See, e.g., *Mediterranean Shipping Co. S.A. Geneva v. POL-Atlantic*, 229 F.3d 397, 406 (2d Cir. 2000) (considering scope of arbitral powers under the English Arbitration Act).

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be construed in tandem with another legal authority. For example, motions to enforce an arbitral award typically fall under one of the international treaties on arbitration, but treaty provisions may in some jurisdictions be supplemented by the national statute on arbitration. Article III of the New York Convention contemplates this possibility specifically, stating that “[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.” As a result, courts need to consider the requirements of both the New York Convention and U.S. law.

U.S. federal courts sometimes have to consider whether and to what extent an issue is governed by the arbitration statute of an individual U.S. state. This analysis may give rise to questions about whether the FAA has preempted that particular state provision.²⁷ For example, it appears that parties may agree to have U.S. state arbitration law govern their arbitration agreement so that they can contract for expanded judicial review, which is prohibited under the FAA.²⁸

U.S. courts regularly rely on the FAA to identify the scope of judicial authority concerning a variety of matters, including the court’s ability to compel or aid arbitration; stay litigation; set aside, confirm, or enforce arbitral awards; appoint arbitrators; remove a dispute from state court; and appeal certain orders relating to arbitration. The FAA also establishes federal jurisdiction in matters involving international arbitration arising under the New York and Panama Conventions and gives domestic effect to the two treaties. The FAA itself is outlined in *infra* Part III.C.

It is beyond the scope of this guide to consider in detail the content of any statute other than the FAA, although brief reference should be made to the UNCITRAL Model Law on International Commercial Arbitration (commonly referred to as the Model Arbitration Law or

27. See *Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477–78 (1989).

28. See *Hall Street Assoc. LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008); *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 96–97 (Tex.), *cert. denied*, 132 S. Ct. 455 (2011).

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MAL).²⁹ The MAL, which was drafted in 1985 and amended in 2006, was intended to act as a template for nations that wanted to reform their statutory approach to international commercial arbitration. The MAL has been adopted in whole or in part by sixty-five countries and seven U.S. states, and has been instrumental in helping to harmonize the law relating to international arbitration.

The MAL contains a number of distinctive elements that will be discussed throughout this guide. However, it should be noted that although most national statutes on arbitration do not include provisions regarding arbitral procedure, some jurisdictions are modifying their approach as a result of the MAL. The MAL supplements the usual statutory provisions concerning the relationship between the court and the arbitral tribunal with certain default rules addressing arbitral procedure, found in Chapter V of the MAL, although the parties may agree to use alternative procedures.

The United States has not adopted the MAL at the federal level, but U.S. courts may be asked to address matters governed by foreign law based on the MAL. In such cases, judges should not be surprised to see parties introducing comparative legal research to show how a particular provision of the MAL has been interpreted in other jurisdictions, including the nation whose law governs the issue. UNCITRAL has specifically stated that the MAL was intended to be applied consistently across national borders, which means that parties may refer to international consensus on some matters.

c. Case law

Although case law plays a central role in U.S. litigation, international commercial arbitration often involves issues that are not governed by U.S. law. These matters may not be determined or determinable by case law in the same way that domestic issues are.

To understand how case law is treated in international commercial arbitration, it is necessary to understand how judicial opinions are

29. See UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), revised by Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., Annex 1, U.N. Doc. A/61/17 (July 7, 2006), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html.

used in both the common law and civil law traditions. Common law lawyers tend to rely heavily on judicial opinions as a primary source of authority. Although statutes are important, subsequent judicial interpretations of statutory provisions are often equally, if not more, persuasive to common law decision makers. Scholarly commentary is relied on rarely.

The situation is different in civil law countries. There, statutes are the primary source of authority, and the first task of a judge is to identify which of several competing statutory provisions governs the issue in question. Then the judge applies the law to the facts of the dispute.

However, civil law codes can be difficult to apply. At this point, judges look to see how other authorities have handled issues similar to the one at bar. Here the common law and civil law diverge, for although judges in both traditions look to previously published judicial opinions, civil law judges are as likely to turn to scholarly treatises to determine how the matter ought to be decided.³⁰ Therefore, it is something of a misperception to say that the civil law does not follow precedent, for civil law courts do aim to provide consistent judgments over time. However, the extent to which civil law judges rely on precedent may vary from jurisdiction to jurisdiction and issue to issue.³¹

Even those civil law judges who do rely on precedent do not do so in quite the same way or for quite the same purposes as common law judges. This interpretive distinction is rooted in the way judicial opinions are reasoned and written in the two legal traditions.

Judicial opinions written by civil law judges are much shorter and more conclusory than those written by common law judges. Because there is so little explicit judicial reasoning in a published civil law opinion, case law provides courts with little guidance on how to address similar disputes in the future. Although the courts know the outcome of the earlier dispute, a judge will not necessarily be able to glean the reasoning behind the decision. Scholarly works fill this gap

30. See *Empresa Colombiana de Vías Férreas (Ferrovías) v. Drummond Ltd.*, 24 Oct. 2003—Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera [Council of State, Administrative Chamber, Third Section], No. 25.25, ¶ 8, *affd.*, 22 Apr. 2004, No. 24.261, ¶ 25, in Albert Jan van den Berg (ed.), XXIX Y.B. Comm. Arb. 643 (2004) (demonstrating Colombian court's reliance on both judicial precedent and scholarly authorities).

31. See Born, *supra* note 9, at 2957–59.

by providing in-depth analysis of the various statutory texts and considering the issues holistically, rather than on a limited case-by-case basis. Together, these factors lead civil law judges to give significant weight to scholarly commentary as a supplement to judicial precedent.

This distinction is important to understand for two reasons. First, a federal court dealing with a matter involving international commercial arbitration may be asked to consider a point governed by foreign law. To decide that issue, the court must determine what was required under that foreign law and therefore must understand the relative importance of the various types of authority in that jurisdiction.

Second, federal courts may be asked to review certain issues decided by the arbitral tribunal, which could raise questions about the legal authorities relied upon by the arbitrators. While it is generally inappropriate for courts to review arbitrators' decisions as to the weight of various authorities,³² judges who understand how legal resources are used in different legal systems are less likely to question an arbitrator's reasoning simply as a result of a common-law-based conception about what constitutes a "proper" form of legal authority.

d. Arbitral rules

Parties to an international commercial arbitration often agree to adopt any one of a wide variety of procedural rules, regardless of whether the arbitration is administered or ad hoc. There are virtually no restrictions on the type of rules that can be used in an international arbitral proceeding. Most arbitral rules indicate that their provisions apply unless the parties agree otherwise. However, some rule sets include provisions from which the parties cannot derogate. For example, parties to an ICC arbitration may not contract around provisions regarding the scrutiny of the draft award by the International Court of Arbitration of the ICC.³³

Arbitral rules focus primarily on matters of internal procedure and are therefore most relevant to the arbitral tribunal. However, many rule sets also include some provisions outlining the relationship be-

32. See *Zurich Ins. Co. v. Ennia Gen. Ins. Co.*, 882 F. Supp. 1438, 1440 (S.D.N.Y. 1995).

33. See International Chamber of Commerce (ICC) Rules of Arbitration, effective Jan. 1, 2012, art. 27, available at <http://www.iccwbo.org/court/arbitration/id4199/index.html>.

tween the tribunal and the court and therefore may be relevant to certain jurisdictional questions.³⁴ As a general rule, judges defer to arbitral tribunals on matters of procedure, since most arbitration agreements, national statutes on arbitration, and procedural rules give the arbitrators a great deal of discretion in such matters.³⁵ However, arbitral discretion is not unbounded; indeed, the use of published procedural rules is one of the key methods by which the parties agree to limit and define the power of the arbitral tribunal.

Therefore, courts occasionally need to determine whether the procedure used by the tribunal was consistent with the parties' agreement and fundamental notions of due process.³⁶ When construing the terms of the parties' agreement—including with respect to the interpretation of any relevant rules—courts must consider what legal authorities are relevant to the determination of the issue at bar.

Arbitral rules are not U.S. laws. Instead, these rules of procedure have been promulgated by specialized arbitral bodies such as the ICC, the ICDR, the LCIA, or UNCITRAL, and adopted by the agreement of the parties. At the time the rules were adopted—which was in all likelihood at the time the underlying transaction was concluded, typically years before the dispute in question arose—there may not have been any indication that some aspect of arbitral procedure would be heard in a U.S. court.

It is commonly accepted that parties choose arbitral rules based on an international understanding of how the rules would be interpreted and applied rather than on the perspective of a particular nation. This international understanding is reflected in a variety of sources, including not only U.S. case law but also published arbitral awards construing the relevant language, scholarly commentary, and judicial opinions from other jurisdictions. These sources contribute to and reflect the international understanding of the procedural rules in question

34. See *id.* art. 28; International Centre for Dispute Resolution (ICDR) International Arbitration Rules, effective June 1, 2009, arts. 21(3), 37(8), available at <http://www.adr.org>; London Court of International Arbitration (LCIA) Arbitration Rules, effective Jan. 1, 1998, arts. 22.2, 23.4, 25.3, 26.9, available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx#.

35. See *Indus. Risk Ins. v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443–44 (11th Cir. 1998); *Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F. Supp. 2d 332, 359, 361 (S.D.N.Y. 2007), *aff'd*, 584 F.3d 396 (2d Cir. 2009).

36. See 9 U.S.C. § 10 (2012); New York Convention, *supra* note 6, art. V.

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and are therefore relevant to what these particular parties intended and expected when they adopted the provisions. Accordingly, U.S. courts will need to consult a variety of sources when construing matters involving arbitral rules.

Most arbitral rules address a relatively standard set of issues that are sufficient for most purposes. However, there are a few potentially contentious matters that are not included in the normal procedural rules. These issues are covered in supplemental provisions that can be adopted as necessary by arbitrators and parties. The two most important rule sets were promulgated by the International Bar Association (IBA) and consist of the IBA Rules on the Taking of Evidence in International Arbitration (published in 1999 and amended in 2010) and the IBA Guidelines on Conflicts of Interest in International Arbitration (published in 2004).³⁷ These supplemental rules have been growing steadily in importance over the years and have been deemed highly persuasive indications of international procedural norms by a growing number of arbitrators and courts.³⁸

e. Agreements between the parties

International commercial arbitration is based on the concept of party autonomy, which means that the intent of the parties controls the question whether the dispute is to be arbitrated as well as what procedure is to be used to resolve that dispute.³⁹ Parties are allowed to adopt a wide variety of procedures in international arbitration, even those (such as documents-only or fast-track proceedings) that are not available in litigation. When it comes to procedural issues, the arbitral tribunal, rather than the court, determines the terms of the parties' agreement.⁴⁰

37. See IBA, Guides, Rules and Other Free Materials, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

38. See *New Regency Prod. Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007) (citing IBA Guidelines); *In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d 101, 107 (D.D.C. 2010) (citing IBA Rules).

39. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

40. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003) (plurality opinion).

f. Arbitral awards

Of the various types of legal authority available in international commercial arbitration, arbitral awards are perhaps the most misunderstood. Even though they constitute a private (i.e., non-state-generated), rather than public, source of authority, arbitral awards from international proceedings have long been available in collected series and yearbooks that are similar to case reporters. Many of these awards are also available on specialized subscription databases, such as *kluwerarbitration.com*. A growing number are appearing on Westlaw and LexisNexis as well.

While publishers remove various pieces of identifying information, such as the parties' names, so as to respect the strictures of confidentiality, published awards often contain a considerable amount of information about the arbitrators' procedural and substantive decisions, similar to what would be seen in a judicial opinion rendered by a common law or civil law court. Parties and arbitrators therefore can and do review previously rendered awards to determine whether and to what extent international consensus exists on a particular point of law or procedure. This is similar to what occurs in other areas of arbitration, including employment and labor arbitration and maritime arbitration, where the frequent and consistent use of arbitration leads to the creation of something akin to arbitral precedent.⁴¹

Reliance on arbitral awards makes a great deal of sense, given the great need for consistency and predictability in international commercial arbitration. Indeed, as one ICC award has noted, "[t]he decisions of these tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond."⁴²

41. See *Fournelle v. NLRB*, 670 F.2d 331, 343–44 (D.C. Cir. 1982); *In re Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.)*, 579 F.2d 691, 696 (2d Cir. 1978) (noting review of 1,200 published awards of Society of Maritime Arbitrators); *State Farm Mut. Auto. Ins. Co. v. Mallela*, Civ. No. CV-00-4923, 2002 WL 31946762, at *12 (E.D.N.Y. Nov. 21, 2002), *question certified by* 372 F.3d 500 (2d Cir. 2004), *certified question answered by* 4 N.Y.3d 313 (N.Y. 2005).

42. Interim Award in ICC Case No. 4131, IX Y.B. Com. Arb. 131, 135 (1984).

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Treatment of arbitral awards can vary. Some arbitral awards, referred to as “reasoned” or “fully reasoned awards,” contain detailed descriptions of the tribunal’s legal and factual analyses. Other awards, known as “unreasoned awards,” simply indicate who the prevailing party is and what sort of relief is due.

The FAA does not require arbitral awards to be reasoned, and U.S. courts have generally held that unreasoned awards are valid and enforceable so long as the parties’ agreement or governing rules did not require the arbitral tribunal to provide its reasoning.⁴³ This is equally true in the international context.⁴⁴ Most awards arising out of international commercial arbitration are fully reasoned, pursuant to requirements found in individual arbitration agreements and institutional rules.⁴⁵

The persuasive value of previously published awards will depend on the issue in question. For example, arbitral awards often do not have a great deal of influence on matters of substantive law, since there are other, more authoritative materials available (i.e., “public” or state-sponsored sources of law). However, awards carry a great deal of weight in other areas of arbitration law and practice, particularly procedural matters such as the interpretation of arbitral rules or the provision of interim relief. These are issues that reside firmly within the realm of arbitrator discretion, and arbitral awards are the best source of information about how these principles are construed in practice by expert international arbitrators. However, courts may be asked to rule on these issues as well. The parties may present the court with previously published awards as a form of relevant authority.

Reliance on arbitral awards may be particularly appropriate in the international realm for two reasons. First, the kinds of procedural matters discussed in arbitral awards typically are not issues of national law, and the dispute thus would not be governed by existing judicial precedent in any case. Second, these are matters that the parties expected to be resolved in accordance with international commercial and

43. See *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 803 (8th Cir. 2004); Born, *supra* note 9, at 2456.

44. See *In re Arbitration Between Trans Chem. Ltd. and China Nat’l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266, 308 (S.D. Tex. 1997), *aff’d*, 161 F.3d 314 (5th Cir. 1998).

45. See Born, *supra* note 9, at 2457.

legal norms rather than by reference to a single national legal framework. Accordingly, U.S. courts may cite arbitral awards when discussing the relevant international standards.

g. Scholarly works (treatises, monographs, and articles)

U.S. judges are accustomed to scholarly works being used as persuasive authority in litigation. However, scholarly works play a larger role in international commercial arbitration than they do in domestic arbitration or litigation. To some extent these works are used more often because international commercial arbitration reflects an intentional blend of civil and common law traditions, and the civil law has always relied heavily on scholarly works as a source of legal authority.⁴⁶ However, academic commentary is also given heightened respect in international commercial arbitration because arbitration is a private form of dispute resolution, and much of what goes on during the decision-making process is hidden from public view. As a result, there are few public records of procedural decisions.

Arbitral awards provide some insights into the conduct of an international arbitration, but the issues discussed there are often tailored to the dispute at hand. Arbitral awards provide only a snapshot of certain contested matters rather than an overview of the entire process. Uncontested issues and routine practices are not discussed in arbitral awards.

The lack of information on underlying issues may seem troubling to those who are used to the transparency of open courtrooms. However, arbitral procedure is not as secretive or as discretionary as it may initially appear. For years, the international arbitral community has relied on scholarly commentary, often written by top arbitrators and practitioners with years of experience in the field, to describe what goes on behind the closed doors of the hearing room. This information is not publicly available because arbitral awards may be (1) unpublished and/or (2) unreasoned. Treatises and other scholarly works provide comprehensive analyses of a wide variety of procedural and practical matters that may seem subject to arbitral discretion but are in fact largely guided by international consensus and customary practice. Parties and practitioners rely heavily on these materials at all stages of

46. See *supra* notes 30–32 and accompanying text.

the arbitral process: when drafting arbitration agreements, selecting arbitral rules, identifying the seat of arbitration, choosing arbitrators, and deciding what tactical steps to take with respect to judicial relief. This shared understanding of arbitration results in a highly predictable dispute resolution regime, which is precisely what the parties contracted for when they signed their arbitration agreements.⁴⁷

Although the universe of scholarly works concerning international commercial arbitration is expanding rapidly, several works stand out as particularly authoritative.⁴⁸ These authorities have been recognized by various federal courts as persuasive authority.⁴⁹

C. U.S. Statutory Regime

Many judges are familiar with the Federal Arbitration Act (FAA) through their work on domestic disputes. However, application of the legislation in international matters can present complications.

Structurally, the FAA is relatively simple. Chapters 2 and 3 are known as the “international” chapters, since they give domestic effect to the New York Convention and the Panama Convention, respectively.⁵⁰ However, the FAA does not simply incorporate the two conventions into domestic law verbatim and leave it at that, as some foreign statutory regimes do. Chapters 2 and 3 include additional provisions regarding the application of the two treaties in U.S. courts. As will be shown throughout this guide, this approach has created significant difficulties at times.

47. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

48. Born, *supra* note 9 (substantially revising an earlier edition entitled *International Commercial Arbitration in the United States*); W. Laurence Craig et al., *International Chamber of Commerce Arbitration* (2001); Emmanuel Gaillard & John Savage, *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999); Julian D.M. Lew et al., *Comparative International Commercial Arbitration* (2003); Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (2009) (substantially revising an earlier edition entitled *Law and Practice of International Commercial Arbitration*).

49. See *Mitsubishi Motors*, 473 U.S. at 634 (citing Craig et al.); *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 838–39 (9th Cir. 2010) (citing Born, Gaillard & Savage, and Blackaby et al.).

50. See 9 U.S.C. §§ 201, 301 (2012).

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Chapter 1 is commonly considered the FAA’s “domestic” chapter. Nevertheless, it has residual application to international disputes to the extent that it “is not in conflict with” Chapters 2 or 3.⁵¹ This statutory scheme has led to debates about the breath of Chapter 1’s applicability to disputes arising under either the New York Convention or the Panama Convention.

Questions also exist regarding the extent to which the FAA preempts state law. This issue is still under consideration in both the domestic and international realms.⁵² Several recent decisions held that the New York Convention preempts any provision of domestic law that limits the enforceability of arbitration agreements.⁵³ Because Congress has indicated that the New York and Panama Conventions are to be construed harmoniously and consistently, these holdings apply equally to the Panama Convention.⁵⁴

Although the basic structure of the FAA can be easily described in the abstract, difficulties arise in the application of its language. For example, it is not always clear whether a dispute falls under Chapter 1 (the “domestic” chapter) or under Chapter 2 or 3 (the “international” chapters).

Chapter 1, which was originally enacted in 1925, indicates that it applies to both domestic arbitrations and arbitrations involving interstate and foreign commerce.⁵⁵ These arbitrations must arise out of written agreements involving maritime or commercial transactions.⁵⁶ Chapter 2, enacted in 1970, limits Chapter 1’s broad applicability. For example, section 202 states that “[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not,

51. *Id.* §§ 208, 307.

52. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011); *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008).

53. *See* *Safety Nat’l Cas. Corp. v. Certain Underwriters at Lloyd’s, London*, 543 F.3d 744, 755 (5th Cir. 2008), *reh’g en banc*, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom.* *Louisiana Safety Ass’n of Timbermen–Self Insurers Fund v. Certain Underwriters at Lloyd’s, London*, 131 S. Ct. 65 (2010); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1155 (9th Cir. 2008).

54. *See* House Report No. 501, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 675, 678; *DRC, Inc. v. Republic of Honduras*, 774 F. Supp. 2d 66, 71 (D.D.C. 2011).

55. *See* 9 U.S.C. § 1.

56. *See id.* § 2.

which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the [New York] Convention.”⁵⁷ At first, this appears to bring all disputes listed in section 2 under Chapter 2, leaving nothing to the exclusive jurisdiction of Chapter 1. However, section 202 then goes on to limit the types of disputes to which Chapter 2 applies, stating that “[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention.”⁵⁸ This clause returns a subset of disputes to the exclusive jurisdiction of Chapter 1.

Section 202 includes one more provision that brings some disputes that arise out of a relationship between citizens of the United States back within the scope of Chapter 2. This occurs when

that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.⁵⁹

The end result is that Chapter 2 of the FAA applies to

- agreements or awards arising out of an arbitration between a U.S. party and a foreign party;
- agreements or awards arising out of an arbitration entirely between foreign parties; and
- agreements or awards arising out of an arbitration entirely between U.S. citizens, but only if there is some sort of international nexus (i.e., “property located abroad, . . . performance or enforcement abroad, or . . . some other reasonable relation with one or more foreign states”⁶⁰).

Any agreement or award that falls under Chapter 2 is subject not only to the statutory requirements set forth in that chapter, but also to the requirements of the New York Convention.⁶¹ Chapter 1 of the FAA also has residual application to agreements and awards falling under

57. *Id.* § 202.

58. *Id.*

59. *Id.*

60. *Id.*

61. *See id.* § 201.

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Chapter 2, to the extent that no inconsistencies between Chapter 1 and either Chapter 2 or the New York Convention arise.⁶²

Chapter 2 of the FAA does not impose any kind of territorial limitations on arbitrations arising under its provisions. Therefore, Chapter 2 applies to an arbitration located anywhere in the world, including the United States, so long as the definitional test described in section 202 is met, subject to restrictions on reciprocity and commerciality.⁶³

Chapter 3, enacted in 1990, incorporates much of Chapter 2 by reference. For example, Chapter 3 states that section 202 “shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter ‘the Convention’ shall mean the Inter-American Convention.”⁶⁴ However, Chapter 3 also indicates that when the requirements of both the New York and Panama Conventions are met, the Panama Convention (and thus Chapter 3) shall apply if a majority of the parties are citizens of states that have ratified the Panama Convention and that are members of the Organization of American States.⁶⁵

Chapters 2 and 3 are the means by which the New York and Panama Conventions are given domestic effect. Unfortunately, the terms used in the FAA do not mirror those used in the New York Convention, which creates significant difficulties for courts attempting to construe the various provisions. Disputes involving the Panama Convention are somewhat less complicated, since the Panama Convention simply refers to “[a]n agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction” rather than adopting the more complex definitional aspects of Article II of the New York Convention.⁶⁶

The New York Convention governs two types of arbitral awards—“foreign” and “non-domestic”—rather than “international” awards. This distinction is found in the Convention itself, which states that it

62. *See id.* § 208.

63. *See supra* notes 57–60 and accompanying text.

64. 9 U.S.C. § 302.

65. *See id.* § 305.

66. Panama Convention, *supra* note 7, art. 1; *see also* New York Convention, *supra* note 6, art. II.

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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 [i.e., “foreign” awards], 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 [i.e., “non-domestic” awards].⁶⁷

From the perspective of a U.S. court, a foreign award arises out of an arbitration held outside the United States. A non-domestic award arises out of an arbitration that is held in the United States but that meets one of the three criteria described in section 202 of the FAA: that is, involves a U.S. party and a foreign party; involves only foreign parties; or involves only U.S. citizens but includes some sort of international nexus (i.e., “property located abroad, . . . performance or enforcement abroad, or . . . some other reasonable relation with one or more foreign states”).⁶⁸

Although Article I(1) refers only to the recognition of awards, the New York Convention also applies to motions to compel arbitration by virtue of Article II, which indicates that “[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration” certain relevant disputes.⁶⁹ Therefore, the New York Convention governs arbitration agreements as well as arbitral awards.

U.S. courts consider issues arising with respect to both foreign and non-domestic agreements and awards. Although foreign awards clearly fall within the scope of the New York Convention based on geographic criteria, questions occasionally arise regarding the applicability of the Convention to arbitrations that are seated outside the United States but that are between U.S. citizens and do not involve “property located abroad” or “performance or enforcement abroad.”⁷⁰ Although these are clearly “foreign” arbitrations under the New York Convention, U.S. courts have occasionally held that Chapter 2 of the FAA does not apply to these types of disputes.⁷¹ However, it may be that seating an ar-

67. New York Convention, *supra* note 6, art. I(1).

68. 9 U.S.C. § 202.

69. New York Convention, *supra* note 6, art. II(1).

70. 9 U.S.C. § 202.

71. *See Wilson v. Lignotock U.S.A. Inc.*, 709 F. Supp. 797, 799 (E.D. Mich. 1989).

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bitration outside the United States creates a reasonable relationship with a foreign state sufficient to bring the arbitration within the scope of section 202 of the FAA, “at least where this was not an effort to circumvent local regulatory protections.”⁷²

The New York Convention also applies to “non-domestic” agreements and awards, that is, awards and agreements relating to arbitrations held in the United States, so long as the arbitration involves a foreign party or has the requisite international nexus.⁷³ Nevertheless, it remains unclear whether the Convention is applicable to U.S.-seated arbitrations in certain situations, most particularly those involving motions to vacate an award.⁷⁴

Courts considering the relevance of the New York Convention to a particular dispute must take two additional factors into account. According to the terms of the treaty, contracting states may make two declarations limiting the applicability of the Convention. These declarations allow a state party to apply the New York Convention only to “differences arising out of legal relationships . . . which are considered as commercial under the national law of the State making such declaration” and only “on the basis of reciprocity,” meaning that the state making the declaration “will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.”⁷⁵

The United States has made both declarations, but U.S. courts have construed the term “commercial” so broadly as to include not only the prototypical commercial relationships exemplified by the purchase and sale of goods between two corporations but also disputes involving employers and employees, consumers, shareholders, foreign state actors, antitrust issues, foreign regulatory authorities, insurers and reinsurers, and maritime matters.⁷⁶ In addition, courts have concluded that the New York Convention applies to relationships (such as those involving contracts regarding the employment of seamen) that

72. Born, *supra* note 9, at 293–94 (citing analogies to section 1-105 of the Uniform Commercial Code).

73. See *Lander Co. v. MMP Inv., Inc.*, 107 F.3d 476, 482 (7th Cir. 1997) (holding that the New York Convention applied to an arbitration that was between two U.S. parties and seated in the United States but whose performance was to occur abroad).

74. See *infra* notes 233–63 and accompanying text.

75. New York Convention, *supra* note 6, art. 1(3).

76. See Born, *supra* note 9, at 262.

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are excluded from the scope of Chapter 1 of the FAA.⁷⁷ Doubts as to whether a contract involves a commercial dispute (and falls under the New York Convention) are resolved in favor of the arbitrability of the dispute under the Convention.⁷⁸

The U.S. declaration regarding reciprocity also has little effect in practice. Very few countries have not signed the New York Convention.⁷⁹ As a result, a U.S. court seldom will be asked to deny enforcement of an arbitral award based on a lack of reciprocity. Notably, reciprocity under Article I(3) relates only to the place where the award was rendered (i.e., whether the arbitral seat is a contracting state) and not to the nationalities of the parties.

Confusion sometimes arises as a result of a second provision in the New York Convention that mentions reciprocity: “A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.”⁸⁰ This language is rarely invoked during litigation and has been applied only in cases in which a country is routinely behaving in an improperly restrictive manner with respect to its obligations under the Convention.⁸¹ This is a very high burden to meet.

Foreign awards that are rendered in nations that are not parties to the New York Convention or Panama Convention are nevertheless enforceable in the United States.⁸² However, the vast majority of proceedings fall under one of the two conventions.

77. See *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1155 (9th Cir. 2008).

78. See *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 274–75 (5th Cir. 2002).

79. See United Nations, Status—1958 Convention on the Recognition and Enforcement of Foreign Arbitration Awards, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (listing 147 state parties).

80. New York Convention, *supra* note 6, art. XIV.

81. See *Fertilizer Corp. of India v. IDI Mgmt. Inc.*, 517 F. Supp. 948, 953 (S.D. Ohio 1981) (refusing to apply Article XIV).

82. See *Weizmann Inst. of Sci. v. Neschis*, 421 F. Supp. 2d 654, 674 (S.D.N.Y. 2005).

D. Overview of an International Commercial Arbitration

This section provides a brief overview of the arbitral process, placing different judicial proceedings in context and introducing topics that will be discussed in more detail in *infra* Part IV.

1. Drafting stage

Decisions made during the drafting stage can have a significant impact on where and when a party may seek judicial assistance as well as the shape of the arbitral proceedings. Although parties may alter the terms of their arbitration agreement at any time, even after the arbitration has begun, the likelihood of reaching a new agreement on a procedural matter is often low once a claim has formally been made. Parties to an international transaction may also make their initial agreement to arbitrate after the dispute has arisen (known internationally as a *compromis*), although this does not happen frequently.

2. Prior to or at the initiation of the arbitration

The initiation of a legal claim is a busy time. Many disputes proceed straight into arbitration without the need for any judicial intervention, but sometimes the parties need the court to resolve preliminary legal issues.

Parties may disagree about whether the dispute is to be heard in court or arbitration. This can lead to motions being brought in U.S. or other national courts regarding the validity of the arbitration agreement and whether arbitration can properly be compelled.⁸³ Parties may seek to initiate parallel proceedings, thus leading to motions for an anti-suit injunction.⁸⁴

Even parties who agree that their dispute should be heard in arbitration may need the court's assistance on a particular procedural matter. For example, a court may be asked to help select the arbitral tribunal or issue a preliminary injunction to preserve the status quo.⁸⁵

83. See *infra* notes 109–32 and accompanying text.

84. See *infra* notes 140–49 and accompanying text.

85. See *infra* notes 154–73 and accompanying text.

3. During the arbitration

Once the arbitration has begun, most concerns are referred to the arbitral tribunal. However, courts and tribunals share jurisdictional competency over certain matters. This can lead to debates not only over the resolution of the dispute itself, but also over the question of who should properly hear the matter. Among the issues that can arise in court while an arbitration is proceeding are disputes regarding the production of evidence or witnesses,⁸⁶ the availability of injunctive relief, including anti-suit injunctions,⁸⁷ and challenges to one of the arbitrators.⁸⁸

Some countries take the view that judges should not be involved in a dispute between the parties while an arbitration is proceeding and thus prohibit recourse to the courts until the arbitration has concluded. While the United States does not have such a prohibition, U.S. courts generally exercise restraint when asked to assist with an ongoing arbitration so as not to upset the parties' contractual expectation that the dispute will be resolved through arbitral means.⁸⁹

4. After the arbitration

Most parties in international commercial arbitration voluntarily comply with the terms of the arbitral award.⁹⁰ Nevertheless, in some cases, judicial assistance is needed after the completion of the arbitration. A party may seek to have an award vacated or confirmed at the place where it was made.⁹¹ Alternatively, a court may be asked to enforce an award made in another jurisdiction.⁹² Although these proceedings seem similar to what occurs in domestic disputes, actions to enforce a foreign arbitral award may be brought simultaneously in any number of national courts. Parallel proceedings may be filed at this point in the process and are considered entirely proper as a matter of international law and practice.

86. See *infra* notes 174–221 and accompanying text.

87. See *infra* notes 224–25 and accompanying text.

88. See *infra* notes 222–23 and accompanying text.

89. See *infra* notes 163–73 and accompanying text.

90. See Blackaby et al., *supra* note 48, ¶ 11.02.

91. See *infra* notes 233–69 and accompanying text.

92. See *infra* notes 270–348 and accompanying text.

E. Jurisdictional Competence

Courts may become involved in an international commercial arbitration in many different ways. Parties may also seek judicial assistance from several different national courts, including courts at the seat of the arbitration (i.e., the place where the arbitration is legally located, which is often named in the arbitration agreement), in the countries in which the parties reside, at the location where the injury was suffered, or at the place where assets are located.

Sometimes—as in the case of enforcement proceedings—parties may bring actions in one or all of these venues, at the same time or sequentially. Other times, parallel proceedings are neither encouraged nor permitted. A party may seek judicial intervention at a proper time and regarding a proper issue, but from a court that does not have proper jurisdiction over the dispute. When this happens, the issue is not one of domestic law, since the judge overseeing the dispute will ensure that the requirements of national law are met. Instead, the jurisdictional objection arises as a matter of international law and practice. This is different from what happens in domestic arbitration, where jurisdictional disputes focus on whether the court or the arbitral tribunal should hear a particular issue. In international proceedings, two jurisdictional issues may be implicated: (1) may the dispute be heard by a court, and (2) if so, by which court or courts. To answer the second question, the U.S. arbitral community has developed the concept of “primary” and “secondary jurisdiction.”⁹³

1. Primary and secondary jurisdiction as a choice of forum issue

The concept of primary and secondary jurisdiction is based on language in the New York Convention indicating that a court may refuse to enforce an award rendered in another state if the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”⁹⁴ This language has been read as giving some courts (i.e., those with primary jurisdiction) preferential status over other courts (i.e., those with secondary jurisdiction).

93. See Born, *supra* note 9, at 1286.

94. New York Convention, *supra* note 6, art. V(1)(e).

Primary jurisdiction is vested either in the place where the award was made (i.e., the arbitral seat) or in the place under whose law the award was made. In U.S. practice, this usually turns out to be the same place. Secondary jurisdiction exists in any court in the world other than that with primary jurisdiction.

Courts with primary jurisdiction receive preferential treatment with respect to certain well-defined issues. Two of the most important involve the right to set aside an award⁹⁵ and the right to address certain procedural matters relating to the internal workings of the arbitration, such as appointment of or challenge to arbitrators or assistance in the taking of evidence.⁹⁶

Although the language of the New York Convention suggests that primary jurisdiction could lie with the courts of two different countries (i.e., the place where the arbitration was located and the place under the law of which the award was made), under U.S. law, the place where the arbitration is seated is considered to be the only place with primary jurisdiction. The reference to “the law of which[] that award was made” means the procedural law governing the arbitration that led to the award.⁹⁷

In the vast majority of cases, the procedural law of the arbitration is that of the arbitral seat. If the parties attempt to choose the law of a state other than the seat as the procedural law of the arbitration, the arbitral seat retains competence over “external” matters (i.e., the relationship between the courts and the arbitration), while the law that has been chosen to control procedural issues governs any “internal” matters.⁹⁸

Numerous difficulties arise when the procedural law is not that of the arbitral seat, with regard to both the choice of the court to hear the

95. See *infra* notes 233–63 and accompanying text.

96. See *infra* notes 154–62 and 174–221 and accompanying text.

97. New York Convention, *supra* note 6, art. V(1)(e); see also *Steel Corp. of Philippines v. Int'l Steel Servs., Inc.*, 354 Fed. App'x 689, 692–94 (3d Cir. 2009); *Int'l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera*, 745 F. Supp. 172, 176–77 (S.D.N.Y. 1990) (noting this phrase does not refer to the law governing the substance of the dispute).

98. See *Union of India v. McDonnell Douglas Corp.* [1993] 2 Lloyd's Rep. (Queens Bench Division (Commercial Court), England) 48, 50–51; Born, *supra* note 9, at 1330–31.

motion and the choice of applicable law.⁹⁹ As a result, U.S. courts have adopted a strong presumption that parties intend the procedural law of the arbitration to be that of the arbitral seat. As the Fifth Circuit has noted:

Under the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies to the arbitration. Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as “exceptional”; “almost unknown”; a “purely academic invention”; “almost never used in practice”; a possibility “more theoretical than real”; and a “once-in-a-blue-moon set of circumstances.” Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum.¹⁰⁰

Any deviation from this principle must be both clear and explicit. Choice of law provisions in the underlying contract usually are not considered to include matters of procedure but instead are interpreted as referring only to matters of substance.¹⁰¹

U.S. courts must establish jurisdiction as a matter of international law and domestic law. This requirement gives rise to a few interesting issues.

Federal subject matter jurisdiction is relatively straightforward. The FAA clearly states that “[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States” and that district courts have “original jurisdiction . . . regardless of the amount in controversy.”¹⁰² Venue is found in “the place designated in the agreement as the place of arbitration if such place is within the United States” or “any court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought.”¹⁰³

Questions regarding personal jurisdiction are more complicated. Private parties—whether foreign or domestic—are entitled to the due

99. *See supra* notes 93–108 and accompanying text.

100. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 291 (5th Cir. 2004) (citations omitted).

101. *See infra* notes 284–95 and accompanying text.

102. 9 U.S.C. §§ 203, 302 (2012).

103. *Id.* §§ 204, 302.

process protections found in the U.S. Constitution, and all of the necessary constitutional tests regarding personal jurisdiction must be met with respect to private parties.

However, recent decisions have held that foreign states are not “persons” under the U.S. Constitution and are therefore not entitled to the protection of the Due Process Clauses.¹⁰⁴ For example, in *Frontera Resource Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*,¹⁰⁵ an oil company based in the Cayman Islands brought a motion to enforce an arbitral award rendered by a Swedish arbitral tribunal against the State Oil Company of the Azerbaijan Republic. Although earlier precedent had suggested that foreign states were entitled to the protection of the Due Process Clauses of the U.S. Constitution, the court here determined that a foreign state could not be treated more favorably than an individual U.S. state, which was not a constitutional “person” under *South Carolina v. Katzenbach*.¹⁰⁶ However, the court in *Frontera* did not determine whether and to what extent this principle extends to other state-affiliated entities, such as a state-owned foreign corporation.¹⁰⁷ Issues relating to foreign states and state agencies are discussed below.¹⁰⁸

2. Primary and secondary jurisdiction as a choice of law issue

The concept of primary and secondary jurisdiction also is relevant to choice of law issues. As a matter of U.S. practice, the national arbitration law of the country with primary jurisdiction applies to various procedural matters unless the parties have decided otherwise. This means that U.S. courts may have to apply foreign law, using the national arbitration law of the place of arbitration on matters relating to arbitral procedure. These default mechanisms involving the choice of the national arbitration law of the arbitral seat apply only to certain matters of arbitral procedure, not the substantive law that applies to the merits of the dispute.

104. See *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009).

105. *Id.*

106. 383 U.S. 301, 323–24 (1966).

107. See *Frontera*, 582 F.3d at 401.

108. See *infra* notes 377–85 and accompanying text.

IV. Role of U.S. Federal Courts in International Commercial Arbitration

A. Role of the Court Prior to or at the Initiation of Arbitral Proceedings

U.S. courts may be asked to resolve a number of issues prior to or at the initiation of an international commercial arbitration. Several of the more common types of motions are discussed below.

1. Motions to compel arbitration

The first and perhaps most common motion that might be made at this preliminary stage involves a request to compel an international commercial arbitration. Under Chapters 2 and 3 of the FAA, a motion to compel can be made in the United States regardless of where the arbitration is supposed to take place.¹⁰⁹ The technical requirements for a motion to compel arbitration appear in Chapter 1 of the FAA, which applies to international proceedings by virtue of the residual application provisions of Chapters 2 and 3.¹¹⁰

When considering motions to compel, U.S. federal courts must take into account the strong federal policy in favor of international commercial arbitration.¹¹¹ The policy is based on two statutory provisions. First, the FAA mandates that if an arbitration agreement exists and “there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.”¹¹² Second, the New York Convention requires that

[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties,

109. *See* 9 U.S.C. §§ 206, 303 (2012) (stating that “[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States”).

110. *See id.* §§ 4, 208, 307.

111. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (noting arbitration agreements should be enforced in the international realm, “even assuming that a contrary result would be forthcoming in a domestic context”).

112. 9 U.S.C. § 4.

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refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.¹¹³

This pro-arbitration policy is predicated on the existence of a valid arbitration agreement between the parties.¹¹⁴ However, the FAA does not specify who should decide questions regarding the validity or existence of an arbitration agreement: the court or the arbitral tribunal. Courts must look to other sources of authority to resolve this issue.

Analysis of the question of “who decides” involves two separate but related concepts: separability and *competence-competence* (or *Kompetenz-Kompetenz*), known in the United States as the arbitrators’ jurisdiction to determine their own jurisdiction. Separability refers to the idea that the existence, validity, and legality of the underlying contract does not necessarily affect the existence, validity, or legality of the arbitration agreement.¹¹⁵ “[U]nless the challenge is to the arbitration clause itself, the issue of the contract’s validity is considered by the arbitrator in the first instance.”¹¹⁶

Questions about the validity of the arbitration agreement itself (as opposed to the contract in which the arbitration agreement is found) raise “gateway” issues. Gateway determinations distinguish between those matters that are properly within the jurisdiction of the arbitrator and those that are properly within the jurisdiction of the court.¹¹⁷ There is considerable jurisprudence regarding gateway issues in the context of domestic arbitration that appears equally applicable to international arbitration.¹¹⁸

Although domestic case law in this area can give rise to some confusion when applied to international cases, this is primarily a linguistic issue rather than a conceptual issue. Gateway issues often involve discussion of “arbitrability,” which is used in the United States to refer to “[t]he question whether the parties have submitted a particular dis-

113. New York Convention, *supra* note 6, art. II(3).

114. *See id.*; 9 U.S.C. §§ 2, 4.

115. *See* *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, 402–04 (1967).

116. *Buckeye Check Cashing*, 546 U.S. at 445.

117. *See* *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

118. *See* *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 155 (3d Cir. 2001) (applying *First Options* in an international dispute).

pute to arbitration.”¹¹⁹ According to this definition, arbitrability is a private concern that goes to the scope of the parties’ agreement.

“Arbitrability” is not defined the same way in other countries, where it refers to a public law concern as to whether a country will permit a particular subject matter to be resolved through arbitration.¹²⁰ This type of arbitrability is not considered very often in U.S. courts because the United States has few restrictions on the types of issues that can be heard in arbitration.¹²¹

Other countries have declared some types of claims off-limits for arbitration.¹²² This practice is specifically allowed under the New York Convention.¹²³

Although the New York Convention allows countries to impose some restrictions on arbitrability, those restrictions must be narrowly construed. The restrictions also should not be interpreted by reference to the national law of a single state, but instead “must be made on an international scale, with reference to the laws of the countries party to the Convention.”¹²⁴

Both types of arbitrability can be raised in U.S. courts. The domestic understanding of arbitrability (have the parties consented to arbitration) can be considered a gateway issue. The international understanding is implicated in situations in which a U.S. court is asked to determine whether an issue can be made subject to arbitration.¹²⁵ Courts need to distinguish between the two types of arbitrability, depending on the question at hand.

119. *Howsam*, 537 U.S. at 84 (citations omitted).

120. See Gaillard & Savage, *supra* note 48, ¶¶ 532–33 (1999).

121. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 636–37 (1985).

122. See European Council Regulation 44/2001 of 22 Dec. 2000 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, art. 22(4) (giving courts exclusive jurisdiction over “proceedings concerned with the registration or validity of patents, trade marks, designs, or similar rights required to be deposited or registered”).

123. See New York Convention, *supra* note 6, art. II(1) (noting applicability of the Convention only to arbitration agreements “concerning a subject matter capable of settlement by arbitration”).

124. *Meadows Indem. Co. v. Baccala & Shoop Ins. Servs., Inc.*, 760 F. Supp. 1036, 1042 (E.D.N.Y. 1991); see also New York Convention, *supra* note 6, art. II(1).

125. See New York Convention, *supra* note 6, art. V(1)(a).

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Returning to the question of “who decides,” U.S. courts need to consider more than just separability and arbitrability (in the U.S. sense). Judges also need to take into account the concept of *competence-competence*, or the arbitral tribunal’s ability to decide its own jurisdiction.¹²⁶ The principle of *competence-competence* allows an arbitral tribunal to rule on its own jurisdiction even if the tribunal ultimately decides that no valid arbitration agreement exists. *Competence-competence* deters parties from challenging arbitral agreements as a delay or obstruction tactic.¹²⁷

Although the FAA is silent on the subject, the U.S. Supreme Court has indicated that arbitral tribunals are competent to decide matters relating to their own jurisdiction.¹²⁸ However, this issue is subject to party agreement. If the parties agreed to submit the question of jurisdiction to arbitration, the matter will be determined through arbitration. If the parties reserved that issue for judicial determination, it will be determined through litigation.¹²⁹

U.S. courts’ power over arbitrations seated outside the United States is not as extensive as their power over arbitrations seated in the United States. There are also times when domestic law may give U.S. courts the authority to act, but principles of international comity suggest restraint.

U.S. courts have the power to compel arbitration wherever that proceeding is to be seated (i.e., located).¹³⁰ Indeed, this is a mandatory duty. As the First Circuit has noted,

[s]o long as the parties are bound to arbitrate and the district court has personal jurisdiction over them, the court is under an unflagging, nondiscretionary duty to grant a timely motion to compel arbitration and thereby enforce the New York Convention as provided in

126. See William W. Park, *Determining an Arbitrator’s Jurisdiction: Timing and Finality in American Law*, 8 Nev. L.J. 135, 139–42 (2007) (noting this question involves several constituent issues).

127. See Gaillard & Savage, *supra* note 48, ¶¶ 680–682.

128. See *Rent-a-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777–79 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83–84 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

129. See *First Options*, 514 U.S. at 943.

130. See 9 U.S.C. §§ 4, 206, 303 (2012).

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Chapter 2 of the FAA, even though the agreement requires arbitration in a distant forum.¹³¹

However, any order directing the parties to arbitration must not attempt to specify the procedures that are to be used in the arbitration, since that could run afoul of governing laws as well as important principles regarding party autonomy, arbitrator discretion, and the supervisory competence of courts at the arbitral seat (i.e., the primary jurisdiction).¹³²

2. Motions to stay litigation

Courts also may be asked to stay a litigation proceeding in front of them. A motion to stay litigation is the mirror image of a motion to compel and merits the same level of respect under the New York Convention, even though the Convention only explicitly mentions the court's duty to refer parties to arbitration.¹³³

The FAA states expressly that

[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.¹³⁴

This provision is made applicable to international disputes through the residual application clauses of Chapters 2 and 3.¹³⁵

Sometimes a party files an action that involves both arbitrable and non-arbitrable claims. In that situation, a court may compel the arbi-

131. *InterGen NV v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003).

132. *See Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Achille Lauro*, 712 F.2d 50, 54–55 (3d Cir. 1983).

133. *See* New York Convention, *supra* note 6, art. II(3); Born, *supra* note 9, at 1020–28.

134. 9 U.S.C. § 3.

135. *See id.* §§ 208, 307; *Energy Transp., Ltd. v. M.V. San Sebastian*, 348 F. Supp. 2d 186, 201 (S.D.N.Y. 2004).

tration of some disputes and stay litigation of the remaining issues pending the outcome of the arbitration.¹³⁶

A similar outcome occurs when a plaintiff attempts to bring claims against multiple parties but only some of the defendants are subject to an arbitration agreement. In that situation, a court may compel the arbitration of some disputes while staying the remaining claims.¹³⁷ In rare cases, a court may decide that the FAA does not preempt a state law that allows for a stay of arbitration pending the outcome of litigation.¹³⁸

3. Motions seeking an anti-suit injunction

U.S. courts may also be faced with requests for anti-suit injunctions. Recently, courts have considered a related form of relief, the anti-anti-suit injunction.¹³⁹ Although anti-suit injunctions are discussed here in the context of preliminary proceedings, they may be sought during an arbitration as well.¹⁴⁰

Because anti-suit and anti-anti-suit injunctions have their roots in common law jurisdictions, U.S. courts are often prime candidates for receiving motions of this type.¹⁴¹ The United States has become an even more attractive jurisdiction for anti-suit injunctions ever since the Court of Justice of the European Communities curtailed English

136. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985) (recognizing the possibility of “piecemeal” litigation” and “the possibly inefficient maintenance of separate proceedings in different forums”); *Kwasney Co. v. AcryliCon Int’l Ltd.*, No. 09-13357, 2010 WL 2474788, at *3 (E.D. Mich. June 11, 2010).

137. See *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 20–21 (1983) (stating that “federal law *requires* piecemeal resolution when necessary to give effect to an arbitration agreement” and noting that the agreement must be enforced “notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement”); *AgGrow Oils, LLC v. Nat’l Union Fire Ins. Co.*, 242 F.3d 777, 783 (8th Cir. 2001); *Marubeni Corp. v. Mobile Bay Blue Chip Ctr.*, No. 02-0914-PL, 2003 WL 22466215, at *17–18 (S.D. Ala. June 16, 2003).

138. See *Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 471, 479 (1989).

139. See *Teck Metals, Ltd. v. Certain Underwriters at Lloyd’s, London*, No. 05-411, 2010 WL 252804, at *1 (E.D. Wash. Jan. 19, 2010).

140. See *infra* notes 224–25 and accompanying text.

141. See *Born*, *supra* note 9, at 1042.

courts' ability to issue such injunctions in cases involving proceedings brought in other Member States of the European Union.¹⁴²

To obtain an anti-suit injunction from a U.S. court, a movant must demonstrate that

- the parties in the foreign litigation are the same as those who are bound by the agreement to arbitrate;
- the foreign litigation involves the same issues as would be resolved under the arbitration agreement;
- irreparable injury or grave hardship would occur absent the injunction; and
- the public policy of the U.S. forum warrants a grant of injunctive relief.¹⁴³

It is also necessary to weigh matters of international comity against “the need to ‘prevent vexatious or oppressive litigation’ and to ‘protect the court’s jurisdiction.’”¹⁴⁴ Although “‘it is well settled that American courts have the power’ to issue foreign antisuit injunctions, ‘[c]omity dictates that [these injunctions] be issued sparingly and only in the rarest of cases.’”¹⁴⁵

U.S. courts must consider requests for anti-suit injunctions in light of U.S. obligations under the New York Convention. There is no consistent approach among courts or commentators. One international commentator has taken the position that anti-suit injunctions “are not inconsistent with the New York Convention (because they enforce, rather than breach, international arbitration agreements).”¹⁴⁶ Others have argued that “anti-suit injunctions negate the very basis of arbitration, that is, the parties’ consent to submit their disputes to arbitra-

142. See Case C-185/07, *West Tankers Inc. v. Allianz SpA (formerly RAS Riunione Adriatica diSciurtà SpA)*, [2009] 1 A.C. 1138, 1153 ¶ 74 (Court of Justice of the European Communities).

143. See *LAIF X SPRL v. Axtel, SA de CV*, 390 F.3d 194, 199–200 (2d Cir. 2004); *Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Tech., Inc.*, 369 F.3d 645, 652–53 (2d Cir. 2004); *Empresa Generadora de Electricidad ITABO, SA v. Corporación Dominicana de Empresas Eléctricas Estatales*, No. 05 CIV 5004 RMB, 2005 WL 1705080, at *5–6, 8–9 (S.D.N.Y. July 18, 2005).

144. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 366 (5th Cir. 2003).

145. *Answers in Genesis of Ky., Inc. v. Creation Ministries Int’l, Ltd.*, 556 F.3d 459, 471 (6th Cir. 2009) (citations omitted).

146. Born, *supra* note 9, at 1044.

tion,” even when anti-suit injunctions are issued with the intent to support international arbitration.¹⁴⁷ Still others believe that it is the timing of the request that is critical.¹⁴⁸ Another factor may be whether the U.S. court has primary or secondary jurisdiction over the arbitration.¹⁴⁹ This is a developing area of law that will require attention in the coming years.

4. Motions seeking an anti-arbitration injunction

Courts may also be faced with a motion for an anti-arbitration injunction, which is a type of anti-suit injunction meant to stop the initiation or continuation of an arbitration.¹⁵⁰ Anti-arbitration orders can be directed to a party to the arbitration or to the members of the arbitral tribunal. Because these actions challenge the validity or existence of an arbitration agreement, they must be considered in light of the principle of *competence-competence*, or the arbitral tribunal’s power to rule on its own jurisdiction.¹⁵¹

Anti-arbitration orders are justified on the grounds that allowing an arbitral proceeding to go forward when no valid arbitration agreement exists injures the innocent party. However, anti-arbitration injunctions can be seen as encroaching on the proper jurisdiction of the arbitral tribunal and interfering with the parties’ consent to arbitrate their disputes.¹⁵² There is not a great deal of case law on this issue, and questions arise as to whether U.S. courts may issue such an injunction in cases in which the arbitration is seated outside the United States.¹⁵³

147. Emmanuel Gaillard, *Reflections on the Use of Anti-Suit Injunctions in International Arbitration*, in *Pervasive Problems in International Arbitration* 203 ¶ 10-10 (Loukas A. Mistelis & Julian D.M. Lew eds., 2008).

148. See Strong, *Border Skirmishes*, *supra* note 1, at 12–17.

149. See W. Michael Reisman & Heide Irvani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 *Am. Rev. Int’l Arb.* 5, 12–17 (2010).

150. See *Certain Underwriters at Lloyd’s v. Bristol-Myers Squibb Co.*, 51 F. Supp. 2d 756, 758 (E.D. Tex. 1999).

151. See *supra* notes 109–32 and accompanying text.

152. See Gaillard, *supra* note 147, ¶ 10-19 to 10-21.

153. See *Farrell v. Subway Int’l, B.V.*, No. 11 Civ. 08(JFK), 2011 WL 1085017, at *2 (S.D.N.Y. Mar. 23, 2011); *URS Corp. v. Lebanese Co. for Dev. & Reconstr. of Beirut Cent. Dist.* SAL, 512 F. Supp. 2d 199, 208 (D. Del. 2007); *Certain Underwriters at Lloyd’s*, 51 F. Supp. 2d at 761.

5. Motions for assistance in the naming of an arbitrator

Not all motions made at the preliminary stage of an international commercial arbitration relate to the desire to compel or stay a particular type of proceeding. Sometimes the parties agree that the dispute should be heard in arbitration, but experience difficulties appointing the arbitral tribunal, either because they did not agree in advance to the method of selecting the arbitrator or arbitrators or because one party may be unable or unwilling to exercise its power to appoint an arbitrator. Alternatively, an appointing agency may fail to act in an expeditious manner.

Quite often, the solution to these problems can be found in the arbitration agreement itself or in the arbitral rules that the parties have selected to apply to their proceedings; those rules reflect the parties' implicit agreement regarding procedural matters. In both situations, the FAA empowers U.S. courts to "appoint arbitrators in accordance with the provisions of the agreement."¹⁵⁴

Sometimes, the agreement is silent regarding the selection of the arbitral tribunal. In these cases, the court must look to Chapter 1 of the FAA for guidance, since Chapters 2 and 3 of the FAA only address situations in which the parties have made provision for the appointment of arbitrators. Section 5, made applicable to international disputes through the residual application provisions of Chapters 2 and 3, states that if the arbitration agreement makes no provision for the naming of the arbitrators, then

the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.¹⁵⁵

The FAA's approach to the appointment of arbitrators is consistent with that taken by other countries, so there is no danger of the United States being out of step with foreign jurisdictions. Nevertheless, care must be taken with motions of this type, because parties could seek similar relief from multiple courts, including those at their places of residence, the place of performance of the contract, or the place of ar-

154. 9 U.S.C. §§ 206, 303(a) (2012).

155. *Id.* §§ 5, 208, 307.

bitration. Successful motions in all these locations would result in an excessive number of arbitrators.

The international arbitral community has taken the view that motions to appoint an arbitrator should be made only in the court with primary jurisdiction. This position is based on treaty language indicating that a party may object to the enforcement of the arbitral award if “[t]he composition of the arbitral authority . . . 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.”¹⁵⁶ Because the law governing the selection of arbitrators is that of the seat of arbitration, it is logical to give the seat jurisdiction over appointment-related issues. Indeed, “[i]t is only in the rarest cases that national arbitration legislation should be interpreted as permitting appointment of arbitrators in an arbitration that does not have its seat in the appointing court’s state.”¹⁵⁷

Federal courts have enforced agreements regarding the selection of arbitrators according to the terms of the agreement in a U.S.-seated arbitration.¹⁵⁸ U.S. courts also have held that they have the ability to name arbitrators in cases in which the parties have not agreed to the place of arbitration, but “only where the second party has expressly consented to a United States forum or has contacts with that forum sufficient to meet the requirements of personal jurisdiction.”¹⁵⁹

In addition, U.S. courts have recognized their power to appoint arbitrators in international arbitrations seated in the United States when the parties have not agreed to a particular procedure.¹⁶⁰ This is true even if the agreement between the parties indicates that the arbitration may be seated either in the United States or elsewhere, so long as the U.S. alternative is chosen.¹⁶¹

156. New York Convention, *supra* note 6, art. V(1)(d); *see also* Panama Convention, *supra* note 7, art. 5(1)(d).

157. Born, *supra* note 9, at 1433.

158. *See* 9 U.S.C. §§ 206, 303(a); *Farrell v. Subway Int’l, B.V.*, No. 11 Civ. 08(JFK), 2011 WL 1086017, at *5 (S.D.N.Y. Mar. 23, 2011).

159. *See* *Jain v. de Mere*, 51 F.3d 686, 692 (7th Cir. 1995).

160. *See* 9 U.S.C. §§ 5, 208, 307; *Certain Underwriters at Lloyd’s London v. Argonaut Ins. Co.*, 500 F.3d 571, 578–79 (7th Cir. 2007), *affirming* 444 F. Supp. 2d 909, 921–22 (N.D. Ill. 2006).

161. *See* *Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos*, 25 F.3d 223, 224–25 (4th Cir. 1994).

The more difficult question arises when the seat of the arbitration is outside the United States. The FAA's appointment mechanisms do not differentiate between arbitrations seated in the United States and those seated elsewhere. Few U.S. courts have addressed this issue, although one older decision suggests in dicta that the court might have had the ability to name arbitrators in a proceeding seated in Switzerland.¹⁶² However, such an action on the part of a U.S. court would be problematic as a matter of international law and practice for the reasons discussed above, and could conflict with orders made by the court at the arbitral seat regarding the appointment of arbitrators.

6. Motions for provisional orders in aid of arbitration

Parties also may come to a U.S. judge to seek assistance with the freezing of assets, protection of property, or other forms of preliminary injunctive relief. Although the FAA is silent on the issue of provisional measures in arbitration other than those in a narrow range of maritime disputes,¹⁶³ in domestic arbitration, absent an agreement between the parties to grant exclusive jurisdiction on this issue to one body or another, both the arbitral tribunal and the court are empowered to provide such relief.¹⁶⁴

In international arbitration, it is clear that the arbitral tribunal itself may provide such provisional relief.¹⁶⁵ However, there is some debate regarding the ability of U.S. courts to order provisional relief in international disputes given mandatory language in the New York Convention indicating that a court "shall . . . refer the parties to arbitration."¹⁶⁶ Two different approaches are reflected in the case law.

The Second Circuit has held that "entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court's powers" under section 206 of the FAA and thus the New York Convention.¹⁶⁷ This is true even if the arbitration is seated outside the

162. *See Creative Tile Mktg., Inc. v. SICIS Int'l, S.r.L.*, 922 F. Supp. 1534, 1540 (S.D. Fla. 1996).

163. *See* 9 U.S.C. § 8.

164. *See Am. Express Fin. Advisors v. Thorley*, 147 F.3d 229, 231 (2d Cir. 1998).

165. *See Banco de Seguros del Estado v. Mutual Marine Office, Inc.*, 344 F.3d 255, 262–63 (2d Cir. 2003); Born, *supra* note 9, at 1955–56, 2045–46.

166. New York Convention, *supra* note 6, art. II(3).

167. *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990); *see also* 9 U.S.C. § 206.

United States.¹⁶⁸ This approach has been applied to both preliminary relief and prejudgment remedies.¹⁶⁹

In contrast, the Third and Ninth Circuits do not permit courts to provide provisional relief in international commercial arbitration, either because the relief requested is available from the arbitral tribunal (a factor that may be particularly important in disputes arising after the tribunal has been constituted or where an arbitral mechanism for urgent preliminary relief exists) or because the New York Convention forbids such actions by requiring courts to refer parties to arbitration as a mandatory matter.¹⁷⁰

Of the two approaches, the first seems to be the more prevalent, both because of the large number of international disputes seated in the Second Circuit and because it is more consistent with international standards. Indeed, the weight of U.S. authority “rejects the view that Article II(3) of the [New York] Convention precludes court-ordered provisional measures in aid of arbitration,” consistent with “almost all non-U.S. decisions and academic commentary.”¹⁷¹ As a practical matter, allowing courts to order provisional relief makes sense, particularly in the early stages of a dispute, when the tribunal has not yet been constituted.

Although this issue can arise at any stage of the arbitration,¹⁷² courts follow the same procedure regardless of when the application for assistance is made. Judges consider whether and to what extent the parties have agreed, implicitly or explicitly, to a particular mode of provisional relief (i.e., whether they have required recourse to a court or a tribunal or permitted access to both). Courts also consider other relevant factors, looking at whether the party seeking the assistance has previously demonstrated support for the arbitral proceeding (such

168. *See* *Bahrain Telecomm. Co. v. Discoverytel, Inc.* 476 F. Supp. 2d 176, 180–81 (D. Conn. 2007).

169. *Id.* at 182.

170. *See* *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) (noting preliminary relief was available under arbitral rules); *McCreary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032, 1038 (3d Cir. 1974) (citing Article II(3) of the New York Convention).

171. Born, *supra* note 9, at 2031, 2039.

172. *See supra* notes 154–62 and *infra* notes 224–25 and accompanying text.

as by moving to compel arbitration) and whether the moving party is seeking any relief other than provisional measures.¹⁷³

B. Role of the Court During Arbitral Proceedings

Judicial assistance may also be sought while the arbitration is ongoing. Courts in the United States and elsewhere agree that in these circumstances, restraint is necessary to give effect to the principle of judicial noninterference in an ongoing arbitral proceeding.¹⁷⁴

1. Motions for disclosure or discovery in aid of an international arbitral proceeding

Perhaps the most controversial type of motion that can be brought during an international commercial arbitration involves requests for judicial aid in the disclosure or discovery process. This is a particularly complicated and contentious area of law, given the vast conceptual and practical differences between discovery in U.S. litigation on the one hand and the production of evidence in other countries and in other forms of private dispute resolution on the other. Before discussing the various issues that can arise in connection with international commercial arbitration, it is necessary to describe certain fundamental principles regarding the exchange of information outside U.S. courts.

a. Discovery versus disclosure

Procedures relating to the discovery or disclosure of information vary. Not only does each country have its own approach to the exchange and presentation of evidence, but international commercial arbitration has also developed its own unique method of taking and presenting evidence, blending elements of both common law and civil law in a process known as “disclosure” rather than “discovery.”

The U.S. approach to discovery in litigation is by far the broadest in the world, even among common law nations. The situation is very different in other jurisdictions, particularly those that follow the civil law tradition. Not only must plaintiffs in a civil law dispute attach all

173. See *Bahrain Telecomm.*, 476 F. Supp. 2d at 181–82; Born, *supra* note 9, at 2040–42.

174. See Gary Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings*, 30 U. Pa. J. Int'l L. 999 (2009) (discussing obligation of noninterference under national and international law).

relevant documentation to their moving papers, but defendants have a concordant obligation to attach their own documents to responsive pleadings. Parties then have several other opportunities to supplement their evidentiary positions, either through formal rebuttal papers or in response to particular matters that arise during a series of interim hearings. Requests to compel the production of documents or other information from another party are virtually unknown. The civil law approach to discovery differs significantly from the common law method of presenting documents at a single time and in a single hearing at the end of extensive discovery. The civil law's more iterative process allows judges and parties to focus on precise issues that are actually raised rather than trying to anticipate, in the abstract, all possible arguments.

International commercial arbitration intentionally reflects elements of both the civil law and the common law. Civil law influences are evident in the early submission of materials to the tribunal, while common law practices are reflected in the exchange of documents. This process closely resembles English litigation practice and is much more limited in its scope than U.S.-style discovery.¹⁷⁵

To the extent that disclosure occurs in international arbitration, it does so entirely within the arbitral context, under the control of the tribunal and only involving actual parties to the arbitration rather than third parties.¹⁷⁶ As a rule, arbitrators in international proceedings “are often reluctant to order disclosure as readily, or to the same extent, as in many common law litigations,” often refusing “to grant expansive, fishing-expedition discovery requests.”¹⁷⁷

Parties in arbitration may not be formally compelled to produce documents as part of the disclosure process. However, arbitral tribunals may limit self-serving non-disclosure by making adverse inferences about issues discussed in documents that are believed to exist but that are not produced.

175. See Civil Procedure Rules (Engl.), Part 31, available at <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31>; Practice Direction 31A—Disclosure and Inspection (Engl.), available at http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_part31a.

176. See Born, *supra* note 9, at 1877.

177. *Id.* at 1907.

Prehearing depositions are virtually unheard of in international commercial arbitration, as are orders to compel the production of documents from non-parties prior to the hearing. However, witnesses, including non-parties, may be compelled to attend a hearing and bring documents with them. Both fact and expert witnesses may be asked to produce and exchange extensive written statements in advance of the hearing.

Procedures relating to disclosure are addressed in various institutional rules on arbitration, but the provisions are often sparse. Arbitral tribunals use their discretionary powers to create suitable means for the taking and presentation of evidence tailored to individual disputes. In the last ten years, parties and arbitrators also have come to rely heavily on the International Bar Association (IBA) Rules on the Taking of Evidence, which provide detailed guidance on numerous issues and reflect the international arbitral community's consensus on how disclosure should ideally progress.¹⁷⁸

b. Arbitrators' powers to order disclosure

U.S. federal courts may become involved in a disclosure dispute in cases in which the parties do not comply with the arbitrator's orders. Most arbitral rules provide arbitrators with the ability to order disclosure, and a similar grant of power is found in section 7 of the FAA, which applies to international arbitrations through the residual application provisions of Chapters 2 and 3.¹⁷⁹ The arbitrators' power is discretionary, in that the arbitrators simply "may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case."¹⁸⁰

If a person so summoned does not appear, the U.S. court at the seat of arbitration "may compel the attendance" of the summoned person or persons "or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses

178. See IBA Rules on the Taking of Evidence in International Commercial Arbitration, art. 3(3), adopted May 29, 2010, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

179. See 9 U.S.C. §§ 7, 208, 307 (2012).

180. *Id.* § 7.

or their punishment for neglect or refusal to attend in the courts of the United States.”¹⁸¹

Federal courts also can become involved in disputes regarding the extent to which international arbitral tribunals may order depositions or disclosure from third parties in advance of the arbitral hearing. Precedents in this area are split.¹⁸² The “emerging rule” among federal courts is that the arbitral tribunal does not have the power to compel prehearing disclosures from a non-party.¹⁸³ This approach is based on the language of section 7 of the FAA as well as the view that arbitrators who feel the need to see certain documents in advance of the final hearing “have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings.” Section 7’s presence requirement, however, forces the party seeking the non-party discovery—and the arbitrators authorizing it—to consider whether production is truly necessary.¹⁸⁴ This technique is consistent with party expectations regarding both the limited scope of disclosure in international commercial arbitration and the blending of civil law and common law procedures.

A second issue that courts occasionally address involves the territorial scope of an arbitrator-issued summons. According to the FAA, an arbitrator-issued summons “shall be served in the same manner as subpoenas to appear and testify before the court.”¹⁸⁵ Because the Federal Rules of Civil Procedure impose geographic limitations on the service of a summons, problems can arise if arbitrators attempt to issue summonses to witnesses residing beyond those territorial boundaries.¹⁸⁶ The question arises whether it is possible for arbitrators to extend their jurisdictional reach through reliance on the Hague Conven-

181. *Id.*

182. *See* *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 215–17 (2d Cir. 2008) (discussing positions held by various circuits).

183. *See id.* at 216–17; *Nat’l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 188 (2d Cir. 1999).

184. *Life Receivables Trust*, 549 F.3d at 218 (citations omitted).

185. 9 U.S.C. § 7.

186. *See* *Fed. R. Civ. P. 45(b)(2)–(3); Dynergy Midstream Serv., LP v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006).

tion on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention).¹⁸⁷

On its face, this question is difficult to answer, given the Hague Evidence Convention's language restricting use of the Convention to situations in which evidence is sought "for use in judicial proceedings."¹⁸⁸ However, one commentator has suggested that it is "plausible that a tribunal could apply to a national court in the arbitral seat and request that it issue a letter of request, which could be executed pursuant to the Hague Evidence Convention."¹⁸⁹ The Hague Conference on Private International Law has also suggested that, in proper circumstances, the Hague Evidence Convention may be used in arbitration.¹⁹⁰ U.S. courts have not yet considered this issue.

c. Courts' powers to order disclosure in a U.S.-seated arbitration

U.S. courts may also be asked to order disclosure directly. Numerous states allow arbitral tribunals, or parties with the approval of an arbitral tribunal, to seek the assistance of a court in the taking of evidence in an international commercial arbitration.¹⁹¹ When acting in this manner, U.S. courts are in accordance with international norms. However, the United States is very much of an outlier to the extent that U.S. courts have held that parties themselves may seek disclosure orders from courts even when the arbitral tribunal has not expressly consented to such actions.

This is not to say that U.S. courts grant these motions routinely. Orders of this type, considered implicitly authorized by section 7 of

187. See Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature*, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

188. *Id.* art. I.

189. Born, *supra* note 9, at 1939.

190. See Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, 28 I.L.M. 1556, 1566–67 (1989).

191. See United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, UNCITRAL, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), *revised by* Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., Annex 1, art. 27, U.N. Doc. A/61/17 (July 7, 2006) [hereinafter UNCITRAL MAL]; Born, *supra* note 9, at 1923.

the FAA, are made applicable to international disputes through the residual application provisions of Chapters 2 and 3, and are only available in exceptional circumstances.¹⁹² Most courts that have considered this issue have required parties to demonstrate that there is a fairly strong need for the requested material (such as when the evidence may become unavailable) as well as a showing that the arbitral tribunal is unable to take or safeguard the evidence itself (as might occur if the tribunal has not yet been constituted).¹⁹³ Particular care must be taken in cases in which a party claims the discovery is necessary for a litigation that has been stayed pending an ongoing arbitration, since such a tactic could be used to circumvent the arbitration.¹⁹⁴

Allowing courts to grant disclosure at the parties' direct request may "run[] counter to the parties' agreement to resolve their disputes exclusively by arbitration."¹⁹⁵ Various U.S. courts have recognized that the only time such relief is justifiable as being consistent with the parties' agreement is when the disclosure is necessary to prevent imminent, irreparable harm, which means that such relief should usually only be granted prior to the constitution of the arbitral tribunal.¹⁹⁶ Indeed, as one circuit court judge has noted, judicial intervention in the arbitral disclosure process

would create practical difficulties. . . . Since the judge will not be involved in the development of the issues as the case proceeds through the arbitration process, he will lack a basis upon which to make informed rulings on discovery matters. His only options would be to have the parties brief the development of the issues in arbitration or to discuss the current state of the dispute with the arbitrator. Such a

192. See 9 U.S.C. §§ 7, 208, 307 (2012); Born, *supra* note 9, at 1930.

193. See *Levin v. Ripple Twist Mills, Inc.*, 416 F. Supp. 876, 880 (E.D. Pa. 1976), *dismissed by* 549 F.2d 795 (3d Cir. 1977); *Vespe Contracting Co. v. Anvan Corp.*, 399 F. Supp. 516, 522 (E.D. Pa. 1976) (involving evidence that was disappearing as a result of construction work).

194. See *Harry F. Ortlip Co. v. George Hyman Constr. Co.*, 126 F.R.D. 494, 497 (E.D. Pa. 1989).

195. Born, *supra* note 9, at 1931.

196. See *Nat'l Broad. Co. v. Bear Stearns & Co.*, 165 F.3d 184, 187 (2d Cir. 1999); *Suarez-Valdez v. Shearson Lehman/Am. Express, Inc.*, 858 F.2d 648, 649 (11th Cir. 1988).

litigation model is obviously both inefficient and a waste of judicial resources.¹⁹⁷

d. Courts' powers to order discovery in a foreign-seated arbitration

Because disclosure is a procedural matter, questions relating to its availability are typically governed by the parties' agreement, the governing arbitral rules (if any), and the arbitration law at the arbitral seat. Thus, U.S. laws seem to have no bearing on an international commercial arbitration seated outside the United States.

The relative insignificance of U.S. law to questions of this nature was uncontroverted for many years, leaving U.S. courts with little or no role to play in disclosure disputes involving foreign-seated arbitrations. However, this position may be changing, owing to a new reading of 28 U.S.C. § 1782, which describes the kind of assistance that U.S. courts may provide to foreign and international tribunals and to litigants before such tribunals.

The aim of the statute is clear. The text states that “[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.”¹⁹⁸

The language is equally straightforward with respect to the procedure to be followed, indicating that

[t]he order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

197. *Suarez-Valdez*, 858 F.2d at 650 (Tjoflat, C.J., concurring).

198. 28 U.S.C. § 1782 (2012).

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A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.¹⁹⁹

Section 1782 originally was invoked only in cases involving foreign litigation. Recently, however, parties have begun to make applications for assistance relating to international commercial arbitrations seated outside the United States. Federal courts have split on this use of the statute.

i. Arbitration as involving “foreign or international tribunals”

U.S. courts are divided as to whether the statutory reference to “foreign or international tribunals” includes international commercial arbitrations. Most courts have taken the view that “the fact that the term ‘foreign or international tribunals’ is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that the term, as used in § 1782, does include both.”²⁰⁰

Although the 2004 decision of the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.* did not involve international commercial arbitration, it may have opened the door to the use of section 1782 in arbitration cases.²⁰¹ *Intel* involved a request for information made in the context of competition law investigations by the European Commission. Although the Commission is not normally considered a tribunal, it was acting in this instance as the taker of proof for two judicial bodies (i.e., the Court of First Instance and the European Court of Justice). The courts themselves did not accept evidence in matters of this type, and the U.S. Supreme Court decided that the Commission was acting as a “foreign or international tribunal” within the meaning of section 1782.²⁰²

One of *Intel*'s key holdings was its explicit recognition that section 1782 is a discretionary device that does not *require* a court to order discovery in response to a party's request.²⁰³ Several issues are relevant

199. *Id.*

200. *Nat'l Broad. Co.*, 165 F.3d at 188.

201. *See* 28 U.S.C. § 1782; *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004).

202. 28 U.S.C. § 1782; *see also Intel*, 542 U.S. at 257–58.

203. *See Intel*, 542 U.S. at 264.

to the decision whether to grant the request for disclosure. For example,

when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . . In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.²⁰⁴

Other criteria also must be considered. “[A] court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.”²⁰⁵ Furthermore, a court “could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.”²⁰⁶ Many of these factors refer to public-law-oriented concerns, which could be interpreted as meaning that section 1782 was not intended to apply to arbitration. However, other criteria, such as the possibility of circumventing restrictions on proof-gathering, could be seen as applying by analogy to private forms of dispute resolution, which could weigh in favor of a more expansive reading of section 1782.²⁰⁷

Intel has created a considerable amount of confusion as to whether section 1782 applies to international arbitral proceedings.²⁰⁸ One district court, having analyzed the purpose and history of section 1782 as well as the decision in *Intel*, concluded that

after applying a functional analysis of the ICC Panel, the Court finds that it is not a foreign or international tribunal under § 1782. The

204. *Id.* (citations omitted).

205. *Id.*

206. *Id.* at 264–65.

207. See Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration*, 47 *Stan. J. Int'l L.* 51, 96–108 (2011).

208. See *Ex rel. Application of Winning (HK) Int'l Shipping Co.*, No. 09-22659-MC, 2010 WL 1796579, at *6–7 (S.D. Fla. Apr. 30, 2010) (noting split of opinion).

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decisions of the ICC Panel are not judicially reviewable under the criteria established by *Intel*. The ICC Court is itself a creature of contract and may only modify the form of the ICC Panel's award, not its substance. In addition, the ICC Panel is the product of the parties' contractual agreement and its authority to issue binding decisions arises from that contract. The Court finds that § 1782 does not authorize discovery relief in a proceeding such as the ICC Panel, which functions as a contractual alternative to state-sponsored courts, administrative agencies, arbitral tribunals, and quasi-judicial bodies. Thus, the Court is without authority to provide discovery assistance under § 1782.²⁰⁹

One of the few appellate opinions to discuss the matter comes out of the Fifth Circuit. The decision here is particularly useful because it describes the effects that a broad interpretation of section 1782 would have, noting

that § 1782 authorizes broader discovery than what is authorized for domestic arbitrations by Federal Arbitration Act § 7. If § 1782 were to apply to private international arbitrations, "the differences in available discovery could 'create an entirely new category of disputes concerning the appointment of arbitrators and the characterization of arbitration disputes as domestic, foreign, or international.'" . . . [E]mpowering parties in international arbitrations to seek ancillary discovery through federal courts could destroy arbitration's principal advantage as "a speedy, economical, and effective means of dispute resolution" if the parties "succumb to fighting over burdensome discovery requests far from the place of arbitration." Neither private arbitration nor these questions were at issue in *Intel*.²¹⁰

The application of section 1782 to international commercial arbitration is an important issue that will no doubt develop over time.²¹¹

209. *In re Operadora DB Mexica, S.A. de C.V.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009).

210. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. App'x 31, 34 (5th Cir. 2009) (citations omitted); see also *In re Caratube Int'l Oil Co., LLP*, 730 F. Supp. 2d 101, 107 (D.D.C. 2010) (concluding that reliance on section 1782 constitutes "an attempt to circumvent the Tribunal's control over the arbitration's procedures, and this factor thus weighs against granting the petition").

211. A number of federal court opinions on use of section 1782 arose in the context of a complex series of disputes involving Chevron and the Republic of Ecuador. Those cases are not discussed here because the section 1782 requests were made in support of several ongoing matters, including those proceeding in both arbitration and

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Courts need to consider a variety of factors when determining whether and to what extent section 1782 applies to international commercial arbitration. This determination will involve analysis of the language of the statute as well as the effect the various interpretations will have on the international arbitral regime. Questions include whether an expansive interpretation of section 1782 would contravene U.S. treaty obligations under the New York and Panama Conventions and whether application of section 1782 to international commercial arbitration would promote the kind of “respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes” that is required by the U.S. Supreme Court.²¹² Courts evaluating the applicability of section 1782 may find it useful to consider the significant practical differences between international litigation and international arbitration, particularly with respect to the distinction between discovery and disclosure, as a matter of both party expectation and international practice.²¹³

ii. “Interested persons” in arbitration

Although most analysis focuses on whether international commercial arbitration involves “foreign or international tribunals” under section 1782, questions also arise as to who constitutes an “interested person” under the statute.²¹⁴ The statutory language states that applications may be made by tribunals or “any interested person.”²¹⁵ However, allowing parties to submit discovery applications directly to the court in a section 1782 proceeding without the approval of the arbitral tribunal runs afoul of the same issues that arise in the context of U.S.-seated arbitration,²¹⁶ namely that the parties have agreed to have the arbitral

litigation, and therefore do not address the specific issues relating to use of section 1782 in international commercial arbitration.

212. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

213. *See supra* notes 175–78 and accompanying text.

214. 28 U.S.C. § 1782 (2012).

215. *Id.*; *see also* *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 257 (2004) (discussing scope of term); *In re Caratube*, 730 F. Supp. 2d at 104 (concluding, without analysis, that a party to an international arbitration was an “interested person”).

216. *See supra* notes 191–97 and accompanying text.

tribunal, and not the court, decide matters of procedure, including disclosure. Although U.S. courts have in some cases granted discovery under section 1782 on the application of a party, there is very little case law on this particular issue.²¹⁷

As this area of law develops courts will consider the various factors the Supreme Court identified in *Intel* concerning the exercise of judicial discretion in an action under section 1782.²¹⁸ The most relevant of these may be “whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.”²¹⁹ Certainly it has been suggested that party-initiated requests for judicial assistance in U.S.-seated arbitrations may be an illegitimate means of avoiding the arbitral process.²²⁰ This concern would likely hold equal if not greater weight in arbitrations seated outside the United States. Judges may also want to consider the effect that broad use of section 1782 would have on international commercial arbitration generally.²²¹

2. Challenges to arbitrators during proceedings

Challenges to sitting arbitrators can be triggered by a variety of circumstances, both inside and outside the arbitral proceedings. A comment made by a panelist during a hearing may suggest a lack of impartiality. An arbitrator’s recent purchase of stock in one of the parties to the proceeding may call that arbitrator’s independence into question. A failure by the arbitrator to reveal a personal relationship with a party can create concerns about both impartiality and independence.

When considering a challenge to an arbitrator, a court must first determine the relevant standard and procedure. The court will look at the parties’ agreement, the governing arbitral rules (if any), and the governing law, which in the case of a U.S.-seated arbitration will be U.S. law.

217. See *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1223 (N.D. Ga. 2006); *Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265(JBA), 2009 WL 2877156, at *2 (D. Conn. Aug. 27, 2009).

218. See *Intel*, 542 U.S. at 264–65.

219. *Id.*

220. See *In re Caratube*, 730 F. Supp. 2d at 107.

221. See *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. App’x 31, 34 (5th Cir. 2009).

If the parties have addressed the challenge procedure explicitly in their arbitration agreement or implicitly by choosing a rule set that covers this issue, then the U.S. court will apply those provisions. Otherwise, the challenge is governed by U.S. law. However, the FAA is somewhat unusual in that it does not contemplate the possibility of a party challenging an arbitrator during the proceedings. This has led federal courts to limit parties' ability to bring an interim challenge to an arbitrator. For example, the Second Circuit has held that "it is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of the award."²²² There are a few exceptions to this general rule, where a court has allowed removal of an arbitrator prior to the rendering of the final award. "For example, pre-award removal of an arbitrator is justified 'when the court concludes that one party has deceived the other, that unforeseen intervening events have frustrated the intent of the parties, or that the unmistakable partiality of the arbitrator will render the arbitration a mere prelude to subsequent litigation.'"²²³

3. Motions in aid of arbitration

Part IV.A above discusses a number of motions that commonly are made prior to or at the initiation of an international commercial arbitration. Several of these motions—for example, those requesting an anti-suit injunction or seeking prejudgment attachment—also can be brought while the arbitration is ongoing. For the most part, courts consider these motions using the same criteria that are used during the pre-arbitration phase.²²⁴

The one potential difference involves provisional relief. Although courts and tribunals share concurrent jurisdiction over the granting of provisional relief by virtue of the applicable national law or arbitral rules, there often is less need for the parties to seek recourse from a court once an arbitration has begun. As noted above, the circuits are

222. *Aviall, Inc. v. Ryder Sys.*, 110 F.3d 892, 895 (2d Cir. 1997) (citation omitted).

223. *Fleming Co. v. FS Kids, L.L.C.*, No. 02-CV-0059E(F), 2003 WL 21382895, at *4, 6 (W.D.N.Y. May 14, 2003) (citations omitted) (relying on section 2 of the FAA).

224. *See supra* notes 163–73 and accompanying text.

split as to whether a U.S. court is permitted to order provisional relief in cases involving the New York Convention.²²⁵ There may be less need for judicial intervention in cases in which the arbitral tribunal is already in place.

4. Motions to enforce interim awards and provisional measures

The final type of interlocutory judicial proceeding to consider involves requests for immediate enforcement of an interim award or provisional measure ordered by the arbitral tribunal. Although the law regarding the enforcement of final arbitral awards is well developed,²²⁶ it is less clear whether and to what extent interim awards, and provisional measures are immediately enforceable by a court.

The difficulty arises because the New York Convention has been interpreted as being applicable only to the enforcement of final awards, meaning an “award that disposes of either all the parties’ claims or all the parties’ remaining claims in the arbitration.”²²⁷ However, the enforceability of other types of arbitral awards and procedural orders (including arbitral decisions regarding stays, disclosure, and provisional measures) is much less clear.

Most of the debate focuses on the distinction between “partial final awards” (sometimes called “partial awards”), which finally dispose of some portion of the parties’ claims in arbitration, and interim awards (sometimes called “interlocutory awards”), which decide a particular issue that is relevant to the final disposition of a claim (such as a determination involving the choice of law) but do not finally dispose of the claim or any part of the claim. Partial final awards are usually immediately enforceable. Interim awards are less likely to be immediately enforceable, even when they provide for provisional relief that appears to finally dispose of the request for such relief, since they do not finally decide an issue relevant to the final disposition of the claim.

The FAA provides little guidance on this issue, since it, like the New York Convention, fails to distinguish among the various types of awards. Thus, Chapter 2 only refers to “an award falling under the Convention” while Chapter 3 discusses “[a]rbitral decisions or awards

225. See *supra* notes 163–73 and accompanying text.

226. See *infra* notes 270–348 and accompanying text.

227. Born, *supra* note 9, at 2429–30; see also New York Convention, *supra* note 6, art. V.

made in the territory of a foreign state.”²²⁸ Chapter 1, which is applicable to international disputes by virtue of the provisions on residual application, is slightly broader and states that an appeal may be immediately taken from an order “confirming or denying confirmation of an award or partial award.”²²⁹

U.S. courts have adopted the position, consistent with that of courts from other jurisdictions, that provisional or interim measures ordered by an arbitral tribunal may be judicially enforced to the extent that the measure in question constitutes a final disposition of the matter requested.²³⁰ “[A]lthough the Federal Arbitration Act uses the word award in conjunction with finality, courts go beyond a document’s heading and delve into its substance and impact to determine whether the decision is final.”²³¹

C. Role of the Court After Arbitral Proceedings Have Concluded

The conclusion of the arbitration does not necessarily put all issues between the parties to rest, and courts in the United States and elsewhere may be asked to address several different types of matters even after the final arbitral award has been rendered, since this is a time period in which judicial assistance may be sought in several jurisdictions simultaneously.²³²

I. Motions to vacate an arbitral award

Although U.S. courts often adjudicate motions to vacate in the domestic context, international disputes give rise to several unique issues.

228. 9 U.S.C. §§ 207, 304 (2012).

229. *Id.* §§ 16(a)(1)(D), 208, 307.

230. *See Arrowhead Global Solutions, Inc. v. Datapath, Inc.*, 166 Fed. App’x 39, 41 (4th Cir. 2006).

231. *Publicis Comm. v. True North Comm., Inc.*, 206 F.3d 725, 729 (7th Cir. 2000).

232. *See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 368 (5th Cir. 2003) (noting “multiple judicial proceedings on the same legal issues are characteristic of the confirmation and enforcement of international arbitral awards under the Convention”).

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a. Forum

Some questions may arise as to whether a U.S. court is the appropriate forum to hear a motion to vacate an arbitral award. The only time that a U.S. court may hear a motion to vacate an arbitral award is when the underlying arbitration is seated in the United States, since an award may only be set aside (i.e., vacated) in the place of arbitration or the country under whose laws the award was made (which will in most cases be the arbitral seat).²³³ This is a classic example of primary jurisdiction at work.²³⁴ If the arbitration is seated elsewhere, the U.S. court only has jurisdiction to consider whether to recognize or enforce the award, since the U.S. court would only have secondary jurisdiction. However, in those circumstances, the U.S. court would be able to hear a motion to enforce the award and any objections thereto. The distinction between setting aside an award and recognizing and enforcing an award is critical because different standards and procedures may apply to the two actions. The two procedures also yield different effects.²³⁵

Just because the arbitration is seated in the United States does not mean all parties reside here. As a result, it may be necessary to serve notice of a motion to vacate an award on a foreign party. The question whether the Hague Convention on the Service Abroad of Extra-Judicial and Judicial Documents (the Hague Service Convention) is applicable in these circumstances has not been resolved.²³⁶

One potential issue involves the time periods associated with the service of process under the Hague Service Convention, since the three-month deadline for service of process under the FAA is the minimum amount of time recommended for service of process under the Hague Service Convention.²³⁷ However, concerns about timing may not exist in all cases, such as those in which service by mail is permit-

233. See New York Convention, *supra* note 6, art. V(1)(e).

234. See *supra* notes 93–108 and accompanying text.

235. See *infra* notes 234–63 and 270–348 and accompanying text.

236. See Hague Convention on the Service Abroad of Extra-Judicial and Judicial Documents, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638; *Argentine Republic v. Nat'l Grid PLC*, 637 F.3d 365, 366–67 (D.C. Cir. 2011).

237. See 9 U.S.C. §§ 12, 208, 307 (2012); *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 120 n.10 (D.D.C. 2010).

ted under the Hague Service Convention.²³⁸ This is a developing area of law that will require further attention in the future.

b. Standards

The second major matter to consider involves the standards to be used to vacate an arbitral award in an international arbitration. There is a growing international trend toward having the grounds for setting aside an arbitral award in the place where it was rendered mirror the grounds for non-enforcement of a foreign award under the New York Convention.²³⁹ Nevertheless, some countries still allow vacatur on grounds additional to or different from those relating to non-enforcement of an award under the New York Convention. In the view of at least one commentator, the practice “produces anomalous results which are very difficult to justify in light of the Convention’s overall structure and purposes.”²⁴⁰

U.S. courts are split on how to handle this issue. The Seventh and Eleventh Circuits have held that parties may only rely on the grounds for non-enforcement under Article V of the New York Convention, even in actions to vacate an award arising out of an arbitration seated in the United States.²⁴¹ The rationale is that the New York Convention applies to both “foreign” awards (i.e., those seated outside the United States) and “non-domestic” awards (i.e., those seated within the United States but falling within the scope of the Convention by virtue of section 202 of the FAA) through the express language of Article I(1).²⁴² This appears to be the approach taken in the draft *Restatement on the U.S. Law of International Commercial Arbitration*, although the reporters have cautioned that drafts are to be considered tentative un-

238. See *Int’l Transactions, Ltd. v. Embotelladora Agral Regionmontana SA de CV*, 277 F. Supp. 2d 654, 662 (N.D. Tex. 2004).

239. See New York Convention, *supra* note 6, art. V; UNCITRAL MAL, *supra* note 191, art. 34; Born, *supra* note 9, at 2553.

240. Born, *supra* note 9, at 2555–56.

241. See *Indus. Risk Ins. v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1140–41, 1445 (11th Cir. 1998); *Lander Co. v. MMP Inv., Inc.*, 107 F.3d 476, 481–82 (7th Cir. 1997).

242. See New York Convention, *supra* note 6, art. I(1); 9 U.S.C. § 202 (2012); see also *supra* notes 50–82 and accompanying text.

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til the entire project is complete, since revisions, some significant, are entirely likely.²⁴³

The Second Circuit takes a different view, holding that the New York Convention does not impose any limits on the grounds upon which vacatur is allowed.²⁴⁴ Courts adopting this approach allow parties seeking to set aside an arbitral award rendered in the United States to rely on domestic principles of law. In this analysis, courts would look to section 10 of the FAA for the appropriate criteria for vacatur, which is deemed applicable to international arbitrations by virtue of the residual application provisions of Chapters 2 and 3.²⁴⁵ Section 10(a) states:

In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.²⁴⁶

243. See American Law Institute, Publications Catalog, Restatement on the U.S. Law of International Commercial Arbitration, available at http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=130.

244. See *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 22–23 (2d Cir. 1997). *But see* *Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 221–22 (2d Cir. 2002) (calling *Toys “R” Us* into question regarding reliance on section 10 of the FAA).

245. See 9 U.S.C. §§ 10, 208, 307.

246. *Id.* § 10(a).

c. Partiality of arbitrators

Notably, the provisions of section 10 of the FAA are broadly similar to the standards for non-enforcement described in the New York Convention.²⁴⁷ Consequently, there at first appears to be little conflict between the international arbitral regime and the U.S. statutory scheme. For the most part, the criteria listed in section 10 are construed the same way in international and domestic disputes, at least in those circuits in which section 10 is relied upon in motions to vacate an award.

One exception to this general interpretive rule may arise in cases in which the non-prevailing party claims that the arbitrator acted with “evident partiality.”²⁴⁸ The international arbitral regime requires arbitrators to be impartial, independent, and neutral. However, the United States initially embraced a very different approach, based on domestic principles of law, concluding that party-appointed arbitrators did not have to be neutral unless the parties agreed otherwise.

The U.S. position became problematic as international commercial arbitration grew more popular, increasing the importance of predictable and consistent standards. This led to several initiatives from the international legal community. International organizations like the IBA made the expectation of arbitrator neutrality clear, as a matter of international practice.²⁴⁹ Several U.S.-based arbitral institutions amended their rules and codes of conduct to make their default positions reflect international expectations.²⁵⁰ Parties to international disputes also became increasingly vocal about their expectations regarding arbitrator conduct, not only including explicit provisions regarding neutrality in their arbitration agreements, but also demanding

247. See New York Convention, *supra* note 6, art. V; 9 U.S.C. § 10.

248. 9 U.S.C. § 10(a)(2).

249. IBA Guidelines on Conflicts of Interest in International Arbitration, adopted May 29, 2010, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx [hereinafter IBA Guidelines], Gen. Std. 1.

250. See Int’l Centre for Dispute Resolution (ICDR) International Arbitration Rules, effective June 1, 1999, art. 7, *available at* <http://www.adr.org>; AAA Commercial Arbitration Rules, effective June 1, 2009, R-12, R-17, *available at* <http://www.adr.org>; AAA Code of Ethics for Arbitrators in Commercial Disputes, effective Mar. 1, 2004, Canons IX–X, *available at* http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased; Born, *supra* note 9, at 1496–99.

acknowledgement of the neutrality of the arbitrators at the appointment stage.²⁵¹

As a result, most U.S. courts now tend to embrace the expectation that party-appointed arbitrators in international disputes will adhere to international standards regarding independence, impartiality, and neutrality.²⁵² However, this approach has not yet been universally adopted.²⁵³

Although it is easy to describe the relevant standard of behavior in the abstract, it is much harder to establish precisely how the concepts of independence, impartiality, and neutrality are to be applied in practice. The IBA Guidelines on Conflicts of Interest in International Arbitration offer some assistance.²⁵⁴ The Guidelines are considered persuasive rather than binding, but their provisions are widely relied upon by arbitrators and practitioners in the field. Several U.S. courts have also invoked the Guidelines.²⁵⁵ Two older documents—the IBA Rules of Ethics for International Arbitrators and the AAA Code of Ethics for Arbitrators in Commercial Disputes—also discuss relevant standards of behavior, although these instruments’ influence has waned in the wake of the IBA Guidelines, which are much more detailed and practically oriented.²⁵⁶

d. Common law grounds

Section 10 of the FAA itself poses few problems in the context of international arbitration, to the extent that the statute is considered to apply to international arbitral proceedings. However, there is signifi-

251. See *Employers Ins. Co. of Wausau v. Certain Underwriters at Lloyd’s of London*, No. 09-cv-201-bbc, 2009 WL 3245562, at *3–5 (W.D. Wis. Sept. 29, 2009).

252. See *Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co.*, 732 F. Supp. 2d 293, 309 (S.D.N.Y. 2010) (concluding that a party-appointed arbitrator acted with “evident partiality”).

253. See *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 307 F.3d 617, 620, 623 (7th Cir. 2002).

254. See IBA Guidelines, *supra* note 249.

255. See *New Regency Prod. Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1110 (9th Cir. 2007); *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 136 (2d Cir. 2007).

256. See IBA Guidelines, *supra* note 249; see also AAA Code of Ethics, *supra* note 250; IBA Rules of Ethics for International Arbitrators, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics.

cant debate about whether certain common law bases for the setting aside of an arbitral award apply to international disputes, even in those circuits in which section 10 is considered an appropriate standard for vacatur.

Two of these non-statutory grounds for vacatur—public policy and non-arbitrability—also are found in the New York Convention and therefore pose few problems, although the standards applicable to international disputes may differ slightly from those applicable to domestic cases.²⁵⁷

It is the third common law ground for vacatur—manifest disregard of law—that causes difficulties. The status of manifest disregard as a matter of domestic U.S. law is unclear, despite several recent U.S. Supreme Court pronouncements on the subject.²⁵⁸ “[E]xamples of manifest disregard . . . tend to be extreme, such as ‘explicitly reject[ing] controlling precedent’ or otherwise reaching a decision that ‘strains credulity’ or lacks even a ‘barely colorable’ justification.”²⁵⁹ Even if manifest disregard still exists, the doctrine only applies in a very narrow range of cases in which the arbitrators were cognizant of controlling legal authority and deliberately disregarded it, and claims of manifest disregard of law very seldom result in the setting aside of an award.²⁶⁰ Use of manifest disregard of law is particularly problematic in international disputes that are governed by something other than U.S. law, since U.S. judges are not well placed to determine whether, in those instances, there is a “clearly defined governing legal principle” that has been ignored.²⁶¹

e. Enforcement after vacatur

The final issue to consider involves the effect of a decision to vacate an arbitral award arising out of an international dispute seated in the United States. In a domestic dispute, the decision to vacate an arbitral

257. See New York Convention, *supra* note 6, art. V(2); Born, *supra* note 9, at 2622 (noting the content of international public policy), 2637.

258. See *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1768 n.3 (2010); *Hall St. Ass’n, LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008).

259. *Telenor Mobile Commc’ns AS v. Storm LLC*, 584 F.3d 396, 407 (2d Cir. 2009) (citations omitted).

260. See *id.*

261. *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003); see also Born, *supra* note 9, at 2644.

award forecloses all future opportunities to recover on the award. In international commercial arbitration, however, a decision to vacate an award bars recovery on the award in the jurisdiction where the court is seated, but does not necessarily preclude enforcement of the award in other (i.e., secondary) jurisdictions. The New York Convention states explicitly that a court sitting in a secondary jurisdiction still may enforce an award even if that award has been set aside in the primary jurisdiction.²⁶² At the same time, a court in a secondary jurisdiction can take the fact that the award has been set aside into account during an enforcement proceeding.²⁶³

2. Motions to confirm an arbitral award rendered by a U.S.-seated panel

Another action that can be brought in a U.S. court after the conclusion of an arbitration seated in the United States is a motion to confirm the award. There is no need to confirm an award to trigger the obligation of the non-prevailing party to comply with the terms of the award, since an arbitral award has legal effect immediately upon being rendered.²⁶⁴ Nevertheless, a prevailing party might bring a confirmation proceeding to transform the award into a civil judgment and facilitate enforcement of the award domestically.

Confirmation of arbitral awards in the United States is a straightforward process.²⁶⁵ A party may object to confirmation of the award only on grounds used for non-enforcement of a foreign arbitral award under the New York or Panama Convention.²⁶⁶ Parties to an award that falls under the New York or Panama Convention have three years in which to bring a motion to confirm the award, which is considerably longer than the one-year period for confirming a domestic award.²⁶⁷

U.S. courts are split as to whether the parties' underlying arbitration agreement must include language to the effect that "judgment upon the award may be entered by a Court having jurisdiction hereof"

262. See New York Convention, *supra* note 6, art. V(1)(e).

263. See *infra* notes 314–30 and accompanying text.

264. See *infra* notes 349–61 and accompanying text.

265. See 9 U.S.C. §§ 207, 302 (2012).

266. See *id.*

267. See *id.* §§ 9, 207, 302.

for the award to be confirmable.²⁶⁸ Numerous U.S. courts have therefore held that the requirement of section 9 has been met by implication.²⁶⁹

3. Motions to enforce a foreign arbitral award

The most common action to be brought in a U.S. court after the conclusion of an international commercial arbitration is a motion to enforce a foreign arbitral award. Virtually all enforcement proceedings brought in a U.S. court will fall under either the New York Convention or the Panama Convention. Parties may enforce arbitral awards outside the treaty framework, but this guide focuses exclusively on treaty mechanisms for reasons of space.

Before beginning this discussion, it is helpful to distinguish between the “recognition” and “enforcement” of a foreign arbitral award under the New York and Panama Conventions. “Recognition” of an award gives the award the status of a national court judgment in that state. An award may also be “recognized” at the arbitral seat, although that process is usually referred to in the United States as “confirmation.” An award is “enforced” when parties ask a court to use its coercive power to give effect to the terms of the award. Because the procedures for recognition and enforcement are the same, the following discussion simply uses the term “enforcement” to refer to both types of action.

The New York Convention reflects a strong presumption in favor of the enforcement of foreign arbitral awards through mandatory language: “Each Contracting State shall recognize arbitral awards as binding and enforce them.”²⁷⁰ A party may object to the enforcement of a particular award, but only on the grounds listed in Article V of the

268. *See id.* § 9; *Oklahoma City Assoc. v. Wal-Mart Stores, Inc.*, 923 F.2d 791, 794–95 (10th Cir. 1991) (concerning domestic arbitration); *Splosna Plovba of Piran v. Agrelak SS Corp.*, 381 F. Supp. 1368, 1371 (S.D.N.Y. 1974) (concerning international arbitration).

269. *See* 9 U.S.C. § 9; *Daihatsu Motor Co. v. Terrain Vehicles, Inc.*, 13 F.3d 196, 199–203 (7th Cir. 1993).

270. New York Convention, *supra* note 6, art. III; *see also* *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n.3 (11th Cir. 2004).

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Convention, which are to be construed narrowly.²⁷¹ Other possible reasons for non-enforcement, such as rationales based on section 10 of the FAA or developed through the common law, are inapplicable in an action to enforce a foreign arbitral award.²⁷²

Procedurally, the New York Convention imposes few requirements other than the production of an original or duly certified copy of both the award and the underlying arbitration agreement as well as certified translations, if necessary.²⁷³ Other than that, contracting states are free to adopt their own procedural mechanisms for enforcing arbitral awards, although “[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies.”²⁷⁴ The FAA’s enforcement provisions are relatively straightforward and have caused few difficulties in practice.²⁷⁵

Whenever a motion is brought to enforce an award, the non-prevailing party may object to enforcement on one or more of the grounds listed in the seven subsections of Article V of the New York Convention, which are discussed below. Preliminarily, it is important to keep in mind that the New York Convention specifically states that non-enforcement is discretionary rather than mandatory.²⁷⁶ U.S. courts are not obliged to refuse enforcement just because the criteria contained in one of the provisions of Article V technically have been met.²⁷⁷ Instead, judges are free to give effect to the general pro-enforcement policy underlying the New York Convention as a whole and enforce the award as a matter of discretion.²⁷⁸

271. See New York Convention, *supra* note 6, art. V; *Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier (RATKA)*, 508 F.2d 969, 974 (2d Cir. 1974).

272. See *Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90, 92 (2d Cir. 2005).

273. See New York Convention, *supra* note 6, art. IV.

274. *Id.*, art. III.

275. See 9 U.S.C. §§ 204 (regarding venue), 207 (regarding enforcement procedures).

276. See New York Convention, *supra* note 6, art. V (noting enforcement “may be refused”).

277. See *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Achille Lauro*, 712 F.2d 50, 54 (3d Cir. 1983).

278. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15. (1974).

Article V is reproduced in its entirety in Appendix 3, along with the rest of the New York Convention, but it is useful to note at the outset that Article V has two major subsections. Objections under Article V(1) may be made only by a party, whereas objections under Article V(2) may be raised *sua sponte* by the enforcing court.²⁷⁹ This distinction arises because Article (V)(2) addresses two issues that are of particular significance to states: whether the subject matter of the dispute is capable of settlement by arbitration under the national law of the enforcing country (i.e., arbitrability in the international sense) and whether enforcement of the award is contrary to the public policy of the enforcing country.²⁸⁰

Article V also contains several provisions regarding the law that is to apply to any particular issue. Objections arising under Article V(1) are considered largely pursuant to the law that has been chosen by the parties, either explicitly in their agreement or implicitly through the choice of the arbitral seat.²⁸¹ This means that the law relevant to inquiries under Article V(1) may be different than that of the enforcing court.²⁸² However, objections under Article V(2) are explicitly made subject to the law of the enforcing court.²⁸³

a. Article V(1)(a)—incapacity of the parties or invalidity of the agreement

The first ground for objection to enforcement of a foreign arbitral award under the New York Convention involves the incapacity of the parties or the invalidity of the agreement.²⁸⁴ Either or both of these issues may have been raised earlier in the proceeding. The matter may have been determined in a U.S. or other court, or it may have been considered by the arbitral tribunal, depending on how questions regarding *competence-competence* and gateway issues developed.²⁸⁵

Although the parties are free to raise this issue again at the time of enforcement, a U.S. judge may conclude that an earlier judicial deter-

279. See New York Convention, *supra* note 6, art. V.

280. See *id.* art. V(2).

281. See *id.* art. V(1).

282. See *id.*

283. See *id.* art. V(2).

284. See *id.*, art. V(1)(a).

285. See *supra* notes 109–32 and accompanying text.

mination on this issue, by a U.S. or other court, precludes a similar objection in an enforcement proceeding.²⁸⁶ The enforcing court may also choose to defer to the arbitral tribunal on this issue, although the amount of deference given to the arbitrators' decision may depend on whether the parties agreed to have matters such as these determined by the arbitrators.²⁸⁷

The most difficult issue arising under Article V(1)(a) involves the determination of the applicable law. Parties very seldom designate the law under which the arbitration agreement is to be construed, although they often include a general choice of law provision elsewhere in the contract.²⁸⁸ The question therefore becomes whether a general choice of law provision should be construed to govern issues relating to incapacity or invalidity in an Article V(1)(a) analysis.

U.S. courts have responded to this question in a variety of ways. Some judges apply the law designated in the general choice of law provision to questions arising under Article V(1)(a), while others apply federal common law in an attempt to ensure uniformity of treatment across the nation.²⁸⁹

Some U.S. federal courts have identified a number of problems with both approaches. First, courts using the law designated in the general choice of law provision fail to take heed of the principle of separability.²⁹⁰ Indeed, the U.S. Supreme Court has stated in a similar context that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other."²⁹¹ The Supreme Court appears to

286. See *Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr, S.A.*, 377 F.3d 1164, 1171–72 (11th Cir. 2004).

287. See *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661–62 (2d Cir. 2005); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293 (11th Cir. 2004); *Telenor Mobile Commc'ns AS v. Storm LLC*, 524 F. Supp. 2d 332, 335–52 (S.D.N.Y. 2007), *aff'd*, 584 F.3d 396 (2d Cir. 2009); Born, *supra* note 9, at 2790–91.

288. See Born, *supra* note 9, at 444–45; Gaillard & Savage, *supra* note 48, ¶ 425.

289. See *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 577–78 (7th Cir. 2007) (addressing contract with no choice of law provision); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 50–51 (2d Cir. 2004) (applying law named in general choice of law provision); *Westbrook Int'l, LLC v. Westbrook Tech., Inc.*, 17 F. Supp. 2d 681, 683–85 (E.D. Mich. 1998) (not applying law named in general choice of law provision); Born, *supra* note 9, at 449–50.

290. See *supra* notes 109–32 and accompanying text.

291. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995).

be suggesting that general choice of law provisions should be construed to apply only to substantive issues, absent the parties' agreement to the contrary.

Second, it is difficult to justify the application of federal common law to the question of validity and incapacity simply because the motion to enforce the arbitral award is before a U.S. court.²⁹² Indeed, to do so ignores the express language of Article V(1)(a), which states that issues of invalidity and incapacity should be determined by the law of the arbitral seat when the parties have not agreed on an applicable law to address those concerns.²⁹³ Since the arbitral seat is different from the place of enforcement, U.S. law cannot apply to these issues.

A number of U.S. courts have adopted a third approach, which is to follow the express language of Article V(1)(a) and apply the law of the arbitral seat to questions involving incapacity and invalidity, unless the parties have clearly designated another law to address those matters.²⁹⁴ U.S. courts have also recognized that they have the discretion to enforce the award, even if the objecting party has met the technical requirements of Article V(1)(a).²⁹⁵

b. Article V(1)(b)—notice and presentation of one party's case

The second ground for objection under Article V of the New York Convention raises core due process concerns: notice and the opportunity to present one's case.²⁹⁶ Unlike Article V(1)(a), Article V(1)(b) does not indicate the country whose law is to control this issue.²⁹⁷ Commentators have taken the position that "Article V(1)(b) is best

292. See *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Achille Lauro*, 712 F.2d 50, 52–54 (3d Cir. 1983) (discussing interplay of choice of law issues under Articles II and V of the Convention).

293. See New York Convention, *supra* note 6, art. V(1)(a) (referring to "the law to which the parties have subjected [the issue] or, failing any indication thereon, under the law of the country where the award was made"); Born, *supra* note 9, at 453.

294. See *AO Techsnabexport v. Globe Nuclear Serv. & Supply, Ltd.*, 656 F. Supp. 2d 550, 558 (D. Md. 2009), *aff'd*, 404 Fed. App'x 793 (4th Cir. 2010) (applying Swedish law to validity questions relating to arbitration seated in Sweden); *Spier v. Calzaturificio Tecnica, SpA*, 71 F. Supp. 2d 279, 283 (S.D.N.Y. 1999) (applying Italian law to validity questions relating to arbitration seated in Italy).

295. See *Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr, S.A.*, 533 F.3d 1349, 1352 n.5 (11th Cir. 2008).

296. See New York Convention, *supra* note 6, art. V(1)(b).

297. See *id.* art. V(1)(a)–(b).

viewed as providing the basis for uniform international standards of procedural fairness,” which is to be “applied in light of the Convention’s general pro-enforcement objectives.”²⁹⁸

U.S. courts have indicated that the character of the arbitration as an international proceeding must be considered, even when domestic legal principles are invoked.²⁹⁹ Therefore, it is enough if the broad principles of due process and procedural fairness are met, even if the precise means by which these objectives are fulfilled differ from procedures used in U.S. courts.³⁰⁰

c. Article V(1)(c)—difference not contemplated by or within the terms of the submission of arbitration or beyond the scope of the submission to arbitration

The third ground for objection to the enforcement of foreign arbitral awards under the New York Convention focuses on whether the tribunal has in some way exceeded or abused its jurisdiction, either by going beyond or failing to address the matters that were submitted to arbitration.³⁰¹

Most U.S. courts construe the language of Article V(1)(c) narrowly, since arbitral tribunals are presumed to have acted within the scope of their duties.³⁰² One source of potential confusion involves challenges to awards “based on objections to the arbitrators’ substantive contract interpretations or legal conclusions, or to the arbitrators’ procedural rulings.”³⁰³ Neither allegation can be properly made under Article V(1)(c) because substantive objections to the award may not be raised under Article V and arguments about the fairness of the arbitral procedure should fall under Article V(1)(b) or V(1)(d).³⁰⁴

298. Born, *supra* note 9, at 2738; *see also* Lew et al., *supra* note 48, ¶ 26–81.

299. *See* Employers Ins. of Wausau v. Banco de Seguros del Estado, 199 F.3d 937, 943–44 (7th Cir. 1999).

300. *See id.*

301. *See* New York Convention, *supra* note 6, art. V(1)(c).

302. *See* Mgmt. & Tech. Consultants S.A. v. Parsons-Jurden Int’l Corp., 820 F.2d 1531, 1534 (9th Cir. 1987); *Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier (RATKA)*, 508 F.2d 969, 976 (2d Cir. 1974).

303. Born, *supra* note 9, at 2800.

304. *See* New York Convention, *supra* note 6, art. V.

d. Article V(1)(d)—composition of the tribunal or arbitral procedure

Challenges to the composition of the tribunal and the arbitral procedure are the most commonly raised objections to enforcement of a foreign arbitral award under the New York Convention.³⁰⁵ Application of Article V(1)(d) is relatively straightforward in cases in which the parties have agreed to have their arbitration governed by a set of institutional rules. The relevant standards regarding arbitral procedure and the composition of the arbitral tribunal usually are stated in the rules. When considering whether and to what extent the underlying arbitration complied with the designated rules, U.S. courts look not only to the language of the rules themselves but also to previously published arbitral awards (particularly those construing the rules in question, although analogies can be drawn from similar provisions from other arbitral institutions) and scholarly commentary. These sources provide important insights into how arbitral tribunals and institutions—the entities who are entrusted by the parties to make these procedural decisions and who are most familiar with the rules—view the issues raised.³⁰⁶

The situation is slightly more complicated when the parties have neither agreed to abide by any particular set of arbitral rules nor explicitly addressed the disputed issue in their arbitration agreement.³⁰⁷ In these cases, questions regarding the arbitral procedure and composition of the arbitral tribunal are governed by the law of the arbitral seat.³⁰⁸ This means U.S. courts should look to the arbitration law of the seat of arbitration, not that country's national rules of civil procedure, which are not applicable in arbitration absent a very clear party

305. *See id.*, art. V(1)(d).

306. *See* *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (noting arbitrators are “comparatively better able to interpret and to apply” the rules of their arbitral institution than are courts); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 288–89 n.14 (2d Cir. 2003) (considering similarities between different rule sets).

307. *See* *Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 91 (2d Cir. 2005) 91 (upholding parties' agreement in case in which no institutional rules applied).

308. *See* New York Convention, *supra* note 6, art. V(1)(d); *Pactrans Air & Sea, Inc. v. China Nat'l Chartering Corp.*, No. 3:06-cv-369/RS-EMT, 2010 WL 1332085, at *1–2 (N.D. Fla. Mar. 29, 2010).

agreement.³⁰⁹ U.S. law is irrelevant to the determination of these issues.

To be actionable, a procedural irregularity must be relatively egregious. Some U.S. courts faced with objections to enforcement of an arbitral award under Article V(1)(d) have stated that “because of the clear ‘pro-enforcement bias’ of the New York Convention, it is appropriate to ‘set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party.’”³¹⁰ U.S. courts also give a high degree of deference to the decisions of the arbitrators.³¹¹

However, awards will be refused enforcement if the procedure fails to comply with the parties’ agreement. For example, the arbitration agreement in *Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.*, indicated that the parties were each to appoint an arbitrator, and, “[i]n the event of disagreement between these two arbitrators, they shall choose a third arbitrator who will constitute with them the Board of Arbitration. Upon the failure of the two arbitrators to reach agreement upon the choice of a third arbitrator,” one of the two party-appointed arbitrators could make a request to the President of the Tribunal of Commerce of the Seine to appoint the third arbitrator.³¹² Following some initial discussions between the two party-appointed arbitrators regarding the scope of the dispute and basic procedural issues, one arbitrator contacted the President of the Tribunal of Commerce of the Seine to appoint a chair, even though the two party-appointed arbitrators had not discussed either the merits of the case or the identity of a third arbitrator. A third arbitrator was eventually selected by an

309. See *In re Arbitration Between InterCarbon Bermuda, Ltd. and Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 72 (S.D.N.Y. 1993).

310. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936, 945 (S.D. Tex. 2001) (quoting *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, No. 90-0169, 1992 WL 122712 (D.D.C. May 29, 1992)).

311. See *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 643–44 (9th Cir.) *cert. denied*, 131 S. Ct. 832 (2010); *Compagnie des Bauxites de Guinee*, No. 90-0169, 1992 WL 122712, at *5 (stating that “[t]he Court does not believe that section 1(d) of Article V was intended, as CBG argues, to permit reviewing courts to police every procedural ruling made by the Arbitrator and to set aside the award if any violation of ICC procedures is found”).

312. *Encyclopaedia Universalis*, 403 F.3d at 87 n.1.

appointing institution, despite the fact that the two party-appointed arbitrators had never conferred regarding the identity of the third panelist.

The parties were ordered to proceed with the arbitration over the objection of the party whose arbitrator had not initiated the request for the third panelist, and an award was rendered against the objecting party despite the non-attendance of the objecting party and the party's appointed arbitrator. When the award was brought to be enforced in the United States, the motion was denied on the grounds that the parties' appointment procedure had not been followed, since the party-appointed arbitrators had not had a chance to confer regarding the appointment of the third panelist before the letter was sent to the neutral appointing entity.³¹³

e. Article V(1)(e)—award not yet binding or set aside by a competent authority

The final ground for objection under Article V(1) of the New York Convention involves an award that is not yet binding or that has been set aside by a competent authority.³¹⁴ An award is considered “‘binding’ for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being ‘binding.’”³¹⁵

Concerns about awards being “not yet binding” can also arise in the context of motions to enforce partial or interim awards.³¹⁶ The analysis in these cases focuses on whether immediate enforcement is necessary to protect the final award or whether the parties have expressed an interest in immediate resolution of this particular issue.³¹⁷ In determining whether an award should be considered final, courts

313. See New York Convention, *supra* note 6, art. V(1)(d); *Encyclopaedia Universalis*, 403 F.3d at 90–91.

314. See New York Convention, *supra* note 6, art. V(1)(e).

315. *Fertilizer Corp. of India v. IDI Mgmt. Inc.*, 517 F. Supp. 948, 958 (S.D. Ohio 1981) (citation omitted).

316. See *Hall Steel Co. v. Metalloyd Ltd.*, 492 F. Supp. 2d 715, 717–18 (E.D. Mich. 2007).

317. See *id.* at 719–20.

typically look past the nomenclature of “partial” or “interim” awards and focus on the substance of the award.³¹⁸

The second element of Article V(1)(e) addresses whether the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”³¹⁹ This language is the genesis for the U.S. distinction between courts with primary jurisdiction and those with secondary jurisdiction, and for the conclusion that only courts of primary jurisdiction are considered capable of setting aside an arbitral award.³²⁰ Decisions rendered by courts with secondary jurisdiction have no effect elsewhere in the world, and enforcing courts should not consider those decisions as part of the enforcement analysis.³²¹

Questions arise as to the criteria that should be used to determine whether an award that has been set aside in the primary jurisdiction nevertheless should be enforced in the United States. These criteria also may influence whether a U.S. court considers it proper to stay enforcement proceedings pending a decision by a court with primary jurisdiction on a motion to vacate.³²²

The New York Convention provides no guidance on these issues, and no consensus exists internationally as to how enforcing courts should treat an award that has been set aside by a competent court. U.S. courts demonstrate some consistency in this area, although a few outlying opinions exist. The first U.S. case to deal with this issue was *Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt*, which ultimately enforced an Egyptian arbitral award notwithstanding the fact that an Egyptian court had nullified the award on the grounds that the arbitral tribunal had misapplied Egyptian law.³²³ The U.S. judge pointed to several aspects of the Egyptian judicial process that raised con-

318. See *Publicis Comm. v. True North Comm., Inc.*, 206 F.3d 725, 729 (7th Cir. 2000).

319. New York Convention, *supra* note 6, art. V(1)(e).

320. See *supra* notes 93–108 and accompanying text.

321. See *Nicor Int’l Corp. v. El Paso Corp.*, 292 F. Supp. 2d 1357, 1375 (S.D. Fla. 2003).

322. See New York Convention, *supra* note 6, art. VI (stating an enforcing court “may, if it considers it proper, adjourn the decision on the enforcement of the award” pending a decision on a motion made to a competent authority to set aside or suspend an award).

323. 939 F. Supp. 907, 911 (D.D.C. 1996).

cerns about the legitimacy of the order nullifying the award. For example, the Egyptian decision appeared to espouse a “suspicious view of arbitration” that reflected “precisely the type of technical argument that U.S. courts are not to entertain when reviewing an arbitral award.”³²⁴ Furthermore, the Egyptian court’s decision was made in spite of a contractual provision stating that Egypt would not seek review of the award. This suggested that non-enforcement of the award by the U.S. court “would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under” the laws and courts of the arbitral seat.³²⁵

Because the Egyptian court acted in a manner contrary to both a fundamental U.S. public policy prohibiting substantive judicial review of arbitral awards and the parties’ express agreement waiving any such review, the court in *Chromalloy* held that the decision to set aside the award at the place where it was rendered was not sufficient reason to block enforcement of the award in the United States. Instead, the U.S. court exercised its discretionary power and allowed enforcement of the award, despite the fact that the objection technically met the criteria for non-enforcement outlined in Article V(1)(e).³²⁶

Chromalloy emphasized the fact that a court faced with an objection under Article V(1)(e) of the Convention has the discretion to enforce or not to enforce the award. Other U.S. courts have also recognized this discretionary power, which is made explicit in Article V(1)(e).³²⁷

324. *See id.*

325. *Id.*

326. *See* New York Convention, *supra* note 6, art. V(1)(e); *Chromalloy*, 939 F. Supp. at 912.

327. *See* New York Convention, *supra* note 6, art. V(1)(e) (finding enforcement “may be refused”); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003); *Baker Marine Ltd. v. Chevron Ltd.*, 191 F.3d 194, 197 n.3 (2d Cir. 1999). One U.S. court took the unusual position that there is a mandatory duty to deny enforcement of an award that has been set aside at the arbitral seat. *See Termorio S.A. E.S.P. v. Eltranta S.P.*, 487 F.3d 928, 936 (D.C. Cir. 2007). However, this case contravenes the express provisions of the New York Convention and the weight of U.S. authority. *See* New York Convention, *supra* note 6, art. V(2)(a) (noting that the power of non-enforcement is discretionary).

U.S. courts have identified several criteria that may be relevant in determining whether a U.S. court should enforce an award that has been set aside at the seat. *Chromalloy* suggests that judges reviewing this issue examine the grounds on which the set-aside was founded.³²⁸ If the reason for the set-aside is included in Article V of the New York Convention, then it may be appropriate to deny enforcement in the United States as well.³²⁹ On the other hand, annulments that appear to be based on “parochial” or self-protective rationales might not be considered sufficient grounds for non-enforcement elsewhere.³³⁰

f. Article V(2)(a)—subject matter not capable of settlement by arbitration

The second set of objections to enforcement involves those that fall under Article V(2). These provisions may be raised by a party or by the court. As noted earlier, the court’s power to deny enforcement of a foreign arbitral award under Article V(2) is discretionary, not mandatory.³³¹

The first of the two grounds for non-enforcement found in Article V(2) deals with arbitrability in the international sense, that is, whether a particular country permits certain types of disputes to be resolved in arbitration.³³² Article V(2)(a) therefore allows non-enforcement of an award in cases in which “the subject matter of the difference is not capable of settlement by arbitration” under the law of the enforcing state.³³³

This language resembles that of Article II(1), which describes a contracting state’s affirmative obligation to recognize arbitration agreements “concerning a subject matter capable of settlement by arbitration.”³³⁴ The similarity of language used in these two provisions suggests that questions of arbitrability should be addressed in a paral-

328. See *Chromalloy*, 939 F. Supp. at 911–12.

329. See *Spier v. Calzaturificio Tecnica, SpA*, 71 F. Supp. 2d 279, 287 (S.D.N.Y. 1999) (denying enforcement where the underlying award was determined to be in excess of jurisdiction).

330. See *Chromalloy*, 939 F. Supp. at 911–12.

331. See New York Convention, *supra* note 6, art. V(2) (stating enforcement “may . . . be refused”).

332. See *id.* art. V(2)(a).

333. *Id.*

334. *Id.* art. II(1).

lel manner. In other words, if the subject matter of an arbitration agreement cannot support a motion to compel arbitration, it cannot support a motion to enforce an award arising out of an arbitration based on that agreement, and vice versa.³³⁵

Like other grounds for objection to enforcement under the New York Convention, this provision is to be construed narrowly.³³⁶ Furthermore, “it is essential . . . to distinguish between matters which are non-arbitrable in a domestic context and those which are non-arbitrable in an international context. In many jurisdictions, non-arbitrability rules are broader in domestic than in international matters.”³³⁷ The U.S. Supreme Court has recognized that there are times when it is “necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”³³⁸

The FAA is silent on what matters are to be considered arbitrable, which means that federal judges must look to case law, policy, and substantive statutes to assess arbitrability.³³⁹ Case law demonstrates a clear and consistent approach to arbitrability, such that all claims are deemed arbitrable unless Congress “expressly directed” a contrary result.³⁴⁰ Enforcement of arbitration agreements and awards may be appropriate in the international realm “even assuming that a contrary result would be forthcoming in a domestic context.”³⁴¹ To be non-arbitrable under Article V(2)(a), matters must reflect a “special national interest vested in their resolution.”³⁴²

These and other precedents illustrate that a vast array of types of disputes are considered arbitrable in the United States. Indeed, the

335. See Born, *supra* note 9, at 2863.

336. See *Saudi Iron & Steel Co. v. Stencor USA Inc.*, No. 97 CIV 5976(DLC), 1997 WL 642566, at *3 (S.D.N.Y. Oct. 17, 1997).

337. Born, *supra* note 9, at 775.

338. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 (1985).

339. See Born, *supra* note 9, at 781.

340. See *Mitsubishi Motors*, 473 U.S. at 639–40 n.21.

341. *Id.* at 627.

342. *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RATKA)*, 508 F.2d 969, 975 (2d Cir. 1974); see New York Convention, *supra* note 6, art. V(2)(a).

United States is known to have one of the broadest approaches to arbitrability in the world.³⁴³

g. Article V(2)(b)—public policy

The final ground for non-enforcement of a foreign arbitral award under the New York Convention is one of the most cited as well as one of the least successful. Article V(2)(b) allows (but does not require) courts to refuse recognition and enforcement of foreign arbitral awards on the basis of public policy of the state in which enforcement is sought. The public policy exception is construed narrowly.³⁴⁴ Even though the Convention refers clearly to the public policy of the enforcing state,

it has been a consistent theme of recognition decisions under Article V(2)(b) to interpret national public policies in a manner that is consistent, insofar as possible, with the objectives of the Convention and the public policies and interests of other Contracting States. This approach has manifested itself in two principal ways: (a) the application of “international” public policies, rather than domestic public policies, under Article V(2)(b), and (b) the exercise of a substantial degree of restraint and moderation in the application of public policies under Article V(2)(b).³⁴⁵

Thus, U.S. courts have noted that

[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of “public policy.” Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this *supranational* emphasis.³⁴⁶

Other U.S. courts have limited application of Article V(2)(b) to “only those circumstances ‘where enforcement would violate our most

343. See *supra* notes 109–32 and accompanying text.

344. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004).

345. Born, *supra* note 9, at 2833.

346. *Parsons & Whittemore*, 508 F.2d at 974 (emphasis added).

basic notions of morality and justice.”³⁴⁷ Article V(2)(b) does not permit non-enforcement based on “erroneous legal reasoning or misapplication of law,” two theories that are reminiscent of the highly controversial principle of “manifest disregard of law” seen in some vacatur cases.³⁴⁸

4. Preclusive effects of an arbitral award

Parties to arbitration have raised the preclusive effects of an international arbitration, invoking either the doctrine of *res judicata* (claim preclusion) or issue preclusion. These concepts typically affect only the original parties to the suit. *Res judicata* forbids the relitigation of a particular claim between the parties, and issue preclusion prevents the relitigation of a particular issue of law or fact. Issue preclusion may also be asserted, offensively or defensively, in disputes involving a non-party to an arbitration.

Principles of preclusion clearly operate in international commercial arbitration, though there is no consensus on the precise rules that apply. The New York Convention and the FAA are silent on this issue, although under the Convention, contracting states are to “enforce” arbitral awards and recognize such awards as “binding.”³⁴⁹

Although there is not a great deal of case law on this issue, analogies are often made to preclusive principles developed in litigation. “Under [the doctrine of] issue preclusion, also known as collateral estoppel, ‘once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.’”³⁵⁰ This proposition applies equally in the arbitral realm, since “an arbitrator generally has the power to determine whether a prior award is to be given preclusive effect.”³⁵¹

347. Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396, 411 (2d Cir. 2009) (citation omitted).

348. See *supra* notes 257–61 and accompanying text; *Karaha Bodas Co.*, 364 F.3d at 306.

349. New York Convention, *supra* note 6, art. III.

350. Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC, 638 F.3d 572, 579 (8th Cir. 2011) (citations omitted).

351. *Id.* (citation omitted).

In proper circumstances, an arbitral award may have preclusive effect over a non-party.³⁵² There is no requirement that the award be confirmed or that the tribunal have resolved every outstanding issue.³⁵³ Even if an award does not have preclusive power, it may still be persuasive in a later dispute.³⁵⁴

Issue preclusion is not the only type of preclusion that can arise in the arbitral realm. Arbitral awards are regularly considered to have *res judicata* effect as to all claims heard by the arbitrator, an approach that logically follows the principle that arbitration constitutes a final and binding dispute resolution mechanism.³⁵⁵ However, recognition of the principle of *res judicata* status does not mean that a party may not object to the enforcement of that award under the New York Convention.³⁵⁶

Claim preclusion does not operate in precisely the same way in arbitration as it does in litigation because arbitration is a contractual construct that can limit the claims brought in a particular proceeding.³⁵⁷ Nevertheless, courts have applied the concept of claim preclusion in the arbitral context. For example, a claimant who had “brought an action against the same party, complaining of the same wrongful discharge based on pursuit of worker’s compensation benefits, which resulted in a final arbitration decision on the matter,” was barred from bringing a subsequent action for retaliatory discharge, based on the existence of the arbitral award.³⁵⁸

There is some debate as to whether an arbitral award has preclusive effect immediately after it is rendered or whether some judicial action must first take place. In the United States, an award has preclusive effect after being confirmed under the FAA because the award

352. See *Universal Am. Barge Corp. v. J-Chem., Inc.*, 946 F.2d 1131, 1139, 1142 (5th Cir. 1991) (involving a party who had allegedly been “vouched” into the arbitration); *In re Kaiser Group Int’l, Inc.*, 375 B.R. 120, 128–29 (Bankr. D. Del. 2007) (involving alleged privity between a corporate parent and a subsidiary).

353. See *Asahi Glass Co. v. Toledo Eng’g Co.*, 505 F. Supp. 2d 423, 430–31 & n.2 (N.D. Ohio 2007).

354. See *Acosta v. Master Maint. & Constr. Inc.*, 452 F.3d 373, 377–78 n.7 (5th Cir. 2006).

355. See *FleetBoston Fin. Corp. v. Alt*, 638 F.3d 70, 79 (1st Cir. 2011).

356. See *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992).

357. See *Wolf v. Gruntal & Co.*, 45 F.3d 524, 528 (1st Cir. 1995).

358. *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1147–48 (10th Cir. 2007).

then holds the status of a civil judgment as well as an arbitral award.³⁵⁹ At one time, courts appeared hostile to granting *res judicata* value to anything other than a confirmed award.³⁶⁰ However, U.S. courts have granted preclusive effect to arbitral awards immediately after they are rendered.³⁶¹

V. Special Issues Regarding Parties to International Commercial Arbitration

The following discussion addresses issues that are not related to specific procedural motions: actions involving non-signatories, multiparty arbitrations, and state actors.

A. *Non-signatories*

Only parties who have signed an arbitration agreement are bound by its terms. However, international proceedings involving non-signatories give rise to a few issues that do not exist in domestic matters.

Disputes involving non-signatories often focus on whether the alleged non-signatory has signed the relevant document or documents. Under the New York Convention, an arbitration agreement is only enforceable if it involves an “agreement in writing,” which includes “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”³⁶²

U.S. courts are divided on their analysis of the writing requirement in international commercial arbitration.³⁶³ For example, courts take different approaches to the question whether the relevant document or documents need to be signed by both parties.³⁶⁴ There also is no con-

359. See 9 U.S.C. §§ 207, 302 (2012).

360. See *Jacobson v. Fireman’s Fund Ins. Co.*, 111 F.3d 261, 267 (2d Cir. 1997).

361. See *id.* at 267–68; *Asahi Glass Co. v. Toledo Eng’g Co.*, 505 F. Supp. 2d 423, 430–31 & n.2 (N.D. Ohio 2007).

362. New York Convention, *supra* note 6, art. II.

363. See S.I. Strong, *What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 *Stan. J. Int’l L.* 47 (2012).

364. Compare *Kahn Lucas Lancaster, Inc. v. Lark Int’l, Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999), *partially abrogated on other grounds, Sarhank Group*, 404 F.3d at 660 n.2, with *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 696 (5th Cir. 1994); see also *Smith/Enron Cogeneration Ltd. P’ship, Inc. v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 92 (2d Cir. 1999).

sensus as to whether and to what extent parties can rely on the definition of a written agreement that is reflected in Chapter 2 of the FAA rather than the definition contained in Article II(2) of the New York Convention.³⁶⁵

The United States is not the only country to struggle with these issues. Given the great need for predictability in this area, the international arbitral community has attempted to clarify the writing requirement through a formal recommendation issued by UNCITRAL in 2006.³⁶⁶ This document recognizes that the drafters of the New York Convention hoped that “greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes.”³⁶⁷ The UNCITRAL Recommendation therefore suggests that “the circumstances described” in Article II(2) regarding the definition of an “agreement in writing” not be considered “exhaustive,” thus making it easier for courts to find that an arbitration agreement exists.³⁶⁸

If a party is unable to meet the definition of an “agreement in writing,” that party may nevertheless be brought into an arbitration proceeding under one of the many theories used for this purpose. These theories include “agency (actual and apparent), alter ego, implied consent, ‘group of companies,’ estoppel, third-party beneficiary, guarantor, subrogation, legal succession and ratification of assumption.”³⁶⁹ A number of these concepts have been used in international disputes as well.³⁷⁰

365. See New York Convention, *supra* note 6, art. II(2); 9 U.S.C. §§ 2, 202; *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 45 (1st Cir. 2008).

366. See UNCITRAL, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17 (July 7, 2006) [hereinafter UNCITRAL Recommendation].

367. *Id.*

368. *Id.*; see also *Coutinho Caro & Co. U.S.A. v. Marcus Trading, Inc.*, No. 3:95CV2362, 2000 WL 435566, at *11 (D. Conn. Mar. 14, 2000) (noting Article II(2) should be read broadly to effectuate the purpose of the Convention).

369. *Thomson-CSF, SA v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995).

370. See *Invista S.A.R.L. v. Rhodia, Ltd.*, 625 F.3d 75, 85 (3rd Cir. 2010); *Inter-Gen NV v. Grina*, 344 F.3d 134, 145–50 (1st Cir. 2003).

When considering the standards that should apply to non-signatories in international commercial arbitration,

[t]he touchstone should be whether the parties intended that a non-signatory be bound by and benefit from the arbitration clause. Answering that question cannot be achieved through abstract generalizations, but requires focused consideration of the arbitration clause's language and the relations and dealings among the parties in a specific factual setting.³⁷¹

B. Multiparty Arbitration

Multiparty arbitration proceedings are being used with increasing frequency. A significant proportion of the caseload of several international arbitral institutions involves multiparty proceedings.³⁷² Multiparty proceedings arise in a variety of contexts, including consolidation of proceedings, joinder and intervention of parties, and class or collective arbitration.

Multiparty disputes often include debates about non-signatories; the party who is to be brought into an existing bilateral arbitration may not have signed the same arbitration agreement as the other parties. Multiparty arbitrations can also arise in situations in which all the parties have signed the same arbitration agreement. Accordingly, the multiparty analysis must be conducted separately from the non-signatory analysis, even if both issues arise in a particular dispute and even if certain legal theories—such as that involving groups of companies—are used to justify both the inclusion of a non-signatory and the use of a multiparty procedure.

Neither the New York Convention nor the Panama Convention expressly addresses multiparty arbitration, although these conventions have been held to apply to multiparty proceedings.³⁷³ Similarly, though the FAA is also silent on the issue of multiparty arbitration,

371. Born, *supra* note 9, at 1206.

372. See Lew et al., *supra* note 48, ¶ 16-1 (noting that the percentage of multiparty arbitrations administered by the ICC rose from 20% to 30% during the period 1995 to 2001); Martin Platte, *When Should an Arbitrator Join Cases?* 18 *Arb. Int'l* 67, 67 (2002) (noting that more than 50% of LCIA arbitrations reportedly involve more than two parties).

373. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936, 946 (S.D. Tex. 2001); Born, *supra* note 9, at 2073–74 (citing Articles II(1) and II(3) of the New York Convention).

numerous U.S. courts have upheld multiparty proceedings. The arbitrator usually decides whether multiparty treatment is appropriate under the parties' agreement unless the parties have agreed otherwise.³⁷⁴

Multiparty arbitration may be based on implied consent, as demonstrated by the language contained in the agreement between the parties as well as the governing law and arbitral rules, so that a court may determine whether the parties have demonstrated the requisite consent to multiparty arbitration.³⁷⁵ This approach is consistent with international practice.³⁷⁶

C. State Actors

U.S. courts may also face situations involving international arbitral proceedings brought by or against states or state-affiliated entities. These are not treaty-based arbitrations, such as those discussed above,³⁷⁷ nor are they state-to-state proceedings. Instead, these disputes involve states and state agencies or instrumentalities behaving as private commercial actors.

Disputes involving public actors give rise to the same kinds of issues and problems that arise in purely private disputes, with one additional element: foreign states, agencies, and instrumentalities may object to the jurisdiction of a U.S. court on the grounds of sovereign immunity.³⁷⁸ Such objections usually implicate a specific exception to immunity under the Foreign Sovereign Immunities Act (FSIA), which states:

- (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

374. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion); *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 586–87 (3d Cir. 2007); *Safra Nat'l Bank of New York v. Penfold Inv. Trading, Ltd.*, No. 10 Civ. 8255(RWS), 2011 WL 1672467, at *3–5 (S.D.N.Y. Apr. 20, 2011).

375. See *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 462, 477–78 (S.D.N.Y. 2010) (noting an agreement to allow multiparty proceedings can be implied, based on, among other things, contractual provisions and structure); Lew et al., *supra* note 48, ¶ 16-8.

376. See S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?* 30 Mich. J. Int'l L. 1017, 1059–83 (2009).

377. See *supra* notes 2–3 and accompanying text.

378. See 28 U.S.C. § 1603 (2012).

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....

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.³⁷⁹

Alternatively, states that are parties to arbitration agreements may be said to have waived their immunity implicitly or explicitly.³⁸⁰

Because the statute only mentions motions to compel arbitration and motions to enforce arbitral awards, this raises the question whether a U.S. court has jurisdiction over a foreign state or state agency in a proceeding involving a motion for provisional relief. There is little authority on this issue, although courts have accepted jurisdiction over a foreign state in cases involving enforcement of an interim order regarding prejudgment security.³⁸¹ Attempting to stay an improperly initiated arbitration will not necessarily result in loss of sovereign immunity.³⁸²

For the most part, international commercial arbitration treats state actors the same as non-public parties. A state entity can be brought into an arbitration as a non-signatory.³⁸³

379. *Id.* § 1605(a)(6).

380. *See id.* § 1605(a)(1).

381. *See Banco de Seguros del Estado v. Mut. Marine Offices, Inc.*, 230 F. Supp. 2d 362, 367–72 (S.D.N.Y. 2002), *aff'd*, 344 F. 3d 255 (2d Cir. 2003).

382. *See Republic of Ecuador v. Chevron Texaco Corp.*, 376 F. Supp. 2d 334, 371–72 (S.D.N.Y. 2005).

383. *See U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 146 (2d Cir. 2001); Born, *supra* note 9, at 1203.

One exception to this general rule is that foreign states and state agencies are distinguishable from private parties in that “foreign states are not ‘persons’ entitled to rights under the Due Process Clause” of the U.S. Constitution.³⁸⁴ Thus, parties bringing a motion to compel arbitration or enforce an arbitral award against a foreign state do not have to demonstrate that a U.S. court has personal jurisdiction over the foreign state in the constitutional sense (i.e., that the minimum contacts test has been met). U.S. courts have not yet addressed whether and to what extent this principle extends to other state-affiliated entities, such as state-owned foreign corporations.³⁸⁵

VI. Conclusion

International commercial arbitration is a complicated area of law requiring detailed knowledge not only of domestic legal principles but also of international law and practice. The U.S. Supreme Court has recognized the unique position that international commercial arbitration holds in the world of dispute resolution and has instructed lower federal courts to show great deference to international norms in order to ensure the consistency and predictability that is vital to the effective functioning of the global economy.³⁸⁶

Although many of the legal principles applicable to domestic arbitration appear similar to those used in international disputes, the two mechanisms are not identical. Some procedures, practices, and policies are entirely unique to international commercial arbitration. Courts also must rely on a variety of legal authorities that are not commonly considered in domestic disputes, including foreign statutes and judicial opinions, arbitral rules and awards, and scholarly treatises and commentary. Furthermore, courts must be cognizant of U.S. treaty obligations. All of these issues can make litigation involving international commercial arbitration particularly challenging.

Perhaps the most challenging concern facing U.S. courts involves understanding the way that U.S. law interacts with international law.

384. See *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009).

385. *Id.* at 401.

386. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985).

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This inquiry not only involves a textual analysis of both the FAA and the relevant international instrument (typically the New York Convention but also possibly the Panama Convention) but also requires an understanding of how the issue facing the court affects proceedings in foreign courts and the arbitration itself. The task is further complicated by the fact that the New York and Panama Conventions are intended to be interpreted consistently across national borders; courts must consider international consensus on how treaty provisions are to be judicially interpreted and applied. As a result, courts can expect to see parties provide an increasing number of references to foreign law and international commentary, two principal sources of international consensus.

International commercial arbitration already is the preferred means of resolving cross-border business disputes. As cross-border business opportunities for and with U.S. citizens and companies continue to expand, this trend will most likely continue. U.S. federal courts will doubtless be asked to provide assistance in many of these proceedings, primarily through motions to enforce an arbitration agreement or award but also through requests for related types of judicial relief. These judicial proceedings will not be limited to regions of the country that have traditionally been associated with international law and commerce.

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Further Reading

International commercial arbitration is a rapidly growing field, and it is impossible to include a comprehensive list of relevant materials here. However, an extensive bibliography of recent monographs, treatises, specialty journals, and arbitral reporters on international commercial arbitration can be found in S.I. Strong, *Research and Practice in International Commercial Arbitration: Sources and Strategies* (2009). A more condensed version is available in S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 Am. Rev. Int'l Arb. 119 (2009).

Treatises are considered highly persuasive in this area of law, since international commercial arbitration is strongly influenced by international consensus, which is reflected in international commentary. Some well-respected authorities are the following:

- Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999);
- Gary B. Born, *International Commercial Arbitration* (2009);
- Julian D.M. Lew et al., *Comparative International Commercial Arbitration* (2003);
- Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (2008);
- Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (2009);
- W. Laurence Craig et al., *International Chamber of Commerce Arbitration* (2001); and
- International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention* (created with the assistance of the Permanent Court of Arbitration at the Peace Palace, The Hague), available at http://www.arbitration-icca.org/publications/NYC_Guide.html.

Scholarly articles also hold a place of prominence in this field, although not all are found in U.S. law reviews. Authoritative sources from outside the United States include *Arbitration International*, *ASA Bulletin*, the *Journal of International Arbitration*, and the *Yearbook of Commercial Arbitration*.

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Glossary

AAA—the American Arbitration Association, an arbitral institution based in the United States.

amiable compositeur—an arbitrator who is permitted to disregard or alter legal rules when the strict application of those rules would violate equity.

arbitrability (domestic sense)—the private law question relating to whether the parties have submitted a particular dispute to arbitration.

arbitrability (international sense)—the public law question relating to whether a country will permit a particular subject matter to be resolved through arbitration.

arbitral seat (also “seat”)—the legal location of the arbitration and place from which the award is “made” (i.e., rendered or issued); not necessarily the place where hearings are conducted.

CIETAC—the China International Economic and Trade Arbitration Center, an arbitral institution based in China.

competence-competence (also Kompetenz-Kompetenz)—the principle that an arbitral tribunal has jurisdiction to decide its own jurisdiction.

disclosure—the process of exchanging documents and information prior to an arbitral hearing.

double *exequatur*—a system, now abolished by the New York and Panama Conventions, wherein a court at the arbitral seat had to confirm an arbitral award before it could be taken to another jurisdiction to be enforced.

ex aequo et bono—a process whereby an arbitrator is permitted to rely primarily on equitable principles to decide an issue or dispute in justice, fairness, and equity.

exequatur—the process by which a court officially certifies or confirms an arbitral award.

FSIA—the Foreign Sovereign Immunities Act.

functus officio—Latin for “the task is completed.”

ICC—the International Chamber of Commerce, an arbitral institution based in France.

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ICDR—the International Centre for Dispute Resolution, the international arm of the American Arbitration Association, an arbitral institution based in the United States.

ICSID Convention (also “Washington Convention”)—the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

Kompetenz-Kompetenz (also *competence-competence*)—the principle that an arbitral tribunal has jurisdiction to decide its own jurisdiction.

LCIA—the London Court of International Arbitration, an arbitral institution based in the United Kingdom.

lex arbitri—the procedural law of the arbitration.

lex mercatoria—the customary international law merchant.

Model Arbitration Law (also “MAL”)—the UNCITRAL Model Law on International Commercial Arbitration.

New York Convention—the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Panama Convention—the Inter-American Convention on International Commercial Arbitration of 1975.

primary jurisdiction—the place where the arbitral award was rendered (i.e., the arbitral seat) or the place under whose law the award was rendered.

SCC—the Stockholm Chamber of Commerce, an arbitral institution based in Sweden.

seat (also “arbitral seat”)—the legal location of the arbitration and place from which the award is “made” (i.e., rendered or issued); not necessarily the place where hearings are conducted.

secondary jurisdiction—any place without primary jurisdiction.

separability—the idea that the existence, validity, and legality of the underlying contract does not necessarily affect the existence, validity, or legality of the arbitration agreement.

state—in international circles, a nation state, not an individual U.S. state.

UNCITRAL—the United Nations Commission on International Trade Law.

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UNIDROIT—the International Institute for the Unification of Private Law (Institut International Pour l'Unification du Droit Prive), an international organization based in Italy whose purpose is to study the needs and methods of harmonizing and modernizing commercial law.

Washington Convention (also “ICSID Convention”)—the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.

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Appendix 1: Summary of Legal Authorities and Their Uses

International commercial arbitration involves a wide variety of legal authorities. Not all of these materials are relevant to every type of motion that may be brought in a U.S. court. The following table identifies seven categories of sources that may be used in a judicial proceeding related to an international arbitration and lists the primary uses of each of the various sources.

Some of these authorities differ from those that are typically relied upon in litigation. Other authorities are commonly found in litigation but are used slightly differently in arbitration-related proceedings. These differences relate to the way in which international commercial arbitration blends common law and civil law procedures and the emphasis international commercial arbitration places on international consensus and procedural predictability.

This table is intended only as a guide. Courts may of course consider any type of legal authority that they believe is relevant to a particular issue. Further discussion of these and related matters can be found in this guide at the pages listed in the table below. More extensive discussion of legal authorities in international commercial arbitration can be found in S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 Am. Rev. Int'l Arb. 119 (2009), and S.I. Strong, *Research and Practice in International Commercial Arbitration: Sources and Strategies* (2009).

Source	Pages	Primary Use	Further Information
International conventions and treaties	12–14	Enforcement proceedings; some relevance to motions to compel arbitration	The most important treaty is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

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Source	Pages	Primary Use	Further Information
National statutes on arbitration (including, among others, the Federal Arbitration Act)	14–16	Issues concerning the relationship between the court and the arbitration	The most important statute in the U.S. is the Federal Arbitration Act, and most issues relating to internationally oriented disputes fall under Chapter 2 or 3. However, foreign arbitration laws (including those based on the UNCITRAL Model Arbitration Law) may govern certain ancillary matters that arise during U.S. proceedings.
Arbitration agreement and other agreements between the parties	20	Motions to compel; enforcement proceedings	The terms and existence of the arbitration agreement are often central to a motion to compel. If the agreement addresses the procedures to be used during the arbitration, those elements may be relevant during enforcement proceedings.
Case law (U.S. and foreign)	16–18	Various procedural issues before, during, and after the arbitration	Parties may cite to both U.S. and foreign case law, either to define an issue governed by that state's law or to demonstrate international consensus on a particular point. Some caution may need to be exercised, however, since case law does not play the same role in other countries that it does in the U.S., and U.S. law does not govern every issue raised in a U.S. court.

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Source	Pages	Primary Use	Further Information
Arbitral rules	18–20	Enforcement proceedings; some relevance to other motions to the extent the rules indicate the parties' agreement as to the jurisdictional responsibilities of the court and the arbitral tribunal	Arbitral rules primarily relate to the internal ordering of the arbitration and are therefore largely irrelevant to judicial proceedings. However, arbitral rules can be introduced during enforcement proceedings or to identify the relative jurisdiction of the court and the arbitral tribunal.
Arbitral awards other than that between the parties	21–23	Enforcement proceedings; some interim motions	Published arbitral awards constitute persuasive authority on a variety of issues by identifying areas of international consensus. This perspective is most important in questions relating to the construction of arbitral rules, although there are other issues on which international consensus is important.
Scholarly works, including treatises, monographs, and law review articles	23–24	Various procedural issues before, during, and after the arbitration.	Scholarly works are an important means of identifying international consensus, which is a central element of international commercial arbitration. Scholarly works also play a role in civil law jurisdictions that is similar to that of case law in common law jurisdictions.

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Appendix 2: Jurisdictional Checklist

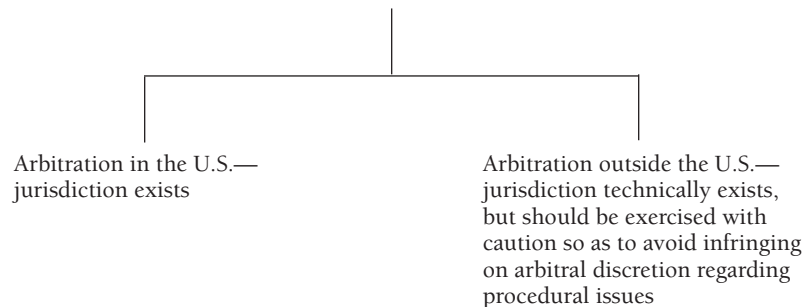
Jurisdictional matters relating to international arbitration can become quite complicated. Not only do U.S. courts have to consider whether a particular issue should be heard by the arbitral tribunal, they also have to consider whether an issue should be adjudicated by a foreign court.

Jurisdictional determinations differ according to the type of motion and the location of the arbitration. Furthermore, there are times when courts should consider whether to decline jurisdiction, even if it technically exists, given the context of an international arbitration dispute.

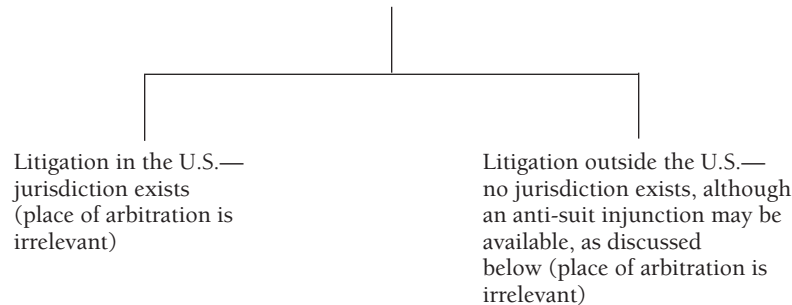
Although each matter must be considered on its own merits, the following checklist provides a framework to illustrate the diverse nature of jurisdictional analyses.

Prior to or at the Initiation of Arbitral Proceedings

Motion to compel arbitration (see pages 37–41)



Motion to stay litigation (see pages 41–42)



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Motion seeking an anti-suit injunction (see pages 42–44)



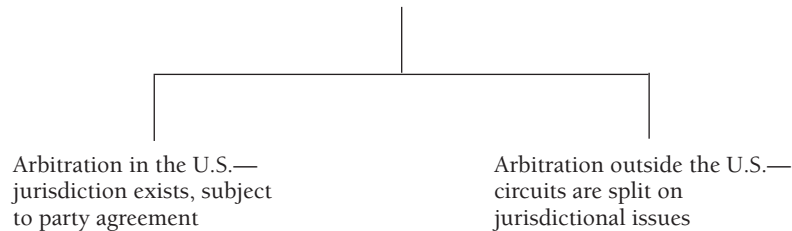
Motion seeking an anti-arbitration injunction (see page 44)



Motion for assistance in the naming of an arbitrator (see pages 45–47)



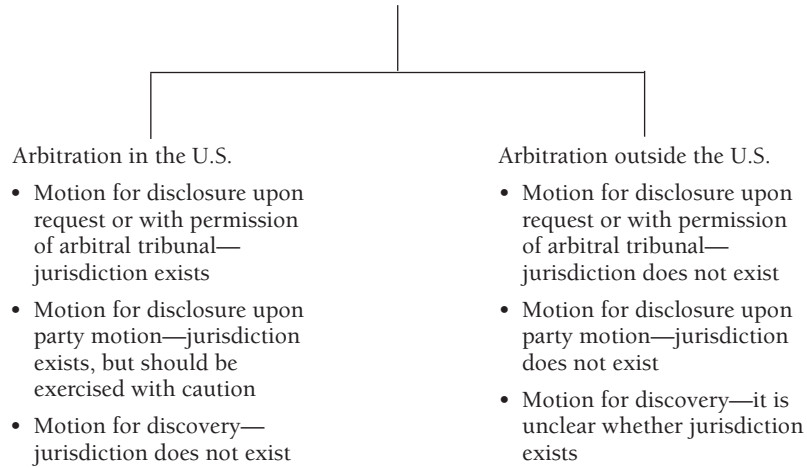
Motion for provisional order in aid of arbitration (see pages 47–49)



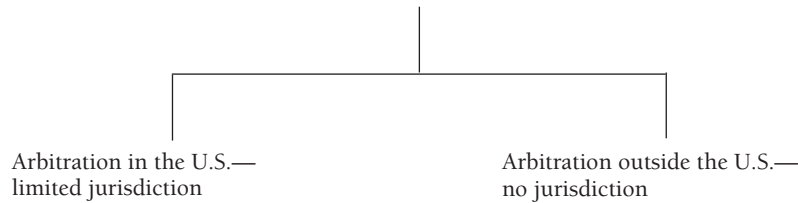
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During Arbitral Proceedings

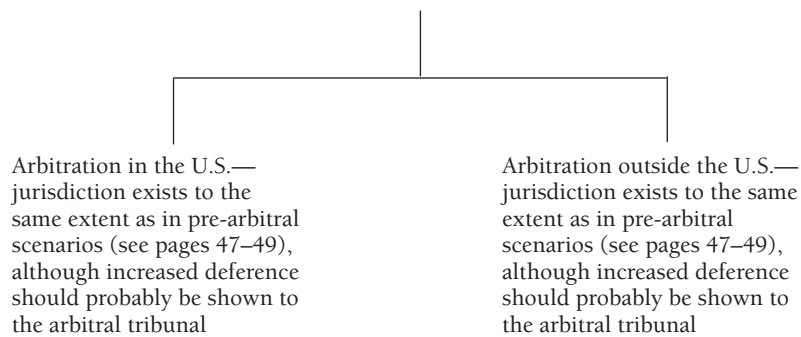
Motion for disclosure or discovery in aid of an international arbitral proceeding (see pages 49–60)



Motion to challenge an arbitrator (see pages 60–61)

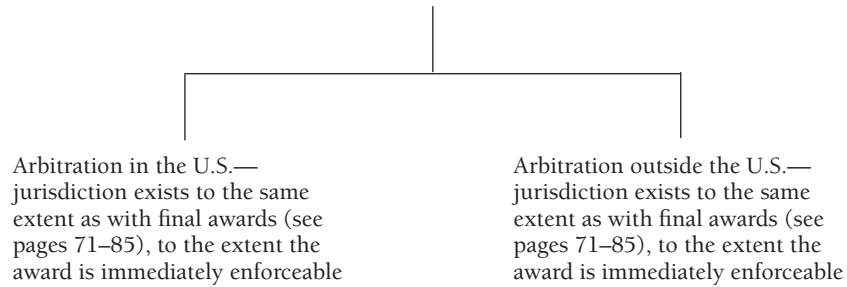


Motion for provisional order in aid of arbitration (see pages 61–62)



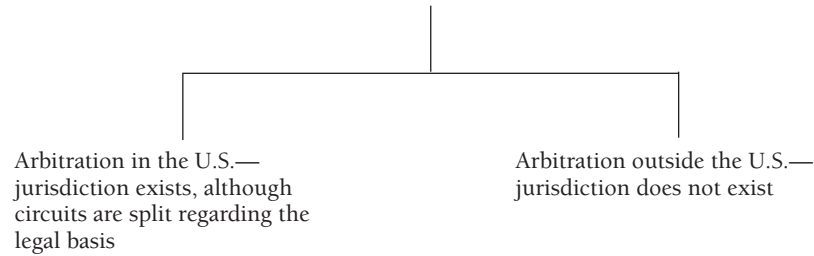
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Motion to enforce interim awards and provisional measures
(see pages 62–63)

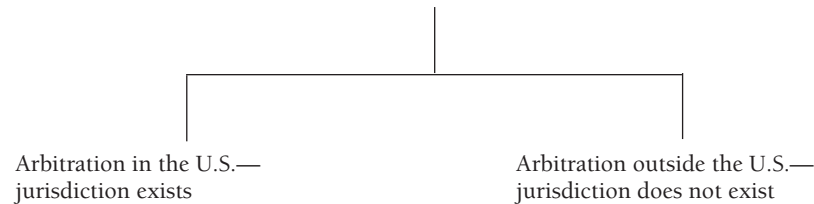


After Arbitral Proceedings Have Concluded

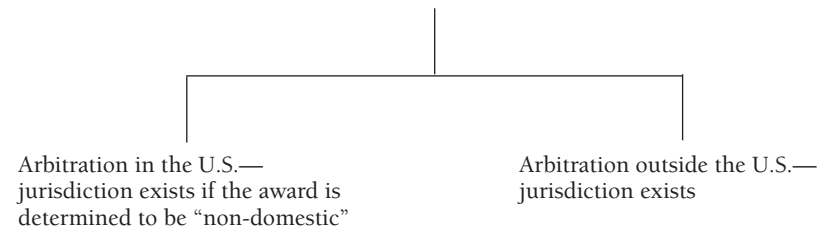
Motion to vacate an arbitral award (see pages 63–70)



Motion to confirm an arbitral award (see pages 70–71)



Motion to enforce an arbitral award (see pages 71–85)



Appendix 3: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518 (New York Convention)

Article I

1. 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.

2. The term “arbitral awards” shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer

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the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. 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:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(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; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. 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:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to

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avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

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3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

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Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Appendix 4: Inter-American Convention on International Commercial Arbitration of 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) (Panama Convention)

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on international commercial arbitration, have agreed as follows:

Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person. Arbitrators may be nationals or foreigners.

Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is

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able to prove to the competent authority of the State in which recognition and execution are requested:

(a) That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made;

(b) That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

(c) That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

(d) That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the law of the State where the arbitration took place; or

(e) That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

(a) That the subject of the dispute cannot be settled by arbitration under the law of that State; or

(b) That the recognition or execution of the decision would be contrary to the public policy (“order public”) of that State.

Article 6

If the competent authority mentioned in Article 5.1(e) has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, post-

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pone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.

Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

Article 10

This Convention shall enter into force on the 30th day following the date of deposit of the second instrument of ratification. For each State ratifying or acceding to the Convention after the deposit of the second instrument of ratification, the Convention shall enter into force on the 30th day after deposit by such State of its instrument of ratification or accession.

Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them. Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective 30 days after the date of their receipt.

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Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE AT PANAMA CITY, Republic of Panama, this thirtieth day of January one thousand nine hundred and seventy-five.

Appendix 5: Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–307

Chapter 1. General Provisions

Section 1. “Maritime transactions” and “commerce” defined; exceptions to operation of title

“Maritime transactions”, as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; “commerce”, as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on applica-

tion of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court

shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

Section 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Section 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

Section 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said per-

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son or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

Section 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

Section 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any 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 unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

Section 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

Section 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

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(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

Section 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Section 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

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Section 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

Section 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

Section 16. Appeals

- (a) An appeal may be taken from—
 - (1) an order—
 - (A) refusing a stay of any action under section 3 of this title,
 - (B) denying a petition under section 4 of this title to order arbitration to proceed,
 - (C) denying an application under section 206 of this title to compel arbitration,
 - (D) confirming or denying confirmation of an award or partial award, or
 - (E) modifying, correcting, or vacating an award;
 - (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
 - (3) a final decision with respect to an arbitration that is subject to this title.
- (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
 - (1) granting a stay of any action under section 3 of this title;
 - (2) directing arbitration to proceed under section 4 of this title;
 - (3) compelling arbitration under section 206 of this title; or
 - (4) refusing to enjoin an arbitration that is subject to this title.

Chapter 2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Section 201. Enforcement of Convention

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.

Section 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Section 203. Jurisdiction; amount in controversy

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.

Section 204. Venue

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Section 205. Removal of cases from State courts

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the

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face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Section 206. Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

Section 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The 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.

Section 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.

Chapter 3. Inter-American Convention on International Commercial Arbitration

Section 301. Enforcement of Convention

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

Section 302. Incorporation by reference

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes

of this chapter "the Convention" shall mean the Inter-American Convention.

Section 303. Order to compel arbitration; appointment of arbitrators; locale

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

Section 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

Section 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

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Section 306. Applicable rules of Inter-American Commercial Arbitration Commission

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

Section 307. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

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Table of Authorities

U.S. Supreme Court Cases

- AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), 25
- Buckeye Check Cashing Inc. v. Cardegna, 546 U.S. 440 (2006), 38
- Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985), 42
- First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995), 38, 40
- Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (plurality opinion), 20, 90
- Hall St. Ass'n, LLC v. Mattel, Inc., 552 U.S. 576 (2008), 69
- Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002), 20, 38, 39, 40, 77
- Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004), 56–58, 59, 60
- Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995), 74
- Medellin v. Texas, 552 U.S. 491 (2008), 13
- Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), 4, 24, 37, 39, 59, 83, 92
- Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co., 460 U.S. 1 (1983), 4, 42
- Preston v. Ferrer, 552 U.S. 346 (2008), 25
- Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), 38
- Rent-a-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010), 40
- Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), 13, 72
- South Carolina v. Katzenbach, 383 U.S. 301 (1966), 36
- Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010), 69
- Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989), 15, 20, 42

U.S. Circuit Court Cases

- Acosta v. Master Maint. & Constr. Inc., 452 F.3d 373 (5th Cir. 2006), 86
- AgGrow Oils, LLC v. Nat'l Union Fire Ins. Co., 242 F.3d 777 (8th Cir. 2001), 42
- Air Line Pilots Ass'n Int'l v. Trans States Airlines, LLC, 638 F.3d 572 (8th Cir. 2011), 85
- Am. Express Fin. Advisors v. Thorley, 147 F.3d 229 (2d Cir. 1998), 47
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- Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132 (2d Cir. 2007), 68
- Argentine Republic v. Nat'l Grid PLC, 637 F.3d 365 (D.C. Cir. 2011), 64
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- Aviall, Inc. v. Ryder Sys., 110 F.3d 892 (2d Cir. 1997), 61
- Baker Marine Ltd. v. Chevron Ltd., 191 F.3d 194 (2d Cir. 1999), 81
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- Borden, Inc. v. Meiji Milk Prods. Co., 919 F.2d 822 (2d Cir. 1990), 47
- Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223 (4th Cir. 1994), 46
- Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571 (7th Cir. 2007), *affirming* 444 F. Supp. 2d 909 (N.D. Ill. 2006), 13, 46, 74
- Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co., 489 F.3d 580 (3d Cir. 2007), 90
- China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274 (2d Cir. 2003), 77
- Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286 (11th Cir. 2004), 71, 74
- Daihatsu Motor Co. v. Terrain Vehicles, Inc., 13 F.3d 196 (7th Cir. 1993), 71
- Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S, 333 F.3d 383 (2d Cir. 2003), 69
- Dynergy Midstream Serv., LP v. Trammochem, 451 F.3d 89 (2d Cir. 2006), 52
- El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa, 341 Fed. App'x 31 (5th Cir. 2009), 58, 60
- Employers Ins. of Wausau v. Banco de Seguros del Estado, 199 F.3d 937 (7th Cir. 1999), 76
- Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc., 403 F.3d 85 (2d Cir. 2005), 72, 77, 78, 79
- FleetBoston Fin. Corp. v. Alt, 638 F.3d 70 (1st Cir. 2011), 86
- Fournelle v. NLRB, 670 F.2d 331 (D.C. Cir. 1982), 21
- Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr, S.A., 377 F.3d 1164 (11th Cir. 2004), 74
- Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr, S.A., 533 F.3d 1349 (11th Cir. 2008), 75

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Francisco v. Stolt Achievement MT, 293 F.3d 270 (5th Cir. 2002), 30
Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic, 582 F.3d 393 (2d Cir. 2009), 36, 92
Gen. Elec. Co. v. Deutz AG, 270 F.3d 144 (3d Cir. 2001), 38
Gibson Guitar Corp. v. MEC Imp. Handelsgesellschaft GmbH, 198 F.3d 245 (table), No. 98-6046, 1999 WL 1073651 (6th Cir. Nov. 17, 1999), 10
Indus. Risk Ins. v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434 (11th Cir. 1998), 19, 65
In re Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.), 579 F.2d 691 (2d Cir. 1978), 21
InterGen NV v. Grina, 344 F.3d 134 (1st Cir. 2003), 41, 88
Invista S.A.R.L. v. Rhodia, Ltd., 625 F.3d 75 (3d Cir. 2010), 88
Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141 (2d Cir. 1992), 86
Jacobson v. Fireman's Fund Ins. Co., 111 F.3d 261 (2d Cir. 1997), 87
Jain v. de Mere, 51 F.3d 686 (7th Cir. 1995), 46
Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd., 186 F.3d 210 (2d Cir. 1999), *partially abrogated on other grounds*, Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005), 87
Karahä Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357 (5th Cir. 2003), 43, 63, 81
Karahä Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir. 2004), 35, 84, 85
Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634 (9th Cir.), *cert. denied*, 131 S. Ct. 832 (2010), 78
LAIF X SPRL v. Axtel, SA de CV, 390 F.3d 194 (2d Cir. 2004), 43
Lander Co. v. MMP Inv., Inc., 107 F.3d 476 (7th Cir. 1997), 29, 65
Lewis v. Circuit City Stores, Inc., 500 F.3d 1140 (10th Cir. 2007), 86
Life Receivables Trust v. Syndicate 102 at Lloyd's of London, 549 F.3d 210 (2d Cir. 2008), 52
Mgmt. & Tech. Consultants S.A. v. Parsons-Jurden Int'l Corp., 820 F.2d 1531 (9th Cir. 1987), 76
McCreary Tire & Rubber Co. v. CEAT, 501 F.2d 1032 (3d Cir. 1974), 48
Mediterranean Shipping Co. S.A. Geneva v. POL-Atlantic, 229 F.3d 397 (2d Cir. 2000), 14
Motorola Credit Corp. v. Uzan, 388 F.3d 39 (2d Cir. 2004), 74
Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184 (2d Cir. 1999), 52, 54, 56

International Commercial Arbitration

- New Regency Prod. Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101 (9th Cir. 2007), 20, 68
- Oklahoma City Assoc. v. Wal-Mart Stores, Inc., 923 F.2d 791 (10th Cir. 1991), 71
- Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Tech., Inc., 369 F.3d 645 (2d Cir. 2004), 43
- Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RATKA), 508 F.2d 969 (2d Cir. 1974), 72, 76, 83, 84
- Polimaster Ltd. v. RAE Sys., Inc., 623 F.3d 832 (9th Cir. 2010), 24
- Publicis Comm. v. True North Comm., Inc., 206 F.3d 725 (7th Cir. 2000), 63, 80
- Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Achille Lauro, 712 F.2d 50 (3d Cir. 1983), 41, 72, 75
- Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148 (9th Cir. 2008), 25, 30
- Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 543 F.3d 744 (5th Cir. 2008), *reh'g en banc* 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom.* Louisiana Safety Ass'n of Timbermen–Self Insurers Fund v. Certain Underwriters at Lloyd's, London, 131 S. Ct. 65 (2010), 25
- Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005), 74, 87
- Simula, Inc. v. Autoliv, Inc., 175 F.3d 716 (9th Cir. 1999), 48
- Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88 (2d Cir. 1999), 87
- Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38 (1st Cir. 2008), 88
- Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617 (7th Cir. 2002), 68
- Sphere Drake Ins. PLC v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994), 87
- Stark v. Sandberg, Phoenix & von Gontard, P.C., 381 F.3d 793 (8th Cir. 2004), 22
- Steel Corp. of Philippines v. Int'l Steel Servs., Inc., 354 Fed. App'x 689 (3d Cir. 2009), 34
- Suarez-Valdez v. Shearson Lehman/American Express, Inc., 858 F.2d 648 (11th Cir. 1988), 54, 55
- Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396 (2d Cir. 2009), 19, 69, 74, 85
- Termorio S.A. E.S.P. v. Eltranta S.P., 487 F.3d 928 (D.C. Cir. 2007), 81
- Thomson-CSF, SA v. Am. Arbitration Ass'n, 64 F.3d 773 (2d Cir. 1995), 88

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- Universal Am. Barge Corp. v. J-Chem., Inc., 946 F.2d 1131 (5th Cir. 1991), 86
- U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135 (2d Cir. 2001), 91
- Westerbeke Corp. v. Daihatsu Motor Co., 304 F.3d 200 (2d Cir. 2002), 66
- Wolf v. Gruntal & Co., 45 F.3d 524 (1st Cir. 1995), 86
- Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15 (2d Cir. 1997), 66

U.S. District Court Cases

- Anwar v. Fairfield Greenwich Ltd., 728 F. Supp. 2d 462 (S.D.N.Y. 2010), 90
- AO Techsnabexport v. Globe Nuclear Serv. & Supply, Ltd., 656 F. Supp. 2d 550 (D. Md. 2009), *aff’d*, 404 Fed. App’x 793 (4th Cir. 2010), 75
- Asahi Glass Co. v. Toledo Eng’g Co., 505 F. Supp. 2d 423 (N.D. Ohio 2007), 86, 87
- Bahrain Telecomm. Co. v. Discoverytel, Inc. 476 F. Supp. 2d 176 (D. Conn. 2007), 48, 49
- Banco de Seguros del Estado v. Mut. Marine Offices, Inc., 230 F. Supp. 2d 362 (S.D.N.Y. 2002), *aff’d*, 344 F.3d 255 (2d Cir. 2003), 47, 91
- Certain Underwriters at Lloyd’s v. Bristol-Myers Squibb Co., 51 F. Supp. 2d 756, 758 (E.D. Tex. 1999), 44
- Certain Underwriters at Lloyd’s, London v. Argonaut, Ins. Co., 444 F. Supp. 2d 909 (N.D. Ill. 2006), *aff’d*, 500 F.3d 571 (7th Cir. 2007), 46
- Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996), 80, 81, 82
- Compagnie des Bauxites de Guinee v. Hammermills, Inc., No. 90-0169, 1992 WL 122712 (D.D.C. May 29, 1992), 78
- Coutinho Caro & Co. U.S.A. v. Marcus Trading, Inc., No. 3:95CV2362, 2000 WL 435566 (D. Conn. Mar. 14, 2000), 88
- Creative Tile Mktg., Inc. v. SICIS Int’l, S.r.L., 922 F. Supp. 1534 (S.D. Fla. 1996), 47
- DRC, Inc. v. Republic of Honduras, 774 F. Supp. 2d 66 (D.D.C. 2011), 7, 25
- Employers Ins. Co. of Wausau v. Certain Underwriters at Lloyd’s of London, No. 09-cv-201-bbc, 2009 WL 3245562 (W.D. Wis. Sept. 29, 2009), 68
- Empresa Generadora de Electricidad ITABO, SA v. Corporación Dominicana de Empresas Eléctricas Estatales, No. 05 CIV 5004 RMB, 2005 WL 1705080 (S.D.N.Y. July 18, 2005), 43

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- Energy Transp., Ltd. v. M.V. San Sebastian, 348 F. Supp. 2d 186 (S.D.N.Y. 2004), 41
- Ex rel.* Application of Winning (HK) Int'l Shipping Co., No. 09-22659-MC, 2010 WL 1796579 (S.D. Fla. Apr. 30, 2010), 57
- Farrell v. Subway Int'l, B.V., No. 11 Civ. 08(JFK), 2011 WL 1086017 (S.D.N.Y. Mar. 23, 2011), 44, 46
- Fertilizer Corp. of India v. IDI Mgmt. Inc., 517 F. Supp. 948 (S.D. Ohio 1981), 30, 79
- Fleming Co. v. FS Kids, L.L.C., No. 02-CV-0059E(F), 2003 WL 21382895 (W.D.N.Y. May 14, 2003), 61
- Hall Steel Co. v. Metalloyd Ltd., 492 F. Supp. 2d 715 (E.D. Mich. 2007), 79
- Harry F. Ortlip Co. v. George Hyman Constr. Co., 126 F.R.D. 494 (E.D. Pa. 1989), 54
- In re* Arbitration Between InterCarbon Bermuda, Ltd. and Caltex Trading & Transport Corp., 146 F.R.D. 64 (S.D.N.Y. 1993), 78
- In re* Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998), 22
- In re* Caratube Int'l Oil Co., LLP, 730 F. Supp. 2d 101 (D.D.C. 2010), 20, 58, 59, 60
- In re* Kaiser Group Int'l, Inc., 375 B.R. 120 (Bankr. D. Del. 2007), 86
- In re* Operadora DB Mexica, S.A. de C.V., No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138 (M.D. Fla. Aug. 4, 2009), 58
- In re* Roz Trading Ltd., 469 F. Supp. 2d 1221 (N.D. Ga. 2006), 60
- Int'l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera, 745 F. Supp. 172 (S.D.N.Y. 1990), 34
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- Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 190 F. Supp. 2d 936 (S.D. Tex. 2001), 78, 89
- Kwasney Co. v. AcryliCon Int'l Ltd., No. 09-13357, 2010 WL 2474788 (E.D. Mich. June 11, 2010), 42
- Levin v. Ripple Twist Mills, Inc., 416 F. Supp. 876 (E.D. Pa. 1976), *dismissed by* 549 F.2d 795 (3d Cir. 1977), 54
- Marubeni Corp. v. Mobile Bay Blue Chip Ctr., No. 02-0914-PL, 2003 WL 22466215 (S.D. Ala. June 16, 2003), 42
- Meadows Indem. Co. v. Baccala & Shoop Ins. Servs., Inc., 760 F. Supp. 1036 (E.D.N.Y. 1991), 39

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- Nicor Int'l Corp. v. El Paso Corp., 292 F. Supp. 2d 1357 (S.D. Fla. 2003), 80
- Pactrans Air & Sea, Inc. v. China Nat'l Chartering Corp., No. 3:06-cv-369/RS-EMT, 2010 WL 1332085 (N.D. Fla. Mar. 29, 2010), 77
- Republic of Argentina v. BG Group PLC, 715 F. Supp. 2d 108 (D.D.C. 2010), 64
- Republic of Ecuador v. Chevron Texaco Corp., 376 F. Supp. 2d 334 (S.D.N.Y. 2005), 91
- Safra Nat'l Bank of New York v. Penfold Inv. Trading, Ltd., No. 10 Civ. 8255(RWS), 2011 WL 1672467 (S.D.N.Y. Apr. 20, 2011), 90
- Saudi Iron & Steel Co. v. Stemcor USA Inc., No. 97 CIV 5976(DLC), 1997 WL 642566 (S.D.N.Y. Oct. 17, 1997), 83
- Scandinavian Reins. Co. v. St. Paul Fire & Marine Ins. Co., 732 F. Supp. 2d 293 (S.D.N.Y. 2010), 68
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- Splosna Plovba of Piran v. Agrelak SS Corp., 381 F. Supp. 1368 (S.D.N.Y. 1974), 71
- State Farm Mut. Auto. Ins. Co. v. Mallela, Civ. No. CV-00-4923, 2002 WL 31946762 (E.D.N.Y. Nov. 21, 2002), *question certified by* 372 F.3d 500 (2d Cir. 2004), *certified question answered by* 4 N.Y.3d 313 (N.Y. 2005), 21
- Teck Metals, Ltd. v. Certain Underwriters at Lloyd's, London, No. 05-411, 2010 WL 252804 (E.D. Wash. Jan. 19, 2010), 42
- Telenor Mobile Commc'ns AS v. Storm LLC, 524 F. Supp. 2d 332 (S.D.N.Y. 2007), *aff'd*, 584 F.3d 396 (2d Cir. 2009), 19, 74
- Ukrnafta v. Carpatsky Petroleum Corp., No. 3:09 MC 265(JBA), 2009 WL 2877156 (D. Conn. Aug. 27, 2009), 60
- URS Corp. v. Lebanese Co. for Dev. & Reconstr. of Beirut Cent. Dist. SAL, 512 F. Supp. 2d 199 (D. Del. 2007), 44
- Vespe Contracting Co. v. Anvan Corp., 399 F. Supp. 516 (E.D. Pa. 1976), 54
- Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654 (S.D.N.Y. 2005), 30
- Westbrook Int'l, LLC v. Westbrook Tech., Inc., 17 F. Supp. 2d 681 (E.D. Mich. 1998), 74
- Wilson v. Lignotock U.S.A. Inc., 709 F. Supp. 797 (E.D. Mich. 1989), 28
- Zurich Ins. Co. v. Ennia Gen. Ins. Co., 882 F. Supp. 1438 (S.D.N.Y. 1995), 11, 18

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U.S. State Cases

Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84 (Tex.), *cert. denied*, 132 S. Ct. 455 (2011), 15

Non-U.S. Cases

Empresa Colombiana de Vías Férreas (Ferrovías) v. Drummond Ltd., 24 Oct. 2003—Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera [Council of State, Administrative Chamber, Third Section], No. 25.25, *aff'd* 22 Apr. 2004, No. 24.261, in Albert Jan van den Berg (ed.), XXIX Y.B. Com. Arb. 643 (2004), 17

Union of India v. McDonnell Douglas Corp. [1993] 2 Lloyd's Rep. 48 (Queen's Bench Division (Commercial Court), England), 34

Case C-185/07, West Tankers Inc. v. Allianz SpA (formerly RAS Riunione Adriatica diSciurtà SpA), [2009] 1 A.C. 1138 (Court of Justice of the European Communities), 43

Arbitral Awards

Interim Award in ICC Case No. 4131, IX Y.B. Com. Arb. 131, 135 (1984), 21

U.S. Legislative Materials

9 U.S.C. §§ 1–307 (Federal Arbitration Act (FAA)), 24–27, 28, 29, 35, 37, 38, 40, 41, 45, 47, 51, 52, 62–63, 64, 66, 68, 83, 86, 88, 89–90, 93

9 U.S.C. § 1, 14, 25

9 U.S.C. § 2, 25, 38, 88

9 U.S.C. § 3, 41

9 U.S.C. § 4, 37, 38, 40

9 U.S.C. § 5, 45, 46

9 U.S.C. § 7, 51, 52, 54

9 U.S.C. § 8, 47

9 U.S.C. § 9, 71

9 U.S.C. § 10, 19, 66, 67

9 U.S.C. § 12, 64

9 U.S.C. § 16, 63

9 U.S.C. § 201, 7, 13, 24, 26

9 U.S.C. § 202, 26, 28, 65, 88

9 U.S.C. § 203, 35

9 U.S.C. § 204, 35, 72

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9 U.S.C. § 206, 37, 40, 45, 46, 48
9 U.S.C. § 207, 63, 70, 72, 87
9 U.S.C. § 208, 25, 27, 37, 41, 45, 46, 51, 54, 63, 64, 66
9 U.S.C. § 301, 13, 24
9 U.S.C. § 302, 27, 35, 70, 87
9 U.S.C. § 303, 37, 40, 45, 46
9 U.S.C. § 304, 63
9 U.S.C. § 305, 27
9 U.S.C. § 307, 14, 25, 37, 41, 45, 46, 51, 54, 63, 64, 66
9 U.S.C. § 308, 7
28 U.S.C. § 1603, 90
28 U.S.C. § 1605, 91
28 U.S.C. § 1782, 55–60
Fed. R. Civ. P. 45(b)(2)–(3), 52
House Report No. 501, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990
U.S.C.C.A.N. 675, 7, 13, 25
Uniform Commercial Code, art. 2, 11

Non-U.S. Legislation and Rules

Civil Procedure Rules (Engl.), Part 31, *available at* <http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31>, 50
European Council Regulation 44/2001 of 22 Dec. 2000 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1, art. 22(4), 39
Practice Direction 31A—Disclosure and Inspection (Engl. and Wales), *available at* http://www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_part31a, 50

International Sources

Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1720, 575 U.N.T.S. 159 (ICSID Convention), 3
Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, 28 I.L.M. 1556 (1989), 53
Hague Convention on the Service Abroad of Extra-Judicial and Judicial Documents, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 64–65

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- Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, 53
- Inter-American Commercial Arbitration Commission Rules of Procedure, *as amended* April 1, 2002, 22 C.F.R. pt. 194, app. A, 14
- Inter-American Convention on International Commercial Arbitration of 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) (Panama Convention), 6, 7, 12, 13, 14, 15, 24, 25, 27, 30, 46, 59, 70, 71, 89, 93
- International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts, art. 1.6(2), UNIDROIT Principles 2004, *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>, 10
- United Nations Commission on International Trade Law (UNCITRAL), Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/6/17 (July 7, 2006), 88
- United Nations Convention on Contracts for the International Sale of Goods (CISG), Apr. 11, 1980, S. Treaty Doc. No. 98-9 (1984), 1489 U.N.T.S. 3, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html, 11
- United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518 (New York Convention), 6, 7, 12, 13, 14, 15, 19, 26, 27, 28, 29, 30, 33, 34, 37–38, 39, 41, 46, 47–48, 62, 64, 65, 66, 67, 69, 70, 71–85, 86, 87, 88, 89, 93
- United Nations, Status—1958 Convention on the Recognition and Enforcement of Foreign Arbitration Awards, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html, 30

Arbitral Rules and Guidelines

- American Arbitration Association (AAA) Code of Ethics for Arbitrators in Commercial Disputes, effective Mar. 1, 2004, *available at* http://www.adr.org/aaa/ShowProperty?nodeId=%2FUCM%2FADRSTG_003867&revision=latestreleased, 67, 68
- American Arbitration Association (AAA) Commercial Arbitration Rules, effective June 1, 2009, *available at* <http://www.adr.org>, 67
- American Law Institute, Publications Catalog, Restatement on the U.S. Law of International Commercial Arbitration, *available at* http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=130, 66

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- International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration, approved May 22, 2004, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx, 20, 67, 68
- International Bar Association (IBA) Rules of Ethics for International Arbitrators, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics, 68
- International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration, adopted May 29, 2010, *available at* http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx, 20, 51
- International Centre for Dispute Resolution (ICDR) International Arbitration Rules, effective June 1, 2009, *available at* <http://www.adr.org>, 19, 67
- International Chamber of Commerce (ICC) Rules of Arbitration, effective Jan. 1, 2012, *available at* <http://www.iccwbo.org/court/arbitration/id4199/index.html>, 18, 19
- London Court of International Arbitration (LCIA) Arbitration Rules, effective Jan. 1, 1998, *available at* http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx, 19
- United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, G.A. Res. 31/98, UNCITRAL, 31st Sess., Supp. No. 17 at 34, U.N. Doc. A/31/17 (Apr. 28, 1976), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf>, 9
- United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (as revised in 2010), *available at* <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>, 9
- United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, UNCITRAL, 18th Sess., Annex 1, U.N. Doc. A/40/17 (June 21, 1985), *revised by* Revised Articles of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL, 39th Sess., Annex 1, U.N. Doc. A/61/17 (July 7, 2006), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html, 15–16, 53

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Books

- Nigel Blackaby et al., *Redfern and Hunter on International Arbitration* (2009), 24, 32, 95
- Gary B. Born, *International Commercial Arbitration* (2009), 7, 17, 22, 24, 29, 33, 34, 41, 42, 43, 46, 47, 48, 49, 50, 53, 54, 62, 65, 67, 69, 74, 75, 76, 83, 84, 89, 91, 95
- W. Laurence Craig et al., *International Chamber of Commerce Arbitration* (2001), 24
- Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999), 24, 39, 40, 74, 95
- International Council for Commercial Arbitration, *ICCA's Guide to the Interpretation of the 1958 New York Convention* (created with the assistance of the Permanent Court of Arbitration at the Peace Palace, The Hague), *available at* http://www.arbitration-icca.org/publications/NYC_Guide.html, 13
- Julian D.M. Lew et al., *Comparative International Commercial Arbitration* (2003), 24, 89, 90, 95
- Campbell McLachlan et al., *International Investment Arbitration: Substantive Principles* (2008), 3
- Christoph H. Schreuer, *The ICSID Convention: A Commentary* (2001), 3
- S.I. Strong, *Research and Practice in International Commercial Arbitration: Sources and Strategies* (2009), 95, 101

Articles

- Kenneth Beale et al., *Solving the § 1782 Puzzle: Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration*, 47 *Stan. J. Int'l L.* 51 (2011), 57
- Gary Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings*, 30 *U. Pa. J. Int'l L.* 999 (2009), 49
- Emmanuel Gaillard, *Reflections on the Use of Anti-Suit Injunctions in International Arbitration*, in *Pervasive Problems in International Arbitration* 203 (Loukas A. Mistelis & Julian D.M. Lew eds., 2008), 44
- Christopher C. Kokoruda, *The U.N. Convention on Contracts for the International Sale of Goods—It's Not Your Father's Uniform Commercial Code*, 85 *Fla. B.J.* 103 (June 2011), 11
- William W. Park, *Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law*, 8 *Nev. L.J.* 135 (2007), 40
- Martin Platte, *When Should an Arbitrator Join Cases?*, 18 *Arb. Int'l* 67 (2002), 89

International Commercial Arbitration

- W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 *Am. Rev. Int'l Arb.* 5 (2010), 44
- S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 *J. Disp. Resol.* 1 (2012), 1, 44
- S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 *Am. Rev. Int'l Arb.* 119 (2009), 95, 101
- S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?* 30 *Mich. J. Int'l L.* 1017 (2009), 90
- S.I. Strong, *What Constitutes an "Agreement in Writing" in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 *Stan. J. Int'l L.* 47 (2012), 87

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