THE AMERICAN LAW INSTITUTE

Restatement of the Law Third
The U.S. Law of International Commercial Arbitration

Council Draft No. 3

(December 23, 2011)

SUBJECTS COVERED

CHAPTER 1 Definitions (revised)
CHAPTER 4 Post-Award Relief (revised)
APPENDIX A Convention on the Recognition and Enforcement of Foreign Arbitral Awards
APPENDIX B Inter-American Convention on International Commercial Arbitration
APPENDIX C Federal Arbitration Act
APPENDIX D Black Letter of Council Draft No. 3

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This document is submitted for discussion at the meeting of the Council of The American Law Institute on January 26 (at 10:00 a.m.), and 27, 2012, at the Wolkin Conference Center, 4025 Chestnut Street, Philadelphia, Pennsylvania. This Draft is scheduled for discussion on Friday, January 27. As of the date it was printed, it had not been considered by the Council or membership of The American Law Institute, and therefore does not represent the position of the Institute on any of the issues with which it deals.

The American Law Institute

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Comments and Suggestions Invited

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The Council approved the start of this project in December 2007. Work has begun on topics of recognition and enforcement. The first Tentative Draft was approved at the 2010 Annual Meeting, but the material contained therein was not previously approved by the Council. Council Draft No. 2 was approved by the Council in October 2010, and thus that Draft represents the position of the Institute.

Earlier versions of Chapter 1 can be found in Preliminary Draft No. 5 (2011), Preliminary Draft No. 4 (2010), Council Draft No. 2 (2010), and Tentative Draft No. 1 (2010). This version of Chapter 4 consolidates versions that had previously been designated as "Chapter 4" and "Chapter 5." An earlier draft of this version of Chapter 4 is contained in Preliminary Draft No. 5 (2011). An earlier version of the previous Chapter 4 can be found in Preliminary Draft No. 4 (2010). Prior versions of Chapter 5 were contained in Council Draft No. 2 (2010), Tentative Draft No. 1 (2010), Preliminary Draft No. 3 (2010), and Council Draft No. 1 (2009).

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REPORTERS' MEMORANDUM

TO: **ALI Council**

FROM: **George Bermann, Jack Coe, Jr., Chris Drahozal, and Catherine Rogers**

DATE: **January 2012**

RE: **Restatement Third, The U.S. Law of International Commercial Arbitration, Council Draft No. 3 (2011)**

We are pleased to present Council Draft No. 3 of the Restatement Third of the U.S. Law of International Commercial Arbitration, Chapter 4 (Post-Award Relief). The draft is provided in anticipation of the Council Meeting scheduled for January 27, 2012.

This work has benefited from expert critiques provided systematically through the ALI peer review process, beginning with comments received on Preliminary Draft No. 1 at a conference on February 23, 2009. Ongoing refinements were introduced through successive Drafts, including those reflected in Council Draft No. 2, which was approved by the Council in October 2010. Further work led to Preliminary Draft No. 4, which was the principal focus of a joint ALI Advisers and Members Consultative Group meeting in Malibu, California, on January 15, 2011.

At that joint meeting, the question of the vacatur grounds applicable to U.S. Convention awards prompted considerable comment. Informed by those observations and our own further study of the issue, the Reporters restructured Chapters 4 and 5. As a consequence of the restructuring, a single consolidated Chapter, titled "Post-Award Relief," has replaced what had previously been two separate Chapters: Chapter 4 on Vacatur and Confirmation and Chapter 5 on Recognition and Enforcement. That consolidated format has been retained and refined in Council Draft No. 3, which also reflects editorial and substantive adjustments prompted by discussion at meetings held in September 2011 with the Advisers and Members Consultative Group and through subsequent communications with members of those two groups.

The consolidation was undertaken for several conceptual and pragmatic reasons. A principal objective was to achieve greater simplicity of presentation, as had been suggested by certain Advisers at the Malibu meeting. Additionally, the draft now adopts the position that the grounds for vacating or denying confirmation of U.S. Convention awards are those specified in the Conventions, not the grounds set forth in FAA Section 10. This development made it difficult to justify maintaining two separate Chapters: vacatur and confirmation, on the one hand, and recognition and enforcement, on the other. A two-chapter approach would have involved significant repetition because the same principles and precedents applied to matters arising in both Chapters. Additionally, extensive cross-referencing would have been required to coordinate the two Chapters, making the material difficult to

follow and, in some places, less conceptually clear. By contrast, the consolidated single Chapter, now Chapter 4 on post-award relief, contains minimal repetition and modest cross-referencing, resulting in a much shorter and sleeker text overall.

We regard the structural reorganization reflected in new Chapter 4 as providing great advantages over the previous architecture. In contrast to the two-chapter structure, the new arrangement treats in a single chapter correction, remand, vacatur, confirmation, recognition, and enforcement. It thus provides "one-stop shopping" for all post–award relief issues, which does not require a firm understanding of the differences between foreign Convention awards, U.S. Convention awards, and non-Convention awards before determining the proper chapter under which to proceed. To the extent that confirmation, vacatur, recognition, and enforcement are handled similarly, Chapter 4 contains provisions common to all. To the extent that they are handled differently, the distinctions are clearly drawn. This consolidation results, we believe, in a draft that is more user-friendly, particularly for those who are not familiar with international arbitration. As an essential aspect of the restructuring, FAA Section 10 grounds now only apply to non-Convention awards.

The restructuring was discussed at length and received favorably at the meetings of the Advisers and Members Consultative Group last September.

As before, the draft includes, as Chapter 1, definitions that are critical to understanding subsequent Chapters. Those definitions are substantially the same as those approved as Council Draft No. 2. They thus maintain, for example, the former conceptual categories and taxonomy of arbitral awards, distinguishing among international awards, domestic awards, and foreign awards; and among foreign Convention awards, non-Convention awards, and Convention awards made in the United States. The consolidation of Chapters 4 and 5, however, has occasioned the introduction of three new definitions, briefly described below.

A summary of the Sections contained in new Chapter 4 follows, arranged by Restatement topic and sub-topic. Additionally, we attach as an Appendix a chart that indicates the Sections in the previous draft that correspond to the sections in the current draft.

Summary of the Draft

Chapter 1—Definitions.

Section 1-1 retains three definitions introduced in Preliminary Draft No. 5. Two of these, set forth in paragraphs (x) and (y), provide short-hand terms embracing the several forms of actions and relief that arise in the post-award context. A "post-award action" is a summary court proceeding brought to vacate, confirm, or enforce an international award, whereas "post-award relief" is a ruling by a court that vacates, confirms, recognizes, or enforces an international award. These collective terms are used for convenience when it

is unnecessary to refer individually to the forms of action and relief. Section 1-1(n) is the third among the recently-added definitions. It defines "final award" and is intended to contribute to a better understanding of certain other Sections, including Section 4-32 (Statute of Limitations).

One noteworthy change in Section 1 concerns interim measures (Section 1-1(q)). After receiving considerable peer comment, the Reporters maintained in Council Draft No. 3 the position that such measures are in principle arbitral awards within the meaning of Section 1-1(a), but structured that classification as a rebuttable presumption. The Draft also provides new Illustrations to explain the operation of that presumption and the circumstances under which it might be rebutted.

Chapter Four—Post Award Relief

Structure

The consolidation of former Chapters 4 and 5 results in a new draft Chapter 4 titled "Post-Award Relief." It comprises four topics: Topic 1—General Provisions; Topic 2—Grounds for Post-Award Relief; Topic 3—Conduct of Post-Award Actions; Topic 4—Modification, Correction, and Remand of Awards. Topic 2 contains three sub-topics: A—Convention Awards; B—Non-Convention Awards; C—Party Modification and Waiver of Grounds.

Topic 1—General Provisions

Section 4-1

Section 4-1 deals with "post-award actions" in general terms. This section is particularly important following the consolidation of former Chapter 4 (vacatur and confirmation) and Chapter 5 (recognition and enforcement). It defines and delineates the effect of vacatur, confirmation, and enforcement as distinct "post-award actions," while treating recognition as a form of "post-award relief," without constituting an action as such. As in other Sections, it becomes critical to distinguish (a) between relief with respect to Convention and non-Convention awards and (b) between relief with respect to Convention awards made abroad and those made in the U.S. The Section also sets out the general circumstances in which partial post-award relief is appropriate.

For ease of reference, the black letter identifies, for each form of relief, the source of the grounds on which that relief may be granted or denied, as the case may be. The comments clarify that, while confirmation and vacatur are conceptually two sides of the same coin, they remain distinct actions as a matter of procedure. Thus, defeat of a confirmation action does not in itself result in vacatur of the award, and defeat of a vacatur action does in itself result in confirmation of the award.

Section 4-2

Section 4-2 provides that a U.S. court may not vacate an award made abroad; it may at most recognize or enforce such an award because, ordinarily, only courts at the arbitral seat may vacate an award rendered there. The one exception that allows a U.S. court to entertain a vacatur action against a foreign award arises when the parties have expressly agreed to subject the arbitration to the arbitration law of the United States. In such a case, which is very rare, the courts of the seat and those of the United States have concurrent authority to vacate. Conversely, if the parties designated the arbitration law of a New York Convention State other than the United States, the same principle would entitle the courts of the State whose arbitration law was named to exercise set-aside jurisdiction over the award; those authorities would enjoy that power concurrently with the courts of the seat.

Section 4-3

Detailed discussion of the law applicable to forms of relief is found in Section 4-3, while detailed discussion of the grounds available for their grant or denial is deferred to Section 4-11. Section 4-3 deals comprehensively with the law applicable to the forms of post-award relief set forth in Section 4-1. It gives pride of place to the New York and Panama Conventions (as implemented by FAA Chapters Two and Three) and Chapter One of the FAA as the law applicable to Convention and non-Convention awards, respectively. However, it acknowledges the possibility that state law, to the extent not preempted by applicable federal law, might eventually be applicable, as might some other body of federal law (such as a bilateral treaty).

Section 4-4

Section 4-4 sets forth the formal requirements governing post-award relief in U.S. courts. In a federal court action, the requirements (such as production of the original agreement to arbitrate and the original award or an authenticated copy thereof) are drawn from either the Conventions or FAA Chapter One, as applicable. Although the Section recognizes that the agreement provided to the court must qualify as an "agreement in writing" within the meaning of the applicable Convention or the FAA, it does not address what writings satisfy that requirement. That issue will be addressed in a future Chapter of the Restatement. The content of the form requirements is largely the same as in prior drafts, except that this draft requires parties seeking vacatur of an award to provide the arbitration agreement (in addition to the award) only if one of the bases upon which the party seeks vacatur requires consideration of the arbitration agreement.

Sections 4-5 and 4-6

Section 4-5 addresses reciprocity as reflected in the U.S. reciprocity reservations to the New York and Panama Conventions. Except for slight wording changes, this Section is unchanged from the approved version in Chapter 5.

Section 4-6 describes the burden of proof applicable to international arbitral awards. This Section is likewise unchanged from prior drafts, except to address vacatur and confirmation, alongside recognition and enforcement.

Section 4-7

Section 4-7, which deals with the standard of review exercised by courts in granting or denying post-award relief, is a new Section. It may be viewed as a companion Section to Section 4-6 on burden of proof. The general principle is that courts make independent determinations as to the presence or absence of a ground for granting or denying post-award relief, and are neither bound by, nor to be substantially influenced by, determinations the arbitral tribunal may have made on those particular matters. The Comments, however, indicate those exceptional circumstances in which tribunal findings on issues relevant to the presence or absence of a ground may affect a court's analysis in applying the relevant ground.

Section 4-8

This draft refines and clarifies the effect on a court's handling of requests for post-award relief of prior judicial decisions on common issues made in connection with the same arbitration or award. Specific issues, such as the validity of the arbitral award or defects in the constitution of the arbitral tribunal, may be raised at several junctures in the life-cycle of a dispute that is subject to arbitration and several different courts may rule on it. Under this Section, courts apply forum law with respect to the preclusive effect of such findings. It observes that grounds such as non-arbitrability and violation of public policy are determined by reference to different bodies of substantive law, depending on the moment at which judicial recourse is sought. One jurisdiction's findings on such matters will not therefore preclude their reexamination under another jurisdiction's substantive law.

Section 4-8, which in previous drafts had been framed in general terms as the "effect of prior judicial determinations," is now organized around the more clearly established doctrines of claim preclusion, issue preclusion, law-of-the-case, and recognition of foreign judgments.

Sections 4-9 and 4-10

The effects of prior arbitral determinations are now treated in two new Sections: 4-9 (claim preclusion) and 4-10 (issue preclusion).

Section 4-9's coverage is entirely new. Previous drafts had only discussed "recognition," effectively as an alternative form of post-award relief. Section 4-9 examines more specifically the close relationship between recognition and claim preclusion (or res judicata) and establishes that recognition is a predicate for application of claim preclusion. Accordingly, the Section clarifies that—contrary to developed law in the context of

domestic arbitration awards—the common law of claim preclusion does not govern the grounds for challenging the finality or validity of an international arbitral award. Instead, courts consult the relevant arbitration law (Convention grounds for Convention awards and FAA Section 10 grounds for non-Convention awards) to determine whether an award is entitled to recognition and therefore the possibility of having claim preclusive effect. Under this approach, courts look to the applicable arbitration law to determine such matters as whether the tribunal had jurisdiction or whether the proceedings were conducted fairly.

Once a court has determined that an award is entitled to recognition, Section 4-9 directs it to apply general forum law to resolve remaining issues in determining whether to grant claim-preclusive effect to an award. These questions include whether the subsequent claim is the "same" as in the original action and involves the "same" parties. Ordinarily, the "same parties" question turns on the scope and application of the arbitration agreement and thus will not require analysis separate from that already undertaken by the court in determining under the relevant convention that the award is entitled to recognition.

This Section also provides guidance on the allocation of the burden of proof among the parties, aligning the burden for establishing recognition with the burdens allocated under the Conventions and the FAA and imposing on the party seeking preclusion the burden of proving the identity of claims and parties, as required by forum law.

Section 4-10 also represents a significant development over previous drafts. Earlier drafts had included issue preclusion (or "collateral estoppel") as a sub-section in the Section dealing with governing law. Advisers urged that we develop the matter more fully, and provide more specific guidance about how and when issue-preclusive effect may be accorded by a court to an international arbitral award.

Accordingly, Section 4-10 now specifies that an award that qualifies for recognition under this Chapter may also be entitled to issue-preclusive effect. The Section follows the same broad approach taken in regard to claim preclusion (Section 4-9). It directs courts to apply forum law to matters not governed by a convention, while providing general guidance about how the international character of an award may affect application of forum law. Additionally, because many foreign jurisdictions do not allow issue preclusion, the Section develops specific criteria for courts to use in evaluating whether an award that might otherwise be entitled to issue-preclusive effect should nevertheless be denied that effect because it is contrary to the parties' agreement or reasonable expectations.

Topic 2—Grounds for Post-Award Relief

Section 4-11

Section 4-11 addresses the grounds for vacating and denying confirmation, recognition, or enforcement of U.S. Convention awards generally. Reflecting feedback from Advisers and MCG members, the draft provides that the applicable grounds are those set

out in Article V of the New York Convention, rather than FAA Section 10. As a result, the grounds for denying recognition and enforcement of Convention awards have also become grounds for vacating and denying confirmation of U.S. Convention awards.

We believe that the frequency of successful vacatur actions is not likely to be affected by this change because the draft defines the FAA Section 10 vacatur grounds as in substance the same as the Article V grounds. The Section 10 grounds remain relevant, however. Under Sub-topic B of Topic 2, they provide the grounds upon which non-Convention awards may be denied recognition and enforcement.

Topic 2, Sub-Topic (A)—Grounds Applicable to Convention Awards

Section 4-12

Section 4-12 provides that a court may vacate or deny confirmation, recognition, or enforcement of a Convention award on the ground that no arbitration agreement exists or that the arbitration agreement is invalid, as provided in Article V(1)(a) of the New York Convention and Article 5(1)(a) of the Panama Convention. Other than extending these grounds to vacatur and confirmation, this Section is largely unchanged from the approved version in former Chapter 5. The one exception is the removal of black-letter language providing that the arbitrator shall decide a challenge to the existence of the main contract when the challenge does not call into doubt the parties' agreement to arbitrate. The possibility is still recognized in the Notes as a case in which the parties have agreed to arbitrate the existence of the main contract; that issue is thus for the arbitrators to resolve. The circumstance, however, was not thought to be sufficiently common to justify treatment in the black letter.

Section 4-13

Section 4-13 addresses the ground set forth in Article V(1)(b) of the New York Convention and 5(1)(b) of the Panama Convention. Under this ground, vacatur may be granted and confirmation, recognition, or enforcement may be denied when the award resulted from an arbitral process that was rendered fundamentally unfair by a severe procedural defect. The content of this Section remains similar to the parallel Section in the former Chapter 5. One important change is that, in response to suggestions from Advisers, the full discussion regarding the standard for "evident partiality" of an arbitrator is located in this Section, rather than in Sections 4-18 (public policy) or 4-20 (evident partiality in the case of non-Convention awards). While the provisions of Section 10 of the FAA provide the statutory basis for the evident partiality standard, the full discussion of it is more appropriately located in this Section because the vast majority of awards addressed by the Restatement are Convention awards and because certain aspects of the domestic standard take on a different gloss when applied in international contexts. Nevertheless, Sections 4-13 (on Convention awards) and 4-20 (on non-Convention awards) remain closely related and largely overlapping in substance.

Section 4-14

Section 4-14 derives from Article V(1)(c) of the New York Convention and Article 5(1)(c) of the Panama Convention. Under that Section, a court may vacate or deny confirmation, recognition, or enforcement of an award to the extent it deals with matters beyond the submission to arbitration. Although the Section is largely congruent with prior versions, the treatment of one issue has been substantially revised: how to distinguish between cases in which the award is contrary to an express restriction on the arbitrator's authority contained in the arbitration agreement, thus inviting court review, and cases in which such review would represent an impermissible judicial examination of the merits. (This is a question to which some members of the Council, while voting in favor of Chapter 5, specifically asked the Reporters to give further thought.) Based on extensive discussion and input from the Advisers and Members Consultative Group, the draft adopts a rebuttable presumption that such a provision is a limitation on remedies rather than a restriction on arbitrator authority, but also identifies factors for determining whether the presumption has been rebutted.

Section 4-15

Section 4-15 is based on Articles V(1)(d) of the New York Convention and 5(1)(d) of the Panama Convention. It permits a court to grant or deny post-award relief, as applicable, if the procedure of the arbitration materially violated either the parties' agreement or, in the absence of such agreement, the law of the arbitral seat. The Conventions purposefully elevate party autonomy and thereby promote flexibility in organizing arbitral procedures. There remain, however, delicate questions about what should happen when compliance with provisions of parties' arbitration agreement violate a mandatory rule of the seat. The draft affirms the preeminence of the parties' arbitration agreement even if that agreement departs from the seat's mandatory law. Concurrently, however, the Section acknowledges that arbitrators sometimes choose to follow the law of the seat rather than the parties' agreement in order to reduce the risk of set-aside. In those instances, the draft allows a court to consider the tribunal's reasons for not observing the parties' agreement and to enforce an award despite the tribunal's non-adherence to the terms of that agreement.

A new Comment deals with the situation in which a tribunal impermissibly adjudicates a dispute ex aequo et bono or applies a substantive law other than the one selected by the parties. The Comment describes in both instances the substantial burden of proof on a party challenging an award on these bases.

Section 4-16

Section 4-16 derives from Articles V(1)(e) of the New York Convention and 5(1)(e) of the Panama Convention. It posits that a court may, but need not, defer a decision whether to grant post-award relief with respect to an award that is subject to set-aside proceedings abroad. The Section also establishes as a ground for declining to confirm, recognize, or enforce an award that the award has been set aside by a competent authority

within the meaning of Section 1-1(f).

Section 4-16 is conceptually the same as its counterpart in former Chapter 5. The text has been revised, however, to account for the possibility that, exceptionally, two States' courts may enjoy concurrent set-aside jurisdiction as a result of an explicit designation by the parties of an arbitration law other than that of the seat. The effects of such a designation have been the subject of helpful peer discussion. According to this Section, when the parties unambiguously designate an arbitration law other than that of the seat, while the seat does not change, the courts of the jurisdiction whose law is named enjoy (concurrently with the courts of the seat) the power to nullify the award. It follows, therefore, that Section 4-16 governs both the routine situation in which only one system's authorities possess set-aside powers and the unusual circumstance in which authorities in two jurisdictions may properly be seized of a set-aside action addressing the same award.

Section 4-17

Section 4-17 is drawn from Articles V(2)(a) of the New York Convention and 5(2)(a) of the Panama Convention. The underlying principle, retained from earlier drafts, is that a court may decline recognition and enforcement of an award that purports to decide matters that are non-arbitrable under U.S. federal law. Under the consolidated format of this Chapter, a U.S. Convention award may also be vacated or declined confirmation on the same basis. Arbitrability may be raised sua sponte by a court.

Sections 4-18

Section 4-18 sets forth the public policy ground for vacatur and for denial of confirmation, recognition, and enforcement. As with all previous drafts, the language used underscores the narrowness of the ground, which will rarely be invoked with success. As with arbitrability, however, public policy may be raised sua sponte by a court. It may not be waived by a party.

Topic 2, Sub-Topic (B)—Grounds Applicable to Non-Convention Awards

Sections 4-19, 4-20, and 4-21

Sections 4-19, 4-20, and 4-21 deal with the grounds for challenging a grant of post-award relief for non-Convention awards found in Sections 10(a)(1), 10(a)(2), and 10(a)(3) of the FAA. Section 4-19 provides a ground for challenging a non-Convention award that was procured by fraud, corruption, or undue means. The Section defines each of these terms, and provides guidance about the evidence required to satisfy the burden of proving each ground.

Section 4-20 addresses potential challenges to awards when an arbitrator is subject to bias or, in the words of the FAA, "evident partiality." Because the Conventions make forum law applicable to challenges based on procedural fairness, the "evident partiality"

standard applies also to Convention awards under Section 4-13. In recognition of the fact that the overwhelming majority of international arbitral awards are Convention awards, this Section limits its discussion of "evident partiality" to the core definition, and refers readers to Section 4-13 for an extended analysis of the term and its application.

Finally, Section 4-21 deals with arbitrator misconduct as a ground for challenging a non-Convention award. Like other sections in this group, this Section analyzes the meaning of "arbitrator misconduct" and provides guidance about the proof required to effectively invoke this ground to prevent recognition or enforcement of a non-Convention award.

Section 4-22

Section 4-22 sets out the ground for denying recognition or enforcement of non-Convention awards provided in FAA Section 10(a)(4), namely that the "arbitrators exceeded their powers." It lists five possible circumstances in which an award may be denied recognition or enforcement on that ground, describing those circumstances as generally congruent with grounds stated in Article V of the New York Convention: (1) the arbitration agreement does not exist or is invalid; (2) the award determines matters beyond the terms of the submission to arbitration; (3) the arbitral procedure is contrary in a material respect to the agreement of the parties; (4) the award decides a matter not capable of arbitral adjudication; and (5) recognition of the award would be repugnant to public policy.

The Section rejects manifest disregard of the law—defined as the knowing refusal to apply clearly applicable law—as a ground for denying recognition or enforcement of a non-Convention award. Instead, the draft adopts the Seventh Circuit's narrower view that manifest disregard exists only when the tribunal orders a party to violate the law. So defined, manifest disregard is an application of the public policy ground and provides no independent basis for refusing recognition or enforcement.

Topic 2, Sub-Topic (C)—Party Modification and Waiver of Grounds

Sections 4-23, 4-24, and 4-25

Notwithstanding the consolidation of former Chapters 4 and 5, the substance of these three Sections remains largely unchanged. Together, these Sections deal with the application of the Supreme Court's decision in Hall Street Associates, L.L.C. v. Mattel, 552 U.S. 576 (2008), to international arbitral awards and related issues of waiver.

Like previous drafts, Section 4-23 provides that parties may not contract to expand the grounds for post-award relief and Section 4-24 provides that parties may not agree to reduce or eliminate those grounds. Also similar to previous versions, these Sections provide that parties are precluded from achieving these same results by contracting for the law of a particular state or by attempting to restrict the authority of arbitrators to make legal errors. In analyzing how waiver may affect parties' ability to challenge a grant of

post-award relief, Section 4-25 distinguishes between "grounds," which are articulated in the applicable law and cannot be altered by party agreement, and the "objections" that constitute the factual underpinnings of an allegation that grounds exist. Parties can waive the objections under the circumstances described in this Section, but they cannot waive the grounds per se.

Topic 3—Conduct of Post-Award Actions

Sections 4-26 and 4-27

Section 4-26 deals with subject matter jurisdiction in actions for post-award relief. The issues treated in Section 4-26 are not fundamentally altered under the new draft. The Conventions and their implementing legislation create federal subject matter jurisdiction; consequently, actions for post-award relief brought under the Conventions (as regards both foreign and U.S. Convention awards) do not require an independent basis of jurisdiction. At the suggestion of Advisers and the Members Consultative Group, a new Comment addresses the question of removal from state to federal court, leaving its details as before to the Reporters' Notes. As before, complex issues of venue are dealt with exclusively in the Reporters' Notes, rather than in either the black letter or the Comments to this Section.

Section 4-27 addresses personal jurisdiction in post-award actions. The only significant addition to the previous draft is the discussion of party autonomy and, more particularly, of whether and to what extent the parties subject themselves to confirmation or vacatur actions in courts other than those of the arbitral seat. The availability of quasi-in-rem jurisdiction in post-award actions is reaffirmed, with additional detail on the value of the judgments resulting from an exercise of such jurisdiction.

Sections 4-28 and 4-29

Section 4-28 is devoted to sovereign immunity. The place of sovereign immunity and its exceptions (as well as the act of state and political question doctrines) is not fundamentally altered by the consolidation of former Chapters 4 and 5. It is a good example of a subject on which the black letter, Comments, and Reporters' Notes would have been, for all practical purposes, duplicated if confirmation and vacatur had remained in a separate Chapter from recognition and enforcement.

The Restatement position on forum non conveniens, now covered in Section 4-29, remains basically unchanged from previous drafts. Forum non conveniens is unavailable in actions for the recognition and enforcement of foreign Convention awards, though available in principle for non-Convention awards. With respect to vacatur and confirmation of U.S. Convention awards, the doctrine also remains greatly restricted. Lis pendens is addressed for the first time in the Comments to Section 4-29, which treat it as unavailable in connection with actions for post-award relief.

Sections 4-30 and 4-31

The next two Sections deal with the proper plaintiff (Section 4-30) and proper defendant (Section 4-31) in a post-award action. The Sections recognize that only under limited circumstances is a non-party to the arbitration proceeding a proper plaintiff or proper defendant. The substance of the Sections is largely the same as in prior drafts, with two exceptions: First, the draft now provides that all parties to the arbitration proceeding are proper plaintiffs and proper defendants in a post-award action. Second, the black letter now expressly contemplates the possibility of ex parte awards (i.e., awards entered in the absence of a party). In prior versions, the Comments had recognized such a possibility, but the black letter did not.

Sections 4-32, 4-33, and 4-34

Sections 4-32, 4-33, and 4-34 represent a cluster governing statutes of limitations, procedure, and appeals in connection with post-award actions. All three Sections confront the question of the extent to which post-relief actions in state courts follow the relevant state law procedural rule or the rule prescribed by the FAA.

Section 4-32 now makes clear that actions to confirm U.S. Convention awards and actions to enforce foreign Convention awards are subject to a three-year limitations period, while actions to vacate U.S. Convention awards remain subject to FAA Chapter One's three-month statute of limitations and actions to enforce non-Convention awards are subject to FAA Chapter One's limitations period of one year.

Section 4-32 also addresses certain matters related to limitations periods that the courts have not thus far clearly or consistently addressed. The limitations period in connection with a partial award, as defined in the Restatement, begins to run when the partial award is issued. However, a party is not required to seek post-award relief in connection with a partial award within that limitations period. Post-award relief regarding the content of a partial award may also be sought within the limitations period following issuance of the final award. The Restatement takes the further position that, while vacatur may only be sought within FAA Chapter One's three-month period, vacatur grounds may be raised to defeat confirmation as long as the confirmation action itself is still timely.

Section 4-33 affirms that post-award proceedings are generally summary in nature. There is, accordingly, a presumption against discovery and evidentiary hearings in those proceedings.

Section 4-34 is now the provision governing right of appeal from rulings on a motion for post-award relief. Its content is essentially the same as that set forth in the corresponding Section of former Chapter 5. The Section echoes the FAA's grant of a right of immediate appeal in post-award actions in federal court, but provides that rights of appeal in actions in state court, even if brought under the FAA, are governed by state law.

Topic 4—Modification, Correction, and Remand

Sections 4-35 and 4-36 derive from Sections first introduced in former Chapter 4. In general, they recognize that awards, in order to be given effect, may require adjustment, repair, or clarification. They also confirm that courts are limited in what they may do to make an award more effectual.

Section 4-35 describes a form of post-award relief provided for in FAA Section 11. The black letter states that a court may modify or correct a U.S. Convention award to the extent that the award contains a mathematical miscalculation or a mistaken description, provided the defect in question is evident and material. A court may also act to correct or modify awards that have minor formal flaws or that purport to decide matters not submitted to the tribunal; the over-reaching that characterizes the latter defect may also lead to vacatur or partial vacatur under Section 4-14, above. The Section cautions throughout that merits review and a court's corresponding imposition of substantive changes in the award are not authorized under the guise of correction and modification. Section 4-35 authorizes correction and modification with respect to U.S. Convention awards and to foreign awards originating in proceedings that the parties explicitly subjected to U.S. arbitration law.

Section 4-36 restates a rule established in case law, and found in statutes outside of the United States. In exceptional circumstances and when appropriate, a court may remand a U.S. Convention award to the arbitral tribunal with instructions to complete the award or to clarify its meaning. The option to remand complements the court's power to correct and modify awards. A court may remand to the tribunal when the existence and character of a correctable defect cannot with confidence be ascertained without further processing of the award by the tribunal; upon remand, the tribunal itself may correct the flaw so that the court need not do so under Section 4-35. The principal limit placed upon remand is that a tribunal may not revisit the merits on matters already determined by it. The Section authorizes remand with respect to U.S. Convention awards and foreign awards originating in proceedings made explicitly subject to U.S. arbitration law by the parties.

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RESTATEMENT OF THE LAW THIRD

THE U.S. LAW OF

INTERNATIONAL COMMERCIAL ARBITRATION

COUNCIL DRAFT NO. 3

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RESTATEMENT OF THE LAW THIRD/ THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION

Chapter 1

DEFINITIONS

§ 1-1. Definitions

(a) An "arbitral award" is a decision in writing by an arbitral tribunal that sets forth the final and binding determination on the merits of a claim, defense, or issue, regardless of whether that decision resolves the entire controversy before the tribunal. Such a decision may consist of a grant of interim relief.

(b) An "arbitral tribunal" is a body consisting of one or more persons designated directly or indirectly by the parties to an arbitration agreement and empowered by them to adjudicate a dispute that has arisen between or among them.

(c) "Arbitration" is a dispute resolution method in which the disputing parties empower an arbitral tribunal to decide a dispute in a final and binding manner.

(d) An "arbitration agreement" is an agreement by which parties consent to submit one or more existing or future disputes to resolution by an arbitral tribunal.

(e) "Commercial" matters or relationships are those matters or relationships, whether contractual or not, that arise out of or in connection with commerce.

(f) A "competent authority" is a court or other body that is empowered to entertain set-aside proceedings with respect to a particular arbitral award and that is either part of the legal system of the arbitral seat or of a legal system whose arbitration law was designated unambiguously by the parties to govern the arbitral proceedings that produced the award.

(g) "Confirmation" is a determination that reduces to judgment a Convention award made in the United States.

(h) A "Convention award" is an arbitral award that is either a New York Convention award or a Panama Convention award. A "Convention award" does not include an award rendered in an arbitration governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

(i) A "Convention award made in the United States" (or "U.S. Convention award") is an international arbitral award rendered in the United States that arises out of a legal relationship involving property located abroad, envisaging performance or enforcement abroad, or having some other reasonable relation with one or more foreign States.

(j) A "court" is any court within the United States.

(k) A "domestic award" is an arbitral award that has no reasonable relation with one or more foreign States.

(l) "Enforcement" is the reduction to a judgment of an international arbitral award, other than a Convention award made in the United States.

(m) "Execution" is the granting of relief provided in a judgment through measures ordered by or under the auspices of a court.

(n) The "final award" means the last award that the tribunal makes with respect to the particular dispute before it.

(o) A "foreign award" is an international arbitral award made in an arbitration seated outside the United States.

(p) A "foreign State" is an entity other than the United States that is recognized as a State under international law.

(q) An "interim measure" is a grant of temporary relief to preserve the status quo, help ensure the satisfaction of a subsequent award, or otherwise protect the rights of one or more parties and promote the efficacy of an arbitration and the resulting award. An interim measure is presumptively treated as a partial award.

A competent court may also order interim relief in aid of arbitration, which is distinguishable from interim measures granted by an arbitral tribunal and which is referred to as "provisional relief."

(r) An "international arbitral award" is an arbitral award that, by virtue of its reasonable relation with one or more foreign States, is not a domestic award. The term includes Convention awards (both foreign awards and Convention awards made in the United States) and non-Convention awards. An "international arbitral award" does not include an award rendered in an arbitration governed by the ICSID Convention.

(s) An arbitral award is "made" when under the arbitration law governing the proceedings that gave rise to the award it is deemed to come into existence.

(t) A "New York Convention award" is an arbitral award that is subject to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

(u) A "non-Convention award" is a foreign award that is not a New York Convention award or Panama Convention award.

(v) A "Panama Convention award" is an arbitral award that is subject to the provisions of the Inter-American Convention on International Commercial Arbitration ("Panama Convention").

(w) A "partial award" is an arbitral award that disposes of some, but not all, of the claims, defenses, or issues before the arbitral tribunal. A partial award does not include an order addressing scheduling, procedural, or evidentiary matters.

(x) A "post-award action" is a summary court proceeding brought to vacate, confirm, or enforce an international award.

(y) "Post-award relief" is a ruling by a court that vacates, confirms, recognizes, or enforces an international arbitral award.

(z) "Recognition" is a determination by a court or other tribunal that an international arbitral award is presumptively entitled to preclusive effect with respect to one or more matters determined therein.

(aa) The "seat" (or "arbitral seat") is the jurisdiction designated by the parties or by an entity empowered to do so on their behalf to be the juridical home of the arbitration. An arbitral proceeding is ordinarily governed by the arbitration law of the jurisdiction in which it is seated, and the resulting award is deemed made in that jurisdiction.

(bb) A "set-aside proceeding" is a legal action by which a party seeks to have an arbitral award annulled by a competent authority.

(cc) A "state" is a commonwealth, district, state, or territory of the United States.

(dd) The "United States" is all territory and waters subject to the jurisdiction of the United States.

Comments:

a. Arbitral award. An arbitral award, for purposes of the Restatement, must be in writing and contain a final and binding determination by an arbitral tribunal regarding a claim, defense, or issue therein. A final and binding determination may be an arbitral award even though it is only a partial award, in that it addresses fewer than all of the claims, defenses, or issues pending before the arbitral tribunal. Whether a writing constitutes an arbitral award is not controlled by the label given to it by the tribunal.

The term "arbitral award" does not include a determination or recommendation, whether by an arbitrator, mediator, or other third party, that is only advisory or otherwise nonbinding. It also does not include determinations made to manage the arbitral process, such as scheduling orders and orders resolving procedural or evidentiary questions.

By contrast, a grant of interim measures by an arbitral tribunal presumptively constitutes an award inasmuch as such measures set forth a "final and binding determination" with respect to whether, on the facts presented to the tribunal, the requesting party is entitled to temporary relief. Accordingly, an order of interim measures must be treated as an award and be subject to post-award relief, unless the presumption that it is an award is rebutted. See Comments *q* and *w*.

b. Arbitral tribunal. An "arbitral tribunal" is a body composed of one or more persons referred to as "arbitrators" (or collectively as "the tribunal") empowered by the parties to decide with finality disputes entrusted to them. The tribunal derives its jurisdiction and remedial powers from the agreement of the parties. Members of the tribunal are appointed by the parties or by an entity or authority acting on the parties' behalf. Although a tribunal will in most cases have been constituted for a particular dispute, it may include certain semi-permanent adjudicative bodies.

The definition of arbitral tribunal is broad enough to include bodies that consist of an even number of arbitrators; that contain one or more arbitrators who are not impartial; that are empowered to conduct, in addition to arbitration, non-arbitral forms of dispute resolution; and that are authorized to act ex aequo et bono or otherwise to depart from strict application of legal principles. A body does not cease to be an arbitral tribunal merely because one of its members is unable or unwilling to participate in the arbitral process.

c. *Arbitration*. Arbitration is an adjudicatory dispute resolution method in which the parties submit a dispute to one or more arbitrators for a final and binding determination. Arbitrators are appointed directly or indirectly by the parties and in principle derive their authority from the consent of the parties. See Comment *b*. Arbitration differs from collaborative forms of alternative dispute resolution ("ADR"), such as mediation, in that it leads to a final and binding determination, in the form of an arbitral award, see Comment *a*, that enjoys res judicata effect and may qualify for

international enforcement under a treaty such as the New York Convention. Moreover, once consent to arbitration is given, it may not be unilaterally withdrawn by a party. The successful conclusion of arbitration does not depend in all instances on active participation by the parties; arbitration, unlike collaborative ADR methods, may produce a valid and enforceable award even though one of the parties refuses to participate in the proceeding. Arbitration is managed through procedural orders, rulings, and instructions issued by the arbitrators who act pursuant to the arbitration law of the arbitral seat, the arbitration agreement, and any procedural rules that the parties may have adopted.

d. Arbitration agreement. An "arbitration agreement" is an instrument by which parties agree to submit one or more existing or future disputes to resolution by arbitration. Agreements by which parties submit an existing dispute to arbitration are commonly called "submission agreements." Agreements by which parties submit future disputes to arbitration are usually contained in a clause within the contract to which the dispute relates or out of which it arose. As the source of an arbitral tribunal's jurisdiction, the arbitration agreement also delimits the matters that are properly before the arbitrators. While an arbitration agreement may be oral as well as written, the applicable law of arbitration may condition judicial enforceability of the agreement on it being in writing.

e. Commercial. The Restatement is concerned with those awards, and disputes giving rise to them, that are "commercial" in nature. The Restatement defines the term

"commercial" broadly but non-exhaustively. A matter or relationship may be commercial even though it does not arise out of or relate to a contract, so long as it has a connection with commerce, whether or not that commerce has a nexus with the United States. A dispute or award may be commercial even though one of the parties to it is a sovereign State or a not-for-profit enterprise, or it relates to a consumer transaction, employment relationship, or donative transfer.

f. Competent authority. Both the New York and Panama Conventions use the term "competent authority" to refer to an adjudicative body that is authorized to set aside or suspend a particular award. The term is restrictive. A court is not rendered competent merely by virtue of such factors as the law governing the parties' substantive rights and duties, the location of proceedings associated with the award, the location of property affected by the award, or the place where the award was physically prepared. Rather, subject to a very rare exception, a body is competent to set aside or suspend an award only if it is part of the legal system established at the seat of the arbitration.

The infrequent circumstance in which set-aside powers are shared by authorities of the seat and another jurisdiction arises when the parties have unambiguously designated the arbitration law of that other jurisdiction to govern the arbitration. In that instance, the seat of arbitration does not change, but under the conventions the seat's authorities cease to have exclusive set-aside powers. By contrast, the extent to which the parties' choice of arbitration law influences the

arbitration law to be applied at the seat is governed not by the conventions but by the seat's choice-of-law rules.

g. Confirmation. The term "confirmation" is commonly used to denote the reduction to judgment in the United States, ordinarily through a summary procedure, of an award made in the United States. The resulting judgment acquires the same status as any other judgment of the court. It is a cause of some confusion that the federal legislation implementing the New York and Panama Conventions refers to the "confirmation" rather than the "enforcement" of Convention awards, even though only a minority of Convention awards are rendered in the territory of the United States. Although the relevant chapters of the Federal Arbitration Act ("FAA") governing such awards use the term "confirmation," even for foreign awards, this Chapter of the Restatement uses the term "enforcement" when referring to foreign awards. It reserves use of the term "confirmation" for Convention awards "made" in the United States within the meaning of paragraph (i). When the context allows, "confirmation" is sometimes also used in connection with proceedings before foreign courts.

h. Convention award. "Convention award" refers only to an award that is governed by either the New York or the Panama Convention. An ICSID Convention award is thus not a Convention award for purposes of this definition.

Vacatur, confirmation, recognition, and enforcement of international arbitral awards within the United States are most often regulated by the New York Convention. By virtue of the large number of States that have ratified the New York Convention, it

applies more frequently than the Panama Convention. The applicability of the two Conventions is determined by the requirements of each Convention and the relevant FAA provisions implementing them. Chapter Two of the FAA implements the New York Convention, while Chapter Three implements the Panama Convention, and each of the Chapters applies only to awards subject to the relevant Convention. However, the Conventions and the FAA must be interpreted together. In particular, construed together, FAA Sections 207 and 302, allow a party to seek vacatur or resist confirmation based on the relevant Convention's grounds for denying recognition and enforcement. The relationship among the three chapters, in turn, is regulated by Sections 208 and 307 of the FAA, under which the provisions of Chapter One supplement Chapters Two and Three, respectively, to the extent they are not in conflict with them.

For either Convention or the corresponding FAA Chapter to apply, the following conditions must be met. First, the award must arise from a "commercial" relationship. See paragraph (e). Second, the award must concern a defined legal relationship, whether contractual or not. Third, the award must either be "foreign," as defined in paragraph (o), or "made in the United States," as defined in paragraph (i). An award is a "foreign" award if made outside the United States, even if both parties are citizens of the United States. Fourth, if the award is a "foreign award" within the meaning of paragraph (o), it must also satisfy any applicable reciprocity requirements. See § 4-5, infra. Finally, an award is considered a Convention award only if it is made pursuant to

an arbitration agreement that satisfies the writing requirements of the applicable Convention.[1]

When these requirements are fulfilled, the relevant Convention supersedes prior inconsistent federal law and preempts conflicting state law regarding the vacatur, confirmation, recognition, and enforcement of an award. See § 4-3(a), infra.

The New York and Panama Conventions are substantially similar, but the two texts exhibit certain variations which may give rise to differences in the obligations they create. In some cases, the requirements for application of both the New York and Panama Conventions will be satisfied. In such cases, the applicable Convention is determined by reference to the identity of the parties to the arbitration agreement. If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified the Panama Convention or are Member States of the Organization of American States, the Panama Convention applies. In all other cases, the New York Convention applies. For these purposes, reference is made to the identity of the parties to the arbitration agreement, not the parties to the final award.

Illustrations:

1. In an action to enforce an award rendered pursuant to an arbitration agreement among *A*, *B*, and *C*, the requirements for application of both Conventions are satisfied. If *A* and *B* are citizens of

[1] Cross-reference to Section to be drafted on enforcing arbitration agreements.

States that have ratified the Panama Convention, but *C* is a citizen of a State that has not ratified the Panama Convention, the Panama Convention applies.

2. Same facts as *Illustration 1*, except that the arbitration is brought only by *A* against *C*. *B* does not participate in the proceedings and is not otherwise deemed to be a party. By virtue of the citizenship of the parties to the arbitration agreement, the Panama Convention applies.

3. In an arbitration arising out of an arbitration agreement between *A* and *B*, the requirements for application of both Conventions are satisfied. *A* is a citizen of a State that has ratified the Panama Convention, but *B* is a citizen of a State that has not ratified the Panama Convention. The New York Convention applies.

The parties to an arbitration agreement may, before or after a dispute arises, agree that one Convention will apply to the exclusion of the other. For such an agreement to be effective it must be express and the requirements for application of the designated Convention must be fulfilled. When the parties have so agreed, their choice supplants the citizenship-based rules of hierarchy set forth above.

i. Convention award made in the United States. A "Convention award made in the United States" denotes an arbitral award that was rendered in the United States, as defined in paragraph (i), but which arises out of a legal relationship that involves property located abroad, envisages performance or enforcement abroad, or has some

other reasonable relation with one or more foreign States. An award bearing such a relationship constitutes a "Convention award made in the United States" even if all of the parties to it are U.S. citizens.

Convention awards made in the United States are referred to in the New York Convention as awards that are "not considered as domestic." Due to the confusion often caused by that description, the Restatement avoids its use. However, for convenience, the Restatement frequently refers to Convention awards made in the United States simply as "U.S. Convention awards."

Convention awards made in the United States are either "New York Convention awards" or "Panama Convention awards" within the meaning of paragraphs (t) and (v) of the Restatement A party seeking to give effect to a Convention award rendered in the United States thus requests confirmation under the relevant Convention and the FAA provisions implementing it. See § 4-3(b), infra.

Illustration:

4. A U.S. citizen seeks to enforce against another U.S. citizen an arbitral award that was made in the United States. The parties' contract was to be performed outside the United States, but is governed by the law of a U.S. state. In confirmation proceedings, a court treats the arbitral award as one governed by the New York Convention and its implementing legislation. The limitation period is therefore that established under the convention chapters and the grounds upon which

a party may resist confirmation are those set forth in Sections 4-12 through 4-18.

j. Court. The term "court" is defined as any court within the United States. Through the reference to the "United States," the term "court" includes territorial, state, and federal courts, and subsidiary courts within such constituent units; recognition or enforcement of international arbitral awards may be sought in any of these court systems, subject to jurisdictional and other requirements. When necessary, the Restatement distinguishes between federal and non-federal courts within the United States, and between all such domestic courts and foreign courts.

k. Domestic award. A "domestic award" is an arbitral award that does not bear a reasonable relationship with one or more foreign States. The term thus does not include any form of "international arbitral award." See paragraph (q). So defined, domestic awards lie beyond the ambit of this Restatement, even though they will be governed by the FAA when the requisite connection with interstate commerce or foreign commerce is present.

l. Enforcement. "Enforcement" is a determination by a court that reduces an arbitral award to judgment in the United States. The resulting judgment has the same status as any other judgment of the court. The term does not denote the coercive effectuation or carrying out of the award; in referring to that activity, the Restatement uses instead the term "execution," as defined in paragraph (m). In the absence of voluntary compliance, enforcement will be necessary, but not necessarily sufficient, in

order for the claimant to have the relief awarded. Enforcement of an award implies "recognition" of the award, within the meaning of paragraph (z), and is a prerequisite to "execution." Enforcement, however, does not imply that the award merges into the judgment.

m. Execution. A court's confirmation or enforcement of an award results in a judgment having the same status as any other judgment of that court. See paragraphs (g) and (l). The relief contained in the judgment, however, is not self-implementing. "Execution" is the judicially sanctioned process through which the relief granted in the award and the judgment of enforcement, typically monetary or injunctive in character, is made available to the prevailing party. The process commonly involves measures taken against the property of the judgment debtor by a law-enforcement official, such as a sheriff or a U.S. Marshal, acting pursuant to a writ of execution.

n. Final award. An award that resolves such issues as may be pending before the tribunal is commonly referred to as the "final" award. The award may be the last in a series of partial awards and decide a single remaining issue, such as the question of costs. Alternatively, it may be the only award made in the dispute because it deals comprehensively with all issues in dispute. The definition applies both to U.S. Convention awards and foreign awards.

All awards by definition set forth a "final and binding" determination on the merits of a claim, defense, or issue. There is, however, only one final award. The issuance of the final award affects the application of certain limitation periods. If the

final award is preceded by one or more partial awards, the limitations periods governing those earlier awards begin to run on the dates they are issued, but are tolled until the final award is issued. Most notably these periods govern the timeliness of actions to vacate, confirm, or enforce the award. See §§ 4-32(c), 4-35, infra.

If an award intended by the tribunal to be its last ("final") award is returned to it by a party for correction, supplementation, or interpretation as contemplated by many arbitration statutes and rule formulae, the award that emerges from that reconsideration will be the final award, regardless of whether the tribunal altered the award. The same rule applies when a court remands an award to the tribunal for further processing under Section 4-36. The award as reissued by the tribunal is its "final" award.

o. Foreign award. A "foreign award" is an arbitral award made in an arbitration having its seat outside the United States, as defined in paragraphs (aa) and (dd). An award made abroad is foreign, even if rendered in a dispute between two U.S. citizens. The term includes both "Convention awards" and "non-Convention awards," as defined in paragraphs (h) and (u).

p. Foreign State. A "foreign State" is a polity other than the United States, as defined in paragraph (dd), that constitutes a State under international law. In keeping with international law, the definition excludes constituent units that form States and lack international capacity, such as cantons, provinces, lands, or states.

q. Interim measure. An "interim measure" is a temporary form of relief granted by an arbitral tribunal in its discretion. The denomination "interim" distinguishes such nonpermanent remedies from those contained in remedial provisions of the final award. Tribunal-ordered interim measures are presumptively treated as arbitral awards, as defined in paragraph (a), and a type of partial award, as defined in paragraph (w). In determining whether the legal presumption has been rebutted, a court considers a number of factors, including: (a) the relief granted, (b) the tribunal's characterization of the measure setting forth the relief, (c) the form in which the interim measure was issued, (d) the content of any governing procedural and institutional rules, and (e) other circumstances bearing on whether the tribunal intended the interim measure to be subject to actions for post-award relief. A court also considers the extent to which treating the measure as an award will promote or lessen the efficacy of the arbitration giving rise to the measure.

Competent courts, as well as tribunals, have the authority to award interim relief in aid of arbitration. Because arbitrators and courts entertain and grant requests for interim relief in different circumstances and subject to different conditions, the Restatement uses the term "provisional relief" (or "provisional remedies") to designate grants of interim relief by courts. In practice, however, the terms "interim" and "provisional" are often used interchangeably; both terms capture the temporary nature of such relief. (The term "protective measures" is also commonly encountered in this context.)

Ordinarily, interim measures are issued to preserve the status quo, to help secure satisfaction of an eventual award, or otherwise to promote the efficacy or fairness of the arbitral process. The precise relief they embody varies, but attachments of assets and grants of preliminary injunctive relief are common modes. An arbitral tribunal that awards interim measures retains the power to revise, suspend, or retract those remedies as required by the circumstances; that prerogative distinguishes interim measures from other types of awards, which are not ordinarily subject to being revised, suspended, or retracted by the issuing tribunal.

Although interim measures are ordinarily temporary, they are nevertheless binding on the parties. When they are treated as awards (meaning when the presumption that they are awards has not been rebutted), they are also subject to the statutory and convention regimes that together govern all forms of post-award relief.

Illustrations:

5. In an arbitration arising from a sales contract, a tribunal issues a written, reasoned, decision instructing a party to care for certain goods in its possession. The writing is titled "conservatory instruction." The arbitration rules designated by the parties authorize a tribunal to issue interim measures in the form of orders or awards, but require awards to be reasoned. Under the circumstances, the tribunal's failure to refer to the instruction as an award does not suffice to rebut the presumption that the measure is an award.

6. Same facts as *Illustration 5*, except that the tribunal's instruction is not accompanied by reasons and states that the tribunal "reserves the option to later re-issue the instruction in the form of an award to enable judicial assistance in giving effect to the tribunal's instruction." In light of the tribunal's characterization of the award, its apparent assumption that the measure in its present form could not be enforced by a court, and its failure to provide reasons for its measure (a requirement for awards under the parties' chosen rules), the presumption that the writing is an award is rebutted.

7. Same facts as *Illustration5*, except that the parties' arbitration agreement states that "the parties are permitted to seek from any court of competent jurisdiction provisional relief of any kind including enforcement of tribunal-issued interim measures in whatever form they are rendered." Under the circumstances, the presumption that the writing is an award is not rebutted.

Interim measures are to be distinguished from routine scheduling, procedural, or evidentiary rulings relating to the proceedings. Such rulings serve organizational, as opposed to remedial purposes. For that reason, they do not ordinarily warrant judicial enforcement and are not presumed to be awards. Whether a tribunal's written determination of a matter represents an interim measure, and is thus presumed to be enforceable as an award, or instead is merely a scheduling, procedural, or evidentiary ruling will generally be evident from its subject and the tenor and content of the

instruction it conveys. The characterization given the measure by the tribunal may confirm its status in cases of doubt, but is not controlling.

Illustrations:

8. In an arbitration between *A* and *B*, the tribunal bifurcates the proceedings to decide as an initial matter whether *B* was liable for breach of contract. After hearing the parties, the tribunal issues a written ruling entitled "decision on liability" that determines finally and conclusively that *B* had breached the contract. Soon thereafter, at *A*'s request and upon hearing the parties, the tribunal issues a written order requiring *B* to pay into escrow certain funds pending the conclusion of the damages phase of the proceeding. The decision on liability is a partial award. The order regarding escrow is also presumed to be a type of partial award, referred to as an "interim measure."

9. During the arbitration described in *Illustration 8*, after hearing the parties, the tribunal issues a written procedural order declaring that, contrary to *A*'s wishes, certain documents must be translated, *B* will be allowed to amend its pleadings, each party will be limited to three days of hearing, and no post-hearing briefs will be accepted. The tribunal declines requests to reconsider each of those rulings. In light of its content and purpose, the procedural order is not an interim measure. No presumption that it is an award would attach even if the tribunal titled

its communication an "award," "partial award," "interim measure," or "provisional relief."

r. International arbitral award. The term "international arbitral award" is a general one. It is intended to embrace the several types of awards defined in this Section. The term thus includes "Convention awards" (both "foreign" and those "made in the United States") and "non-Convention awards." By definition, the term does not include arbitral awards that are domestic, as defined in paragraph (k), because they were rendered in the United States and have no reasonable relation with a foreign country.

s. Made. "Made" is a term used by statutes and treaties to signify the coming into existence of an award. For such regimes, as well as for the Restatement, the date and place of an award's making are of particular importance. In determining the place of making, the seat of arbitration, as defined in paragraph (aa), is conclusive; an award is deemed to be made at the seat even if it is the product of hearings or deliberations held elsewhere, or was drafted or signed elsewhere. The date on which an award was made is the date attributed to it by the arbitration law under which the award was made, which will almost invariably be the arbitration law of the seat. Unless otherwise indicated, the terms "made" and "rendered," when used in reference to an award, are synonymous.

t. New York Convention award. "New York Convention award" refers to an arbitral award that is governed by the provisions of the New York Convention. A New

York Convention award is typically a "foreign award," as defined in paragraph (o), but may also be a "Convention award made in the United States," as defined in paragraph (i).

u. Non-Convention award. The term "non-Convention award" refers to a foreign arbitral award that does not qualify as a New York Convention or Panama Convention award. For example, an award made in the territory of a State that is not a party to either the New York or the Panama Convention is not subject to either Convention because it does not satisfy the reciprocity requirement restated in Section 4-5. Similarly, a foreign award that fails to satisfy the commercial relationship requirement is not a Convention award. See paragraph (e). Such an award will generally fall outside the ambit of the Restatement, which is limited to international commercial arbitration. An award that does not arise out of an "agreement in writing" also is not a Convention award. See paragraph (h) and § 4-4(b). Additionally, the term "non-Convention award" does not include an award rendered in an arbitration governed by the ICSID Convention, which terminologically is neither a "Convention award" nor a "Non-Convention award."

v. Panama Convention award. "Panama Convention award" refers to an award that is governed by the provisions of the Panama Convention. A Panama Convention award is typically a "foreign award," as defined in paragraph (n), but may also be a "Convention award made in the United States," as defined in paragraph (i).

w. Partial award. A "partial award" is an award that is limited with respect to the claims, defenses, or issues it decides. It thus disposes of some but not all of the matters in controversy, such as by deciding only questions of jurisdiction rather than the merits (or vice versa) or only questions of liability rather than quantum of damages (or vice versa). As with all awards, partial awards may be the subject of enforcement and set-aside actions before competent authorities. See paragraphs (f) and (y).

An order addressing scheduling, procedural, or evidentiary matters is not a partial award. Unlike such orders, interim measures, as defined in paragraph (p), are presumed to be a type of partial award in that they resolve in a final and binding manner fewer than all of the issues in the case, specifically a party's right to interim relief under stated circumstances. The presumption may be rebutted. See Comments *a* and *q.*

x. Post-award action. The Restatement uses the term "post-award action" to refer collectively to judicial proceedings seeking vacatur, confirmation, or enforcement of an award. Although recognition is a form of post-award relief, see paragraph (y), a request for recognition is not a post-award action. Recognition is not ordinarily sought as an independent action. See paragraph (z). Post-award actions ordinarily are initiated by motion and are typically summary proceedings. See § 4-33(a), infra.

The reference to "international award" (paragraph (r)) instead of the narrower term "Convention award" (paragraph (h)) corresponds to the possibility that certain post-award actions might relate to a non-Convention award. See paragraph (u) & §4-

3(b). "Confirmation" and "enforcement" are analogous terms that refer to the process by which awards are reduced to judgments in the United States. For Restatement purposes, "confirmation" is used when a U.S. Convention award is the subject of the action. See paragraph (g). By contrast, "enforcement" applies when a foreign award is sought to be reduced to judgment. See paragraph (l).

Although requests for the correction or modification of an award necessarily follow in time the issuance of an award, they are not included within the definition of "post-award actions." Their exclusion is due to the fact that they are governed by procedures and principles that differ widely from those applicable to vacatur, confirmation, recognition, and enforcement. A proceeding brought to correct or modify an award are simply termed "motions to correct" and "motions to modify."

y. *Post-award relief*. "Post-award relief" refers to a ruling by a court that vacates, confirms, recognizes, or enforces an international award. The term is broader than the corresponding term "post-award action." which does not include recognition. See paragraph (x). The concept covers both relief from an award and relief that seeks to give effect to an award. It is not unusual for both types of relief to be sought in the same proceedings through cross-motions.

Although correction or modification of an award necessarily occurs only following issuance of the award, these remedies are not included within the meaning of "post-award relief," as defined here. Correction and modification are excluded because

they are subject to procedures and principles that differ widely from those applicable to vacatur, confirmation, recognition, and enforcement.

z. Recognition. "Recognition" is a determination by a court or other tribunal that an award is entitled to legal effect by precluding relitigation of a claim, defense, or other issue decided in the award. A court or other tribunal may recognize an award without the award having previously been reduced to judgment, either at the place where the award was made or at the place where recognition is sought. An award need not have been enforced within the meaning of paragraph (l) in order to be recognized and may continue to be recognized even after it has been enforced. That an award has been enforced, however, implies that it has also been recognized. An award may be recognized on repeated occasions as the circumstances warrant.

Although recognition is defined broadly in the Restatement to preclude relitigation of defenses and issues, as well as claims, specific instruments such as the New York and Panama Conventions may require recognition only with respect to the claims adjudicated in the arbitration. In fact, while the Conventions are silent with respect to the precise scope of preclusion intended, it is generally understood that they do not of themselves require more than claim preclusion (i.e., res judicata effect). Many countries limit the meaning and practice of recognition to "claims" and do not permit or require adjudications to have preclusive effect with respect to particular issues that may have been decided in connection with resolution of the dispute before the tribunal. In U.S. practice, however, recognition is widely understood also to

encompass "issue preclusion" (or collateral estoppel) as well as "claim preclusion." Recognition of international arbitral awards in the United States may therefore afford greater preclusive effect than that mandated by the Conventions. The extent to which, and the conditions under which, international arbitral awards enjoy issue-preclusive, in addition to claim-preclusive, effects in U.S. courts depends essentially on forum law. See §§ 4-9 and 4-10, infra.

aa. Seat. The juridical function of the seat is to affiliate the arbitration with a particular legal system and its arbitration law and to indicate where, in a technical sense, any resulting award is considered made.

The designation of an arbitral seat does not establish the place at which designated physical activities necessarily occur, but rather has several juridical consequences. The arbitration law of the seat ordinarily governs the arbitral proceedings, and customarily only the courts of the seat are empowered to set aside awards rendered there. The seat is invariably considered the place of the award's making; the place of making in turn dictates whether the reciprocity requirement applicable to Convention awards has been satisfied. See paragraph (aa) of this Section and § 4-5, infra. An arbitration has a single seat at any given time, even if under exceptional circumstances an award may be set aside or suspended by a court other than a court of the seat.

A place becomes the arbitral seat by virtue of having been designated as the seat by the parties or by an arbitral institution or a court on their behalf. It may happen

that an arbitration is initiated before a seat is designated, in which case it will be necessary for the parties to agree on a seat or, should they fail to agree, for an entity to designate a seat in their stead. Arbitration statutes and rules commonly provide that when the parties fail to designate a seat, that designation will be made by the arbitrators, by an arbitral institution, or by a court.

On occasion, the parties change the seat of arbitration by agreement. The fact that the parties have designated an arbitration law other than that of the seat to govern the arbitration, however, does not in itself alter the seat of the arbitration. See paragraphs (f) and (y). Although the Restatement uses the description "juridical home," the terms "situs" and "place" are more widely used as synonyms for "seat."

bb. Set-aside proceeding. An arbitral award is "set aside" when it is annulled (i.e., rendered null and void) by a competent court or other competent authority. While FAA Chapter One uses the term "vacate" to denote the setting aside of an award, the New York and Panama Conventions refer, respectively, to an award as "set aside" or "annulled." In general, the Restatement treats the terms "vacate," "set aside," and "annul" as synonymous. However, when specifically referring to actions brought to nullify a U.S. Convention award as defined in paragraph (i), the Restatement ordinarily uses the statutory terms "vacate" or "vacatur."

The only courts that are competent under the Conventions to set aside an award are the courts at the arbitral seat and, when the parties expressly designated as the applicable arbitration law the law of a country other than the seat, concurrently the

courts of the country so designated. See paragraph (f). Both Conventions treat the setting aside of an award by a competent authority as a ground for a court of another jurisdiction to deny confirmation, recognition, and enforcement of the award. However, the fact that an arbitral award has been set aside by a court of the State on whose territory or under whose arbitration law it was made, and is accordingly null and void within that jurisdiction, does not necessarily render the award legally incapable of being recognized or enforced elsewhere. As stated in Section 4-16, infra, while the Conventions permit courts to refuse enforcement of an award that has been set aside by a competent authority, they also, in certain circumstances, permit recognition or enforcement of an award despite its having been set aside. As also discussed in Section 4-16, infra, the New York and Panama Conventions allow a court to defer vacatur, confirmation, recognition, and enforcement pending the outcome of a set-aside proceeding abroad.

In the case of Convention awards made in the United States, as defined in paragraph (i), both the court of the arbitral seat and the court where recognition or enforcement is sought will be courts in the United States. The effect of a judgment of a court setting aside such an award is accordingly determined by the law of judgment recognition of the forum where recognition or enforcement is sought, guided by the mandates of the U.S. Constitution's Full Faith and Credit Clause.

cc. State. A "state," as used in the Restatement, includes the 50 states of the United States, whether described as states, districts, or commonwealths. It also

includes territories, foreign commonwealths, and other political units within the jurisdiction of the United States, as defined in paragraph (dd). The Restatement distinguishes between states as defined herein, and foreign States, as defined in paragraph (p). The latter have international personality, as reflected in their capacity to enter into treaties and other prerogatives that States are recognized as having under international law.

dd. United States. The term "United States," as used in the Restatement, is a geographic term encompassing all of the territory and waters, continental or insular, subject to the jurisdiction of the United States.

REPORTERS' NOTES

a. *Arbitral award.* The definition of "arbitral award" is essential to establishing the scope and operation of this Chapter. The elements set forth in paragraph (a) are common to the several types of awards to which this Chapter refers: "Convention," "foreign," "international," "non-Convention," and "partial." The Restatement definition of "arbitral award" requires that the award contain a "final and binding" determination, and that it address at least some aspect of the merits in dispute or preserve the tribunal's ability effectively to do so, such as by granting interim relief. Whether a writing constitutes an award is not controlled by the label the arbitral tribunal attaches to it. Consequently, provided the other elements are present, a determination set forth in writing may be an award even though denominated as a "decision," an "order," or a "ruling." Equally, a writing is not an award merely by virtue of being titled "award," see Publicis Commc'ns v. True N. Commc'ns, 206 F.3d 725, 729 (7th Cir. 2000), though a court asked to recognize or enforce such a determination may take into account the description given it by the tribunal that issued it.

The definition of "arbitral award" excludes determinations that are merely advisory, whether rendered as part of an arbitration, mediation, court-annexed regime, or some other dispute resolution process. See Comment *c*.

The term "final" suffers from some ambiguity. See James M. Gaitis, The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations, 16 Am. Rev. Int'l Arb. 1, 5 (2005). Some courts and other authorities would confine the term "final" to those awards that "resolve all the issues submitted to arbitration," that is to say, that dispose of the entirety of a dispute. See P.R. Mar. Shipping Auth. v. Star Lines Ltd., 454 F. Supp. 368, 372 (S.D.N.Y. 1978); Quixtar Inc. v. Brady, No. 08-14346, 2008 U.S. Dist. LEXIS 111811, at *50 (E.D. Mich. Dec. 17, 2008) (interim ruling on arbitrability will not be reviewed; "[w]here . . . arbitrators make an interim ruling that does not purport to resolve finally the issues submitted to them, judicial review is unavailable.").

The Restatement definition, however, extends not only to fully comprehensive awards, but also to an award that resolves fewer than all of the substantive issues before the tribunal, provided it resolves them in a final and binding manner. See e.g., Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1 (S.D.N.Y. 1973), aff'd, 489 F.2d 1313 (2d Cir. 1973) (award held to be "final" and "definite" within the meaning of 9 U.S.C. § 10(d) because arbitrators ruled on all claims before them, fixing a monetary obligation, even though they invited the aggrieved party to seek additional damages from the tribunal when events made them calculable); Mgmt. & Technical Consultants S.A. v. Parsons-Jurden Int'l Corp., 820 F.2d 1531, 1533 (9th Cir. 1987) (separate awards of damages and costs). As defined by the Restatement, awards that resolve fewer than all the issues before the arbitrators are "partial awards." See paragraph (w). Moreover, the Restatement distinguishes between the notion that an award must decide at least one issue in a final manner and the characterization of an award as the "final award." The latter is defined in paragraph (n) to mean "the last award that the tribunal makes with respect to the particular dispute before it." See Comment *n*.

Whether a tribunal grant of "interim measures," as defined in paragraph (q), should be classified as an award raises challenging questions. Although a presumption that such measures are within the definition of "award" can be justified on several grounds that the Restatement ultimately adopts, there are cogent arguments for not doing so. The main analytical objection to treating interim measures as awards is that such relief is generally intended to remain in effect only during the pendency of the arbitration and is capable of being reversed or modified by the arbitral tribunal even during that period. Thus, interim measures are in that sense never final and binding. Commentators underscore that fact: "While the tribunal no doubt intends to bind the parties with its decision, it is hard to conceive of the decision as finally disposing of a dispute between the parties." W. Laurence Craig, et al., International Chamber of Commerce Arbitration 464 (3d ed. 2000); see also ICC, Final Report on Interim and Partial Awards, 1 ICC Ct. Bull. 26-29 (Dec. 1990) (discussing several practical and conceptual problems in treating interim measures as awards); Klaus P. Berger, International Economic Arbitration 345 (1993) (interim "awards" not "true partial awards" because no question on the merits is disposed of therein).

Support for the position that interim measures are not awards can also be found in foreign case law. The leading decision from abroad is Resort Condominiums, Int'l, Inc. v. Bolwell, Sup. Ct. Queensland, Oct. 29, 1993, 9(4) Int'l Arb. Rep. A-1 (1994). The *Resort Condominiums* court declined to enforce under the New York Convention an interim measure issued by an arbitral tribunal sitting in the United States, reasoning that the Convention only applies to awards that decide disputes with finality; see also Craig, et al., supra, at 466 ("strong logic of Resort Condos . . . suggests that it would not be prudent to rely on the enforceability by national courts of such decisions as awards.").

Additionally, to presume that interim measures are awards is potentially to subject them to vacatur actions, generating interlocutory judicial review of arbitrators' procedural rulings that would delay the arbitral process and render it less efficient. See Aerojet-Gen. Corp. v. Am. Arbitration Ass'n, 478 F.2d 248 (9th Cir. 1973); Compania Panemena Maritima San Gerassimo v. J.E. Hurley Lumber Co., 244 F.2d 286, 289 (2d Cir. 1957); Quixtar, 2008 U.S. Dist. LEXIS 111811, at *50 (interim ruling on arbitrability will not be reviewed). Finally, the line between interim measures and procedural directions, scheduling orders, and evidentiary rulings, which are not awards, may in certain settings be difficult to draw.

Nevertheless, the Restatement view, that interim measures are presumed to be awards, is supported by several considerations. First, interim measures represent final and binding determinations in the sense that they purposefully dispose of requests for relief in response to the particular circumstances presented at the time the request is made; and they do so through the application of legal principles about which there is substantial consensus. See, e.g., UNCITRAL Model Law on International Commercial Arbitration, art. 17A (arbitrators to consider irreparable harm, balance of harms, and reasonable possibility of success on the merits).

Second, the Restatement position is supported in U.S. case law. Courts commonly accept the notion that such measures, despite their limitations, are sufficiently final and binding. See, e.g., Pac.

Reinsurance Mgmt. Corp. v. Ohio Reinsurance Mgmt. Corp., 935 F.2d 1019, 1022-1023 (9th Cir. 1991) (ordering escrow payments); Banco de Seguros del Estado v. Mut. Marine Offices, Inc., 230 F. Supp. 2d 362, 368-370 (S.D.N.Y. 2002) (order requiring letter of credit to secure the award confirmed); S. Seas Navigational Ltd. v. Petroleos Mexicanos, 606 F. Supp. 692 (S.D.N.Y. 1985) (interim award requiring removal of claim of lien notice); Sperry Int'l Trade, Inc. v. Gov't of Isr., 532 F. Supp. 901 (S.D.N.Y. 1982), aff'd, 689 F.2d 301 (2d Cir. 1982) (ordering of joint escrow account).

Third, the incidence of actions to vacate an interim measure is not high, due to reluctance on the part of dissatisfied parties to bring judicial challenges to rulings of the arbitral tribunal during the pendency of the arbitration. Thus, courts do not in practice have frequent opportunity to second-guess arbitral grants of interim relief.

Fourth, as formulated, the Restatement classification of interim measures as awards is rebuttable, and thus accords arbitrators and courts useful flexibility. The approach recognizes that there may well be instances in which the tribunal would prefer that its interim measure not be the subject of a court proceeding, and thus crafts its measure accordingly. See Comment *q*.

Fifth and most importantly, to not accord a presumption of award status to interim measures risks undermining their effectiveness. U.S. law offers no reliable framework for ensuring the judicial enforceability of interim measures issued by foreign courts. In particular, the FAA contains no counterpart to the Revised UNCITRAL Model Law's Article 17(H), which provides in relevant part that:

> An interim measure issued by a tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon the application to the competent court, irrespective of the country in which it was issued, subject to the provisions [of this Law concerning grounds for refusing recognition and enforcement].

The grounds for declining recognition and enforcement of interim measures under the Model Law regime, in turn, closely track those found in the New York and Panama Conventions. See Model Law, art. 17(I).

Unless arbitral grants of interim relief are ordinarily eligible for treatment as awards, their judicial enforceability in U.S. courts will be uncertain, due to the likely analogy between arbitral measures of interim relief and comparable measures ordered by foreign courts. See, e.g., Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199, 1214 (9th Cir. 2006) (federal court applies general principles of comity followed by California courts in exercising discretion whether to enforce provisional injunctive relief ordered by a French court); Pilkington Bros. P.L.C. v. AFG Indus., Inc., 581 F. Supp. 1039, 1045 (D. Del. 1984) (whether to give effect to foreign injunctive relief pursuant to international comity is discretionary). Moreover, if judicial enforcement of arbitral measures of interim relief were left purely discretionary, U.S. courts would often have no choice but to enter, at least to some degree, into the merits of the decision to award such relief.

b. Arbitral tribunal. Neither the FAA nor the Conventions fully define arbitration or arbitral tribunal. The Restatement definition of arbitral tribunal nevertheless corresponds to and is consistent with that given to "arbitral award" and "arbitration agreement" under paragraphs (a) and (d). It also parallels usage of the term in both FAA and Convention case law. The Restatement definition is intended to be broad enough to accommodate the variations found in practice. Thus, by referring to "a body composed of one or more persons," the Restatement definition of arbitral tribunal is broad enough to include a tribunal composed of an even number of appointees, as well as the standard one or three members. See Compania Espanola de Petroleos, S. A. v. Nereus Shipping S.A., 527 F.2d 966 (2d Cir. 1975) (multi-party arbitration involving five arbitrators).

Most often, an arbitral tribunal is empowered to decide only one or more individual disputes. There is authority, however, for treating certain more permanent entities as arbitral tribunals. See New York Convention, art. I(2) ("'arbitral awards' include . . . those made by permanent arbitral bodies").

Though technically not a permanent institution, the Iran-U.S. Claims Tribunal is a good example of a semi-permanent entity that constitutes an arbitral tribunal for Restatement purposes. See Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141 (2d Cir. 1992) (refusing enforcement under Article V of the New York Convention);Islamic Republic of Iran v. Gould, Inc, 887 F.2d 1357 (9th Cir. 1989) (finding subject-matter jurisdiction based on the New York Convention); Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 28 (D.D.C. 1999) (applying FAA Chapter Two's three-year limitation period).

The definition of arbitral tribunal includes bodies empowered to act ex aequo et bono (or as amiable compositeur), and bodies some of whose members are not required to be independent and impartial. See ABA/AAA Code of Ethics for Arbitrators, Canon X (2004). Trade associations of various kinds may empanel neutrals with the powers of an arbitral tribunal, and the awards of such deliberative bodies may be regarded as arbitral awards. See Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115, 124-129 (1992). Also included in the definition are tribunals authorized by the parties not only to arbitrate, but also to act in a non-arbitral capacity, such as by pursuing mediation of the dispute. See Cal. Code Civ. Proc. § 1297.301 (Deering 2010) (permitting arbitrators to mediate with permission of the parties). Nor does a body cease to be an arbitral tribunal merely because its jurisdiction or competency has been challenged. This precept is an important corollary to the widely accepted doctrine that arbitrators have jurisdiction to determine their own jurisdiction.

The term arbitral tribunal is not fully without limits, however. A body is ordinarily not an arbitral tribunal if its jurisdiction is predicated not on consent of the parties, but on a requirement imposed by a court as a feature of civil litigation (such as may occur under a court-annexed alternative dispute processing regime). The "awards" originating in such proceedings are typically not binding as such on the parties. Further, if the neutrals' mandate is restricted to performing non-adjudicative ADR, such as mediation, they do not constitute an arbitral tribunal. This limitation coincides with the related notions that proposed terms of settlement or a prediction of a substantive outcome proffered by a neutral are not arbitral awards. See Comment *c*.

The Restatement uses the term "tribunal" instead of "panel." The latter can lead to confusion because, while it may be used as a synonym for "tribunal," it may also refer to the entire roster of arbitrators maintained by an institution. Similarly, in referring to a tribunal's members collectively or individually, the Restatement uses "arbitrator" or "arbitrators" and not the less commonly used terms "arbiter" or "arbiters."

c. Arbitration. Strikingly, arbitration statutes and treaties often fail to define "arbitration." See Jean-Francois Poudret & Sebastien Besson, Comparative Law of International Arbitration 1-3 (2007) (remarking on the lack of definitions). The Restatement definition nevertheless captures what are widely regarded as arbitration's cardinal features: an adjudicatory dispute resolution method in which the parties submit a defined dispute to one or more adjudicators appointed by them or on behalf of them to render a final and binding determination capable of producing res judicata effects. Indeed, arbitration's capacity to yield a ruling having res judicata effect figures prominently in the literature as distinguishing arbitration from other dispute resolution processes. Fouchard Gaillard Goldman on International Commercial Arbitration 12 (Emmanuel Gaillard & John Savage eds., 1999).

Under the prevailing view, and that adopted by the Restatement, arbitration differs from collaborative forms of ADR, such as mediation, which do not produce a binding resolution of disputes and which require the parties' continuing willingness to participate in the proceedings. See, e.g., Advanced Bodycare Solutions, L.L.C. v. Thione Int'l, Inc., 524 F.3d 1235, 1240 (11th Cir. 2008) (concluding that "because the mediation process does not purport to adjudicate or resolve a case in any way, it is not 'arbitration' within the meaning of the FAA"); Dluhose v. Strasberg, 321 F.3d 365, 372-373 (3d Cir. 2003) (holding that proceedings under the ICANN Uniform Domain Name Dispute Resolution Policy "do not fall under the Federal Arbitration Act" and that "FAA . . . applies only to binding proceedings likely to 'realistically settle the dispute'"); Harrison v. Nissan Motor Corp., 111 F.3d 343, 350 (3d Cir. 1997) (Nissan's nonbinding ADR system not arbitration); see also Fouchard Gaillard Goldman on

International Commercial Arbitration, supra, at 12 (binding character of awards distinguishes arbitration from other third-party procedures). In keeping with the weight of decisional authority and international consensus, the Restatement rejects the very broad notion of arbitration sometimes adopted in domestic case law. See, e.g., Fisher v. GE Med. Sys., 276 F. Supp. 2d 891, 893 (M.D. Tenn. 2003) ("This court is persuaded that 'arbitration' in the FAA is a broad term that encompasses many forms of dispute resolution.").

The Restatement also distinguishes arbitration from "expert determination" as that method is commonly practiced. As in arbitration, the expert in that process is entrusted contractually with resolving a dispute. However, in contrast to arbitration, expert determinations generally proceed under a mandate that does not contemplate decisions having res judicata effect. See Julian D.M. Lew, et al., Comparative International Commercial Arbitration 10-11 (2003); Fouchard Gaillard Goldman on International Commercial Arbitration, supra at 12 (French law); Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, Redfern and Hunter on International Arbitration 48-49 (5th ed. 2009). The decision of the experts, if not voluntarily complied with, must be enforced through an ordinary breach of contract action. Lew et al., supra, at 10-11; Blackaby et al., supra, at 49. Authorities identify other differences between arbitration and expert determination that are of significance in particular legal systems. See Lew et al., supra, at 10 (experts may use their own knowledge and are thus not confined to the parties' submissions; experts do not enjoy arbitral immunity; experts need not provide reasons). Such expert determinations ordinarily fall outside the statutory and treaty regimes addressing arbitration, and accordingly lie outside the scope of the Restatement.

An adjudicative process does not need to be administered or otherwise supervised by an arbitral institution in order to constitute an arbitration. See Blackaby et al., supra, at 53-55 (discussing "ad hoc" arbitration). Nor must the decision-makers be bound to apply a particular national law. See id. at 52 (authorization to act ex aequo et bono does not transform the arbitration into non-arbitral ADR); cf. Lisa Bernstein, Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry, 21 J. Legal Stud. 115, 124-129 (1992). Equally, tribunals authorized to resolve a commercial dispute in a final and binding manner by applying religious law may properly be called arbitral tribunals. See Zeiler v. Deitsch, 500 F.3d 157, 169 (2d Cir. 2007) (confirming Convention award rendered in Beth Din arbitration).

d. Arbitration agreement. Arbitration is consent-based. The agreement to arbitrate accordingly plays a fundamental role in the arbitral process and associated jurisprudence. Many of the grounds upon which arbitral awards may be vacated or refused confirmation, recognition, and enforcement under a convention relate to the agreement to arbitrate under which the tribunal purported to act. See §§ 4-12 to 4-18, infra.

Arbitration agreements may be entered into on both a pre-dispute and post-dispute basis. Most often, arbitration agreements form an integral part of the commercial agreement to which they relate and, for that reason, are commonly called arbitration clauses. By definition, such agreements are pre-dispute. But in other circumstances the parties to a dispute may agree to resolve it only after the dispute has arisen. Agreements of this sort are commonly called "submission agreements." The rules governing international commercial arbitration do not normally differ according to whether the agreement has a pre-dispute or a post-dispute character.

Courts in the United States regularly enforce arbitration agreements, subject to a limited number of defenses. Most of the more important decisions rendered by the U.S. Supreme Court in the arbitration field have addressed purported agreements to arbitrate. Those cases often have involved disputes with an international dimension. See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto Culver Co., 417 U.S. 506 (1974).

To varying degrees, modern legal systems give effect to commercial arbitration agreements entered into before a dispute arises. The ability of businesses to anticipate disputes in this way has been identified by the U.S. Supreme Court as an important feature of international trade. See Mitsubishi, 473

U.S. at 629-630. In general, enforcement requires that such agreements be recorded in writing, and additional formal requirements may apply in certain settings. Nevertheless, a wide variety of written provisions meet the definition of "arbitration agreement." These occupy a continuum ranging from very brief to highly detailed and complex agreements. What is essential as a definitional matter is the presence of an undertaking to arbitrate. In practice, parties commonly adopt standard clauses sponsored by arbitral institutions and trade associations, albeit often with modification.

e. Commercial. The broad meaning given the term "commercial" corresponds to the relatively wide ambit of the present Restatement. But the term is not intended to provide a unified definition governing every context in which the commercial character of a transaction or relationship leads to application of the principles restated. Specific contexts may require the application of specialized definitions dictated by the particular treaty or statutory requirements in question.

FAA Section 202 conditions application of the New York Convention on the existence of an agreement to arbitrate or an award "arising out of a legal relationship . . . considered as commercial." This language replicates the U.S. reservation to the New York Convention. According to Section 202, however, use of the term "commercial" in that Section expressly includes relationships that are based on contracts that evidence a transaction "involving" commerce "among the several states or with foreign nations," as those terms are defined in Chapter One of the FAA. See FAA §§ 1, 2, 202. FAA Section 302 in turn extends that incorporation to cases falling under the Panama Convention. The incorporation of the FAA Chapter One term "involving commerce" into FAA Chapters Two and Three lends considerable breadth to the term "commercial," a breadth confirmed by the Supreme Court's decision in Citizens Bank v. Alafabco, 539 U.S. 52, 56 (2003) (citations omitted):

> We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power. Because the statute provides for "the enforcement of arbitration agreements within the full reach of the Commerce Clause," it is perfectly clear that the FAA encompasses a wider range of transactions than those actually "in commerce"—that is, "within the flow of interstate commerce[.]"

The commercial relationship reservation authorized by Article I, paragraph 3 of the New York Convention has been widely, though not universally, adopted by Convention States. Because the United States has insisted that the scope of the New York Convention be limited to those disputes that have a commercial character, and treats the Panama Convention as subject to the same condition, see FAA Sections 202 and 302, the definition of "commercial" is incorporated in the Restatement's definition of "Convention award." See paragraph (h). Accordingly, a foreign award that does not satisfy this requirement is not a Convention award. See Comment *h*. Such an award would also generally fall outside of the ambit of the present Restatement, which is limited to international commercial arbitration.

The commercial relationship requirement of FAA Section 202 and the New York Convention has not been the subject of detailed elaboration by courts in the United States, but those courts that have addressed it have adopted a relatively straightforward application of the requirement, as explained in Island Territory of Curacao, 356 F. Supp. at 13 (quoting Leonard V. Quigley, Convention on Foreign Arbitral Awards, 58 A.B.A. J. 821, 823 (1972)) (citation omitted):

> Research has developed nothing to show what the purpose of the "commercial" limitation was. We may logically speculate that it was to exclude matrimonial and other domestic relations awards, political awards, and the like.
>
> Judged by any test, however, the contract . . . seems clearly to be "commercial". It has been said in this connection: "In the case of the United States reservation it seems clear that the full scope of 'commerce' and 'foreign commerce,' as those terms have been broadly interpreted, is available for arbitral agreements and awards."

Cf. Corcoran v. Ardra Ins. Co., 657 F. Supp. 1223, 1228 (S.D.N.Y. 1987) (that two entities were part of highly regulated industry does not preclude their dispute being "commercial"). As this analysis suggests, the term "commercial" covers a vast array of relationships, including fiduciary relationships, Faberge Int'l, Inc. v. Di Pino, 491 N.Y.S.2d 345, 348 (N.Y. App. Div. 1985); relations between States and foreign investors, Island Territory of Curacao, 356 F. Supp. at 13; claims by foreign regulatory authorities, Corcoran, 657 F. Supp. at 1228; insurance contracts, Meadows Indem. Co. v. Baccala & Shoop Ins. Servs., Inc., 760 F. Supp. 1036 (E.D.N.Y. 1991); and maritime agreements (explicitly contemplated by 9 U.S.C. § 2 and incorporated by reference into 9 U.S.C. § 202).

The Restatement's broad definition of "commercial" comports with the approach taken by the drafters of the UNCITRAL Model Law on International Commercial Arbitration. They recommend that:

> The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

Model Law, art. 1 n.2. In addition, however, because FAA Section 202 defines "commercial" to extend to the full reach of Congress's Commerce power, as reflected in FAA Section 2, it also includes contracts such as employment contracts that are not listed in the note to the Model Law. See 9 U.S.C. § 202; see also Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (holding that employment contracts are within the scope of FAA § 2). Additionally, the definition would ordinarily include awards arising from an investment dispute. See Restatement (Third) of The Foreign Relations Law of the United States § 487, Comment *f*.

f. Competent authority. The question of an authority's "competence" arises mainly in connection with Section 4-16, infra, permitting courts to deny recognition or enforcement to awards set aside by a competent authority on the territory of which, or under the arbitration law of which, the award was made. Both the New York and Panama Conventions entitle a court to refuse confirmation, recognition, and enforcement on this ground. The Restatement's iteration of this principle in Section 4-16 assumes that the court asked to recognize or enforce a Convention award may only decline to do so on the basis of a set-aside judgment when the authority rendering the judgment was "competent" as defined in this Section. Similarly, the discretion to adjourn enforcement proceedings pending the outcome of a set-aside action exists only when the court seized of the set-aside action is "competent" within the meaning of this Section.

Subject only to rare exception, an authority will not be "competent" unless it is part of the legal system of the seat of arbitration, as that term is defined in paragraph (aa). It follows that neither the substantive law governing the parties' rights and duties under the contract, nor the actual places of hearings, deliberations, or the award's drafting (if other than the seat) establish a court's competence. The sole exception—and it is truly rare—arises when an award results from proceedings that the parties had expressly subjected to an arbitration law other than that of the seat. The Restatement holds that such a designation provides for "concurrent set-aside jurisdiction." That is, the parties' choice adds a jurisdiction whose authorities are competent, rather than supplanting the seat as a system whose courts are competent, to nullify an award. Accordingly, the relevant authorities of the system supplying the designated arbitration law will be competent, concurrently with those of the seat, to entertain set-aside actions brought against the award. The fact of concurrent jurisdiction does not alter the arbitral seat, nor affect the basic governing law rule that in set-aside proceedings brought at the seat, mandatory rules of that place may subordinate rules contained in the parties' chosen arbitration law.

g. Confirmation. Even though Chapters Two and Three of the FAA speak generally of actions to "confirm" Convention awards, the Restatement uses the term "confirmation" only in connection with actions to recognize and enforce "Convention awards made in the United States." See paragraph (i). This usage has the virtue of adopting for the Convention chapters the same language used in Chapter One, and to that extent unifying terminology among the chapters of the FAA.

Within the FAA framework, the prevailing party may request "confirmation" of an award made in the United States or its territories, while the opposing party may request "vacatur" of the same award. Confirmation of U.S Convention awards is sought under a convention. See § 4-3(a)(2). A court proceeding under a convention is instructed that it "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition of enforcement of the award specified in the said Convention." 9 U.S.C. § 207. An award may be entitled to preclusive effect, and once confirmed may also be the basis for a coercive order on behalf of the party that prevailed in arbitration. See Marion Mfg. Co. v. Long, 588 F.2d 538, 541 (6th Cir. 1978) (holding that "if the award is upheld in a reviewing court, the rights of the parties are determined from the date of the award").

A Convention award rendered abroad, by contrast, with rare exception, will not be subject to vacatur in a court in the United States, but is subject in U.S. courts only to the secondary control functions authorized in the Conventions. Thus, ordinarily, a U.S. court may do no more than refuse recognition or enforcement, and may do so only on the grounds enumerated in the Conventions. See §§ 4-1 and 4-2, infra. Extraordinarily, an award made outside the United States may be vacated by a U.S. court. A court properly exercises such power, which it will possess concurrently with the courts of the seat, when the parties explicitly have made the arbitration subject to U.S. arbitration law. See Comment *f*.

With respect to foreign awards, the Restatement refers not to "confirmation," but to "recognition and enforcement," so as to avoid the confusion that may arise from the close association between "confirmation" and "vacatur," inasmuch as a U.S. court generally has no authority to vacate a foreign award.

h. Convention award. Convention awards are those awards that satisfy the criteria for application of either the New York or the Panama Convention. As a practical matter, more awards are subject to the New York Convention than to the Panama Convention because a far greater number of States have ratified the New York Convention than have ratified the Panama Convention.

Notwithstanding the broadly parallel structure of the two Conventions, there are noteworthy differences between the two treaties relevant to the confirmation, recognition, and enforcement of awards. See generally John P. Bowman, The Panama Convention and Its Implementation Under the Federal Arbitration Act (2002). Some of these differences have been offset by the Conventions' implementing legislation, and courts have tended to unify practice under the two treaties. See, e.g., Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 515 n.3 (2d Cir. 1975) (New York Convention retroactive); Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 802 F. Supp 1069, 1073 (S.D.N.Y. 1992) (Panama Convention retroactive), rev'd on other grounds, 991 F.2d 42 (2d Cir. 1993). Efforts to harmonize the Conventions sometimes occur even when the texts of the two Conventions diverge. For instance, the reciprocity and commercial reservations found in Article I of the New York Convention, both of which were interposed by the United States upon ratification, are not expressly authorized in the Panama Convention. Nevertheless, the United States included the same two reservations in its instrument of ratification of the Panama Convention, pursuant to that Convention's Article 8, as well as in FAA Chapter Three implementing the Convention. See 9 U.S.C. §§ 302, 304.

According to FAA Chapter Three (9 U.S.C. § 305), if both the Panama and New York Conventions are by their terms in force in the country in which a foreign award was made, the Panama Convention will apply only "[i]f a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Panama Convention and are member States of the Organization of American States." Otherwise, the New York Convention will apply. See Progressive Cas. Ins. Co., 802 F. Supp. at 1073-1074. Section 305 permits the parties to modify this default rule by an express agreement

to the contrary. See 9 U.S.C. § 305. For the parties to make a valid selection, the arbitration agreement must meet the requirements for application of the Convention chosen.

Courts have not yet addressed whether the Panama Convention or the New York Convention applies when all parties to the arbitration agreement are American citizens but the arbitration has a sufficient international nexus under FAA Section 202 for the Conventions to apply. By the terms of Section 305, the Panama Convention would seem to apply to such awards rather than the New York Convention, because the majority of the parties to the agreement are citizens of a State that has ratified the Panama Convention. Only rarely will that issue matter, however, given the substantial similarity between the two Conventions.

i. Convention award made in the United States. By its terms, the New York Convention applies to "arbitral awards rendered in the territory of a State other than the State where recognition and enforcement of such awards is sought . . . and to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." New York Convention, art. I(1) ; see also Albert Jan van den Berg, When Is an Arbitral Award Non-Domestic Under the New York Convention of 1958?, 6 Pace L. Rev. 25 (1985). This formulation allows each ratifying State to develop its own definition of "non-domestic" for purposes of applying the Convention to awards rendered within that State's territory. Chapters Two and Three of the FAA do so by extending the Conventions to awards arising out of a legal relationship that "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States." 9 U.S.C. §§ 202, 302.

The seminal case defining Convention awards made in the United States (i.e., "not considered as domestic") is Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983). In *Bergesen*, the Second Circuit concluded that an award made in New York in an arbitration between Swiss and Norwegian disputants concerning an international charter party qualified for Convention treatment. The court held that the term

> "not considered as domestic" denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.

Id. at 932; cf. Productos Mercantiles e Industriales, S.A. v. Faberge, USA, Inc., 23 F.3d 41, 44 (2d Cir. 1994) (award rendered in New York subject to Panama Convention).

Neither the FAA nor the Conventions explicitly state that awards "not considered as domestic" must be rendered in the United States or its territories, such as occurred in *Bergesen*. The prevailing view, and that adopted by the Restatement, however, is that this residual category is confined to awards made in the United States. Such awards thus do not lend themselves naturally to the Convention term for them—"non-domestic"—because they could just as well be described by reference to the place where they were rendered, hence as "domestic" awards. It is for this reason that the Restatement adopts the phrase "Convention awards made in the United States" (or "U.S. Convention awards," for short) to designate the awards falling in this category. Such awards are also often colloquially referred to as "*Bergesen* awards."

The FAA's manner of delimiting the Conventions' reach with respect to awards made in the United States is elliptical. Section 202 supplies a test that functions by exclusion. The first sentence appears to allocate to the Convention coverage coextensive with that of Chapter One. The remainder of that Section, however, excludes awards that arise out of any relationship solely between U.S. citizens unless that relationship has a reasonable relation with one or more foreign States. This exclusion of course eliminates Convention coverage for what may be deemed "purely" domestic awards. A fair reading of Section 202, however, suggests that the presence of a non-American party to the dispute alone might supply a sufficiently "foreign" element to avoid exclusion. Regardless, the core test is whether the underlying relationship has a reasonable relation to one or more foreign States. The

location of property, or designation of performance or enforcement, in a foreign jurisdiction are examples of non-U.S. elements whose presence is sufficient to qualify an award as a Convention award, even though made in the United States. They are not, however, exhaustive.

j. Court. The vacatur, confirmation, recognition and enforcement of international awards are not entrusted exclusively to federal courts. FAA Chapters Two and Three contemplate that vacatur, confirmation, and enforcement of Convention awards may be sought in state or other nonfederal courts, as evident from the removal provisions found in Sections 205 and 302 (incorporating Section 205 for actions under the Panama Convention). In connection with agreements to arbitrate governed by FAA Chapter One, the Supreme Court has stated that FAA Section 2 creates "a substantive rule applicable in state as well as federal courts." Southland Corp. v. Keating, 465 U.S. 1, 16 (1984). Relatedly, several state courts have regarded agreements to arbitrate that are subject to the New York Convention as requiring enforcement as a matter of treaty obligation. See F.A. Richard & Assocs., Inc. v. Gen. Marine Catering Co., 688 So. 2d 199, 203 (La. Ct. App. 1997) (compelling London arbitration). Thus, Convention awards and non-Convention awards are subject to confirmation, recognition, and enforcement in all courts throughout the United States and its territories.

k. Domestic award. A "domestic award" is an arbitral award that lacks international character because it has no reasonable relation with one or more foreign States. The term thus does not include any form of "international arbitral award" as defined in paragraph (r), and such awards are in general beyond the ambit of this Restatement. An award made in the United States is not necessarily a "domestic award." A domestic award will be governed by FAA Chapter One if the requisite interstate commerce element is present. But, by definition, it cannot be governed by the existing Conventions.

l. Enforcement. Awards are often complied with voluntarily. In the absence of voluntary compliance, enforcement is ordinarily a prerequisite to obtaining the relief granted in an award. Enforcement is the legal process by which an international award is reduced to a judgment of a court that enjoys the same status as any judgment of that court. The relief ordered in the judgment need not take monetary form, but it most often does.

One of the attributes of the New York and Panama Conventions is that awards qualifying under a Convention may be presented directly to a foreign court for enforcement, and need not be reduced to judgment at the arbitral seat as a prerequisite to enforcement. See Waterside Ocean Nav. v. Int'l Nav. Ltd., 737 F. 2d 150, 154 (2d Cir. 1984); Oriental Commercial Shipping Co. (U.K.) v. Rosseel N.V., 769 F. Supp. 514, 515 (S.D.N.Y. 1991).

The New York Convention refers to a court's obligation as the obligation to accord "recognition and enforcement." The FAA provisions implementing the Convention depart from that usage, instructing courts rather to "confirm" Convention awards unless a ground for denying recognition or enforcement is present. See 9 U.S.C. § 207. In keeping with the New York Convention's terminology and to avoid possible confusion with respect to the proper functions of U.S. courts in relation to foreign awards, the Restatement adopts the terms "recognition" and "enforcement" generally, and reserves the word "confirmation" exclusively for awards rendered in the United States. It also uses the same nomenclature of "recognition" and "enforcement" for all foreign awards, including non-Convention foreign awards sought to be given effect under FAA Chapter One. For discussion of the grounds upon which recognition and enforcement of non-convention awards may be declined, see Sections 4-19 through 4-18, infra.

m. Execution generally. The party against whom an international arbitral award is enforced may satisfy the resulting judgment without need for further court intervention. However, if it fails to do so, further effectuation of the judgment is often necessary. Specifically, the prevailing party may obtain from the enforcing court a writ of execution instructing a U.S. Marshal, or a sheriff in the case of a state court, to execute the judgment by seizing the property of the recalcitrant party, subjecting it to sale, and distributing the proceeds to the enforcing party in an amount corresponding to the judgment and any interest awarded by the court. See Fed. R. Civ. Pro. 69; 28 U.S.C. § 566(c). In this Chapter, the term "execution" arises in particular with respect to the immunity of State assets. See §4-28, infra.

n. Final award. The defining characteristic of a final award is its temporal position relative to any other award in the arbitral process. By definition, no other award has been subsequently issued in the same arbitration. The definition of "final award" is central to the operation of certain limitation periods. The characterization "final" thus functions in conjunction with the definition of "made" (see paragraph (s)) and the governing law and tolling principles set forth in Section 4-32 (statute of limitations). Paragraph (c) of the latter underscores one important difference between any antecedent partial awards and the final award: a failure to bring a post–award action on the final award leads to a time-bar, whereas, "[a] failure to bring a post-award action on a partial award does not preclude a party from seeking the same relief within the limitations period applicable to the final award." §4-32 (c), infra. The latter rule, which implements a form of tolling, results from practical and policy considerations. See Comment *c* to §4-32, infra.

If an award intended by the tribunal to be its last ("final") award is returned to it by a party for correction, supplementation, or interpretation as contemplated by many arbitration statutes and rule formulae (see, e.g., UNCITRAL Model Law on International Commercial Arbitration, art. 33), the award that emerges from that reconsideration will be the final award, whether or not the tribunal altered the award. Cf. UNCITRAL Model Law, supra, art. 33(3). The same rule applies when a court remands an award to the tribunal for further processing under Section 4-35. The award as reissued by the tribunal is its "final" award.

o. Foreign award. A "foreign award" is one rendered in an arbitration seated outside the United States as defined in paragraph (dd). It is to be distinguished from the broader term "international arbitral award," which also includes "Convention awards made in the United States." Although most foreign awards are Convention awards, the term "foreign award" also embraces "non-Convention awards" as defined in paragraph (u). Accordingly, an award is still foreign if it was rendered in a non-Convention country, originates abroad but does not meet the commercial relationship test elaborated by FAA case law, or stems from an arbitration agreement that fails to meet the Convention's writing requirement.

p. Foreign State. The Restatement's definition of "foreign State" is consistent with the definition of "foreign award" as defined in paragraph (n), and with the many other instances in which the Restatement uses the qualifier "foreign." For purposes of international law, a State is "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in formal relations with other such entities." Restatement (Third) of The Foreign Relations Law of the United States § 201. A State in this sense is to be distinguished from the sub-units of a State, which are commonly termed, as in the U.S., as "states."

q. Interim measure. In arbitration practice, the terminology associated with temporary relief is not uniform. The Restatement uses the term "interim measure" to describe arbitral grants of temporary relief designed to preserve the status quo, help ensure the satisfaction of any subsequent award, protect the rights of one or more parties pending arbitration, or otherwise promote an arbitration's efficacy and that of the award that results therefrom. The Restatement's adopts "interim measure" in preference to other terms sometimes used as synonyms for such grants of relief, such as "interim relief," "protective order," "conservatory measure," "provisional measure," "interlocutory relief," and "temporary relief."

The qualifier "interim" denotes a measure's temporary nature and distinguishes it from permanent remedies granted by a tribunal such as damages, declaratory relief, and injunctions embodied in a final award. Nevertheless, as defined by the Restatement, an interim measure is final in that it disposes of a particular request at a particular time in the life of an arbitral proceeding, often after the tribunal has considered many of the standard factors that courts generally employ in dealing with requests for provisional relief. See, e.g., UNCITRAL Model Law on International Commercial Arbitration, art. 17A (arbitrators to consider irreparable harm, balance of harms, and reasonable possibility of success on the merits). The Restatement rejects the view that because an interim measure may be

amended or withdrawn by the tribunal it cannot be final and binding for purposes of satisfying the requirements of paragraph (a). Interim measures are thus presumed to be awards.

The Restatement position that such interim measures are presumed to be awards is consistent with the views of most U.S. courts that have squarely addressed the issue. See, e.g., Pac. Reinsurance Mgmt. Corp. v. Ohio Reinsurance Corp., 935 F.2d 1019, 1022-1023 (9th Cir. 1991) (ordering escrow payments); Banco de Seguros del Estado v. Mut. Marine Offices, Inc., 230 F. Supp. 2d 362, 368-370 (S.D.N.Y. 2002) (order requiring letter of credit to secure the award confirmed); Sperry Int'l Trade, Inc. v. Gov't of Israel, 532 F. Supp. 901 (S.D.N.Y. 1982), aff'd, 689 F.2d 301 (2d Cir. 1982) (enforcing order to establish joint escrow account).

By treating such grants of relief as awards only presumptively, however, the Restatement anticipates that a court might determine in appropriate circumstances that the measure should be treated as a non-award. Such a determination has important consequences for the type of relief that a court may grant. Among the considerations that bear on whether the presumption has been rebutted is what the tribunal intended when issuing the measure. In turn, that intention often may be ascertained from the labels and forms the tribunal adopts, particularly in light of the content of the parties' chosen rules and requirements established by the administering institution, if any. Many arbitral rules and arbitration statutes allow, and thus encourage, tribunals to differentiate between interim awards and orders, and they often prescribe that awards take a particular form, or undergo a particular process. See, e.g., ICDR International Arbitration Rules, art. 21(2)(rev'd 2009)("[s]uch interim measures may take the form of an interim award"); id. art. 27(2) (awards should be reasoned unless the parties otherwise agree); ICC Arbitration Rules, art. 28(1) (rev'd 2012)("any such order shall take the form of an order, giving reasons, or of an Award as the Arbitral Tribunal considers appropriate"); id. arts. 31(2) and 33 (awards must be reasoned and must be scrutinized and approved by the ICC Court before being rendered).

Illustration 5 demonstrates the operation of the presumption. The mere failure to characterize an interim measure as an award by the tribunal is not sufficient to rebut the presumption that the measure is an award. The result in *Illustration 7* (presumption not rebutted) follows a fortiori from *Illustration 5*. The label ascribed to the measure by the tribunal should be insufficient to rebut the presumption when the parties have agreed that all tribunal orders may be submitted to a court for enforcement, particularly when as in *Illustrations 5* and *7*, the measure has other features consistent with award status, such as a reasoned character.

Illustration 6 exemplifies a fact pattern that would justify a court in finding that the presumption had been rebutted. There, the failure to adhere to the form that awards are required to take under the parties' chosen rules, and the tribunal's apparent assumption that its measure was not enforceable in the form in which it was issued, would suffice to rebut the presumption. The illustration is inspired by, but differs from, the interim measure granted in Chevron v. Ecuador, PCA Case No. 2009-23, Order for Interim Measures of Feb. 9, 2011, under the 1976 UNCITRAL Rules. In pertinent part the measure stated:

> As to form, the Tribunal records that whilst this decision under Article 26 of the UNCITRAL Rules is made in the form of an order and not an interim award, given the urgency required for such decision, the Tribunal may decide (upon its own initiative or any Party's request) to confirm such order at a later date in the form of an interim award under Article 26 and 32 of the UNCITRAL Rules, without the Tribunal hereby intending conclusively to determine the status of this decision, one way or the other, as an award under the 1958 New York Convention.

As distinct from *Illustration 6*, in which the presumption was rebutted, the *Chevron* tribunal preceded the above caveat with references to rule and treaty provisions confirming the parties' duty to carry out *awards*. Reminding the parties of their obligations with respect to awards suggests that, but for the urgency involved, the form of an award might have been adopted. It also explicitly leaves open the possibility that its decision (apparently in its then-present form) might be treated as an award under

the New York Convention. In that situation, the tribunal's choice of an order format would likely be insufficient to rebut the presumption.

By contrast, under a system such as that maintained by the ICC, in which awards (as distinct from orders) must be vetted by an institution before being issued, the use of an order instead of an award to grant an interim measure (thus obviating institutional scrutiny of the measure) will ordinarily weigh strongly in favor of rebutting the presumption that the measure is an award. In such a circumstance, in the absence of countervailing facts, a court may justifiably be influenced by the fact that the parties chose a regime that confers award status only upon measures that have been screened, including for compliance with mandatory rules. See ICC Internal Rules of the Court, art. 6 (rev'd 2012) (court to consider "to the extent practicable the requirements of mandatory law at place of the arbitration").

Similarly, because most international arbitral rules instruct tribunals to issue reasoned awards unless the parties agreed otherwise, a failure to provide reasons will often be relevant in rebutting the presumption. Conversely, the fact that an interim measure is accompanied by reasons will tend to support the presumption. Ultimately, whether the presumption has been rebutted is for the court to determine in light of all the circumstances. No single factor, including the form or label employed by the tribunal, is dispositive.

The position adopted by the Restatement renders it unnecessary for a court to analogize arbitral interim measures to foreign judicial orders, and thus rely on comity in determining whether to enforce them. See generally George Bermann, Provisional Relief in Transnational Litigation, 35 Colum. J. Transnat'l L. 553, 600-617 (1997); and see ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute §12 (a) ("A court… may grant provisional relief in support of an order, whether or not it is final, issued by a foreign court (i) to secure enforcement of a judgment entitled to recognition and enforcement under this Act; or (ii) to provide security or disclosure of assets in connection with proceedings likely to result in a judgment entitled to recognition and enforcement under this Act.").

Relying on comity to enforce an interim measure would not be inconsistent with the goals of international arbitration or the Conventions, and there exist several cases from which guidance might be taken. See Yahoo, Inc. v. La Ligue contre le Racisme er l'Antisemitisme, 433 F 3d 1199, 1214 (9th Cir. 2006) (general principles of comity developed by California courts governed enforceability of French court's injunction); Pilkington Bros. P.L.C. v. AFG Indus., Inc., 581 F. Supp. 1029, 1045 (D. Del. 1984) (no per se rule against extending comity to foreign injunctive relief); Pacanins v. Pacanins, 650 So. 2d 1028, 1029 (Fla. App. 1995*)* (Venezuelan freezing order enforced in light of public policy favoring predictable payment of foreign court-ordered child and spousal support); Wolff v. Wolff, 389 A.2d 413 (Ct. Spec. App. Md. 1978) (foreign alimony order enforceable; general principles of international comity provide an adequate basis); Int'l Nutrition Co. v. Horphag Research Ltd, 257 F.3d 1324, 1330-32 (D.C. Cir 2001) (comity accorded to French court decision after fairness of French court's process assessed). But see In re Stephanie M., 867 P.2d 706 (Cal. 1994) (Mexican decree not afforded comity because it conflicted with California public policy).

When the presumption that interim relief is a partial award has not been rebutted, the measure in question is subject to post-award relief. When an interim measure emanates from an arbitration seated in a Convention State abroad, the grounds for denying recognition and enforcement are exclusively those set forth in the relevant convention. If, exceptionally, the measure originates from an arbitration seated in a non-Convention state, FAA Chapter One supplies the grounds for refusing recognition and enforcement. Consistent with their treatment of awards generally, courts are not at liberty to perform a merits review of interim measures. See Comment *c* to §4-11.

Though presumed to be a species of "partial award," (see paragraph (w)), an interim measure, is distinctive in that it only temporarily preserves the status quo or serves a similar protective function. Partial awards most often decide conclusively one or more issues presented in the case, issues that the

arbitral tribunal may not thereafter revisit. Such discrete decisions may address, for instance, questions of jurisdiction, liability, and quantum of damages—issues that the tribunal, if it had elected to do so, could have resolved in a single comprehensive award disposing of the entire dispute.

However, the Restatement definitions of "interim measures" and "partial awards" have in common that they exclude scheduling, procedural, and evidentiary rulings, such as those ordering that written submissions be made by a certain date or that evidence be admitted over the objection of a party. Such orders operate to advance the proceedings by attending to administrative, procedural, and evidentiary questions. Unlike awards of interim measures and partial awards, scheduling, procedural, and evidentiary orders are not enforceable as awards, though they may be judicially enforced in some other manner permitted by forum law.

Correspondingly, in contrast to interim measures and partial awards, scheduling, procedural and evidentiary orders are not subject to vacatur proceedings or, generally, to other forms of judicial scrutiny. Shielding these types of orders from interlocutory review preserves the procedural integrity and autonomy of the arbitral process. See Aerojet-Gen. Corp. v. Am. Arbitration Ass'n, 478 F.2d 248 (9th Cir. 1973); Compania Panemena Maritima San Gerassimo v. J.E. Hurley Lumber Co., 244 F.2d 286, 289 (2d Cir. 1957); see also Quixtar, 2008 U.S. Dist. LEXIS 111811, at *49-52 (interim ruling on arbitrability will not be reviewed); Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l Ltd., 683 F. Supp. 945, 956 (S.D.N.Y. 1988) (court review of arbitrators' every procedural ruling inconsistent with FAA's aim of avoiding delay and unnecessary expense). The Supreme Court's opinion in *Stolt–Nielsen* is not to the contrary. The arbitral determination in that case, though having a procedural flavor, was issued as a partial award and raised fundamental questions of arbitral jurisdiction. See Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 130 S. Ct. 1758, 1766-1776 (to impose class format on a party inconsistent with consensual nature of arbitration).

Judicial enforcement of an interim measure issued by an arbitral tribunal is to be distinguished from a court's own issuance of provisional relief in aid of arbitration. As a terminological matter, the Restatement reserves the term "provisional relief" or "provisional remedies" for measures ordered by a court rather than an arbitral tribunal. Indeed, U.S. courts are generally authorized to grant various forms of provisional relief in aid of arbitration during its pendency through separate proceedings brought by a party to the arbitration. See, e.g., Arnold Chase Family, LLC v. UBS AG, 2008 U.S. Dist. LEXIS 58697, *5 (D. Conn. Aug. 4, 2008)(quoting Discount Trophy & Co., Inc. v. Plastic Dress-Up Co., 2004 U.S. Dist. LEXIS 2659, at *8 (D. Conn. Feb. 19, 2004)) (courts enjoy both the "power and duty to entertain motions for [relief] pending the results in [an] arbitration," unaffected by the fact that similar relief may be requested from and granted by the arbitral tribunal).

Although courts are generally permitted to grant provisional relief in aid of arbitration, respective courts' willingness to do so varies among jurisdictions and depends on the circumstances of an individual case. In federal courts, the types of relief available include attachments and like remedies through Federal Rule of Civil Procedure 64, which directs courts to apply state-law standards for this purpose, see, e.g., Bahrain Telecomms. Co. v. Discoverytel, Inc., 476 F. Supp. 2d 176 (D. Conn. 2007) (attachment available to support London arbitration through application of Connecticut statute), or through Federal Rule of Civil Procedure 65, which authorizes the grant of injunctive relief under federal law standards. See Martin Davies, Court-Ordered Interim Measures in Aid of International Commercial Arbitration, 17 Am. Rev. Int'l Arb. 299, 319 (2006); see, e.g., Suchodolski Assoc, Inc. v. Cardell Fin. Corp, No. 03-4148, 2003 U.S. Dist. LEXIS 24933 (S.D.N.Y. Dec. 10, 2003) (injunction granted pending arbitration); AIM Int'l Trading LLC v. Valcucine S.P.A., No. 02-1363, 2002 U.S. Dist. LEXIS 10373 (S.D.N.Y. June 11, 2002) (preliminary injunction granted). But see Venconsul N.V. v. TIM Int'l N.V., No. 03-5387, 2003 U.S. Dist. LEXIS 13594 (S.D.N.Y. Aug. 6, 2003) (request for preliminary injunction pending arbitration entertained but declined).

Analogously, parties to an international arbitration may turn directly to a U.S. court for assistance in the production of documents and other evidence located in the United States. In the context of foreign judicial proceedings, 28 U.S.C. § 1782 authorizes such assistance by U.S. courts in aid

of proceedings before foreign tribunals. Courts and commentators are split, however, regarding whether the section is available in aid of arbitration conducted abroad. See Bruce I. McDaniel, Annotation, What is a Foreign Tribunal Within 28 U.S.C. 1782, 46 A.L.R. Fed 956 (2004). A few states authorize court-issued discovery orders in aid of arbitration. See Cal. Civ. Proc. Code § 1297.271 (Deering 2010) (arbitral tribunal or a party with tribunal permission may seek court assistance in taking evidence).

r. International arbitral award. The term "international arbitral award" encompasses each of the several types of awards defined in this Section, including "Convention awards" (both "foreign" and those "made in the United States") and "non-Convention awards." By definition, the term does not include arbitral awards made in the United States that are purely domestic because they have no significant connection with a foreign country. The definition also excludes ICSID Convention awards, which are legally distinct and are therefore treated separately in the Restatement. See Chapter 6, infra.

s. Made. The New York and Panama Conventions, like the UNCITRAL Model Law on International Commercial Arbitration and the FAA, use the term "made" in referring to the production of an award. See New York Convention arts. I, V(1)(a), and VI; Panama Convention, art. 5(1); UNCITRAL Model Law on International Commercial Arbitration, arts. 29, 30(2), 31; FAA §§ 9-13, 207, 304. Texts associated with court judgments, and the ICSID Convention, by contrast, use the term "rendered." See ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 5 (2006); ICSID Convention, arts. 49, 51(2), 52(2). With respect to arbitral awards, the two terms do not convey different meanings; the Restatement thus treats "made" and "rendered" as synonymous.

The place at which an award is made is of central importance to the operation of the New York and Panama Conventions. The New York Convention, for instance, applies to "arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards is sought." New York Convention, art. I(1). Equally, the Restatement depends heavily on the notion that an award has a place of making, see paragraph (o) (defining "foreign award" by reference to its place of making), and invariably deems the seat of arbitration to be the place of an award's making. See paragraph (aa) (defining "seat").

The principle that an award is deemed to be rendered at the arbitral seat applies even though procedural steps were taken, or the award was actually prepared or signed, elsewhere. See Comment *b* to §4-16, infra. The Restatement thus rejects the approach formerly taken by one English court, which reasoned that an award is made where it is signed. Hiscox v. Outhwaite, [1991] 2 W.L.R. 1321 (arbitration conducted in England, but award signed in France; Court of Appeal reasoned that the award was "made" in France). The precept holds even in the rare situation in which the parties have designated an arbitration law other than that of the seat of arbitration to govern the proceedings. See Comment *f*.

The date upon which an award is made is relevant to the application of certain time limits such as the one found in FAA Section 207, which requires that actions to enforce a New York Convention award be filed "within three years after the arbitral award . . . is made." 9 U.S.C. § 207. See Comment *n* and §4-32, infra.

t. New York Convention award. A "New York Convention award" is an award that satisfies the requirements of the New York Convention and is therefore subject to its provisions. See New York Convention. The New York Convention has been ratified by over 140 countries. An award is still treated as a New York Convention award even if it also qualifies for enforcement under a friendship, commerce, and navigation treaty.

u. Non-Convention award. A "non-Convention award" is an award that does not fall under the ICSID Convention (see Chapter 5, infra), and that is also neither a New York nor a Panama Convention award. See paragraphs (h), (t) and (v). When a foreign award does not fall under the New York or Panama Convention, it is usually because of a lack of reciprocity. See §4-5, infra. Because the great majority of countries that are of significance in international trade and the global economy are signatories to one or both of the New York or Panama Conventions, most international arbitral awards

for which recognition or enforcement are sought in the United States are Convention awards. Nonetheless, there remain a few countries deeply engaged in international commerce (such as Liechtenstein and Taiwan) that have not ratified either the New York or the Panama Convention, such that non-Convention awards do exist. Because non-Convention awards are rare, courts in the United States have not developed settled rules concerning the law that governs them. See Comment *f* to §4-3, infra.

An award is considered to have been made in the territory in which the arbitration producing that award has its seat and, for the purposes of the Conventions, that place is deemed to be the "legal domicile" of the award. Cf. Restatement (Third) of The Foreign Relations Law of the United States § 487, Comment *b* ("The place of the award for purposes of the Convention is the place designated for the arbitration in the agreement to arbitrate; if no place is mentioned, the place of the award is determined in accordance with the agreement to arbitrate by the arbitrators or by the appointing authority."); see also Gary B. Born, International Commercial Arbitration 1240 (2009) (defining "seat" to mean "legal domicile" or "juridical domicile"). Thus, whether an award is made within a Contracting State to one of the Conventions, and thus eligible for Convention treatment, is determined by reference to the national territory in which the arbitration producing the award has its seat.

The nationality and domicile of the parties to an arbitration do not determine that arbitration's seat, and consequently those factors are not relevant to determining the applicability of the Conventions. See Restatement (Third) of The Foreign Relations Law of the United States § 487, Comment *b*; Nat'l Oil v. Libyan Sun Oil Co., 733 F. Supp. 800 (D. Del 1990) (award rendered in France governed by the New York Convention though Libya, State owner of award recipient, was not a party to the Convention and award would not be given Convention treatment there). This is a well-settled principle, even though courts in the United States occasionally have failed to properly apply it. See Texaco Panama Inc. v. Duke Petroleum Transp. Co., No. 95-3761, 1996 U.S. Dist. LEXIS 12861, at *1 (S.D.N.Y. Sept. 5, 1996) (holding that the New York Convention does not apply "since respondent is a Liberian corporation and Liberia is not a signatory to that convention.").

A foreign award may also fail to qualify as a Convention award if the underlying dispute does not arise out of a commercial relationship or if the award is not accompanied by an arbitration agreement that satisfies the Convention's writing requirement. See New York Convention, art. IV(1) (incorporating Article II(2)), paragraphs (e) and (h) of this Section; see also UNCITRAL, Settlement of Commercial Disputes, Preparation of Uniform Provisions on Written Form for Arbitration Agreements, Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), A/CN.9/WG.II/WP.139, at 14-15 (Jan. 23-27, 2006), available at http://www.abanet.org/intlaw/committees/public/private/V0591212.pdf (last visited Aug. 22, 2011).

v. Panama Convention award. A Panama Convention award is an award that satisfies the requirements of the Panama Convention and is therefore subject to its provisions. See Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (1975). The Panama Convention has been ratified by 17 countries in North, Central and South America. See SICE, Foreign Trade Information System, http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp (last visited Aug. 22, 2011). For discussion of the interrelationship between the Panama Convention and the New York Convention, see Comment *h*.

w. Partial award. An arbitral award is "partial" for purposes of the Restatement if it disposes in a final and binding manner of some but not all of the matters in controversy. A tribunal may decide, for one reason or another, to dispose of only portions or aspects of a dispute that the parties have submitted to arbitration. Partial awards are commonly the result of an arbitration that had bifurcated proceedings, i.e., that divided the dispute into phases and in which the tribunal issued a discrete award for each phase. Bifurcation of arbitral proceedings might, for example separate into different phases jurisdictional issues, the merits, and damages. Each award rendered at the end of any of those phases may be called a "partial award." See Hart Surgical, Inc. v. Ultracision, Inc., 244 F.3d 231, 235 n.3 (2001); Stolt-Nielsen S.A., v. Animal Feeds Int'l Grp., 130 S. Ct. 1758 (2010); see also Comment *a*.

Regrettably, statutes, rules, decisions, commentaries, and arbitrators themselves are not always precise or consistent in their usage in designating awards that dispose of less than all of the issues before a tribunal. Some use instead the term "interim award," which can create confusion due to the close association of the term "interim" with provisional relief. Because interim measures ordered by arbitral tribunals are final and binding with respect to whether the facts presented justify a grant of temporary relief, the Restatement classifies them, presumptively, as a type of partial award, even though a tribunal may modify or rescind the remedy granted, and separately defines such measures to allow for greater precision of usage, see paragraph (q) (defining "interim measures"). The Restatement uses the more inclusive term "partial award" when the determination in question disposes not of a request for interim relief but of an issue such as jurisdiction, fault, or quantum of damages.

Case law under the FAA and the New York Convention supports the notion that an arbitral award may be limited with respect to the claims, defenses, or issues that it decides. See, e.g., Island Territory of Curacao, 356 F. Supp. at 1 (award of damages "final" and "definite" though further award of damages might issue); Mgmt. & Technical Consultants, 820 F.2d at 1533 (separate awards of damages and costs); Zeiler, 500 F.3d at 169 (each arbitral accounting order "was specific and final and did not need to be followed by a concluding award").

Under the Restatement, it remains necessary, however, that the putative award resolves finally and conclusively at least one discrete issue or claim. See Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 282-283 (2d Cir. 1986) (citing Michaels v. Mariforum Shipping, S.A., 624 F.2d 411, 414 (2d Cir. 1980), and reasoning that the purported award in Michaels "did not finally dispose of any of the claims submitted, since it left open the question of [offsetting] damages on the four counterclaims of Owner"). Similarly, a putative award is not "final and binding" if it contains only determinations that are interdependent with undecided matters. See P.R. Mar. Shipping Auth., 454 F. Supp. at 373-374 (undecided portions were part of the same claim); cf. Cofinco, Inc. v. Bakrie & Bros., N.V., 395 F. Supp. 613, 616 (S.D.N.Y. 1975) (award directed payment but did not specify amounts).

x. Post-award action. The Restatement's unified approach consolidates in Chapter 4 rules governing court challenges to U.S. Convention awards (actions pursuing vacatur) and proceedings that seek, by contrast, to give effect to both U.S. Convention awards and foreign awards (actions to confirm, recognize, and enforce). Given this ordering of Restatement material, it is helpful to have one or more general terms for use when it is unnecessary to distinguish among the actions or types of relief sought. There are two such related terms: "post-award action" and "post-award relief." The term "post-award action" corresponds to, but is not coextensive with, the broader term "post-award relief" (defined in paragraph (y)), which includes also "recognition" (defined in paragraph (z)). The latter, though a form of "relief," is not the object of an "action" for purposes of Restatement nomenclature.

y. Post-award relief. The Restatement consolidates in Chapter 4 rules governing vacatur, confirmation, recognition, and enforcement of awards. These forms of relief need not always be referred to individually. In such circumstances, it is useful to have one or more global terms that do not distinguish among the constituent actions or types of relief sought. The Restatement employs two such related terms: "post-award actions" and "post-award relief." "Post-award actions" is defined in paragraph (x). It corresponds to, but is not coextensive with, the broader term "post-award relief" (defined in this paragraph). The concept of "post-award relief" includes "recognition" (defined in paragraph (z)) and is thus a slightly broader collective term than "post-award action." For Restatement purposes, "recognition" is a form of relief granted not through a free-standing action, but pursuant to a defensive motion that invokes an award's preclusive effects.

z. Recognition. Recognition denotes a determination by which a court that an award should preclude relitigation of a claim or issue that has been resolved in an arbitral award. This definition in the arbitration context mirrors the definition of "recognition" that is used in the context of foreign-country judgments to denote situations in which a judgment rendered in one country is invoked to preclude litigation of the underlying claim. See Unif. Foreign Money-Judgments Recognition Act, 13

U.L.A. 263 (2002); ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, § 2, Comment *b* (2006).

The principal effect of recognition of an arbitral award is as a predicate to finding res judicata or claim preclusion. In the United States, however, recognition is commonly thought of as giving preclusive effect to a decision not only with respect to the claims actually adjudicated, but also with respect to certain issues that were necessarily and actually decided (known as "collateral estoppel" or "issue preclusion"). Every indication is that, in referring to recognition, the drafters of the New York and Panama Conventions were basically concerned with claim preclusion, that is, with barring relitigation in courts of Convention States of claims decided in arbitration. See §§ 4-8 through 4-10, infra. Accordingly, the Conventions are best understood as not directly imposing an independent obligation on courts to give Convention awards issue-preclusive effect. Instead, whether an award will receive recognition in the form of issue preclusion will depend on the collateral estoppel or issue preclusion policies of the forum where recognition is sought. See §§ 4-9 & 4-10, infra.

Although confirmation, recognition, and enforcement are analytically separate and distinct remedies, confirmation or enforcement by a U.S. court of a Convention award necessarily implies that the award has been recognized. Terminological confusion may result, however, because some writers use "recognition" to mean not only the giving of preclusive effect, but also the conversion of an award into a judgment. The Restatement, by contrast, uses the term "confirmation" or "enforcement" to signify the additional step of transforming the award itself into a local judgment of the court, meaning at a minimum that the court may enter a coercive order against the party that unsuccessfully resisted enforcement. That order, in turn, may be given effect through execution. See paragraph (m).

While it is conceivable that the prevailing party in an arbitration could bring an action in court for nothing more than a declaratory judgment to the effect that a foreign arbitral award is conclusive on the merits, the usual posture is otherwise. Typically, the losing party will institute litigation in court on a claim that was before the arbitrators. The defendant (presumably the prevailing party in the arbitration) will then seek to have the court recognize the arbitral award, and on that basis dismiss those claims that were determined in the arbitration.

aa. Seat. The concept of the arbitral seat is of singular importance. Despite the view among certain commentators that international arbitral proceedings should be treated to various degrees as "a-national," see Jan Paulsson, Delocalisation of International Commercial Arbitration: When and Why It Matters, 32 Int'l & Comp. L.Q. 53 (1983), the Convention system and modern statutory regimes rely heavily on territorial affiliations. The Restatement assumes that an arbitration proceeding and the resulting award must ordinarily be associated, as a formal matter, with a single national legal system. See Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration § 2.08 (4th ed. 2004); see also Gary B. Born, International Commercial Arbitration 1240 (2009) (defining "seat" to mean "legal domicile" or "juridical domicile"). Although the Restatement describes the seat as an arbitration's "juridical home" the more common synonyms for "seat" are "situs," or "place of arbitration." The Restatement regards those terms as equivalent. It thus attributes to "seat" and "situs" the same meaning as given to "place of arbitration" by the UNCITRAL Model Law. See UNCITRAL Model Law on International Commercial Arbitration, art. 20(1). Although the latter's wide acceptance has helped regularize use of the term "place" in this context, the Restatement uses the more traditional term "seat."

The occasional use of the qualifier "deemed" in referring to the seat underscores that the term is a legal designation, rather than a geographical fact. Significant physical activities such as hearings and deliberations often occur away from the seat of the arbitration to which those activities relate. The term nevertheless carries manifold jurisdictional and governing law implications. See William W. Park, Lex Loci Arbitri and International Commercial Arbitration, 32 Int'l & Comp. L Q. 21 (1983). The arbitration law governing a particular proceeding (the lex arbitri) is generally that of the seat of arbitration (the lex loci arbitri). An award, moreover, is regarded as having been rendered at the seat attributed to the arbitration in question. The place of making will in turn fix an award's national identity for reciprocity purposes under both the New York and Panama Conventions. See §4-5, infra.

The place of making also indicates the courts to which a dissatisfied party must look to have an award annulled; that is, the courts of the seat—the deemed place of rendition—are ordinarily considered uniquely competent to entertain set-aside actions, so that other courts act exorbitantly if they purport to do so. The recognized exception to exclusivity in the seat's set-aside authority is narrow and infrequently encountered. See Comment *f*. The exception arises from the parties' power to choose an arbitration law other than that of the seat, and thus empower a second court system to adjudicate set-aside actions. Though that use of party autonomy remains largely unutilized in practice, it is nevertheless a scenario contemplated by the Convention. See New York Convention, art. V(1)(e) (recognizing set-aside authority in courts of the country where the award was made or of the country under the law of which an award was made).

Modern arbitration statutes and rules allow the parties to designate the place where their arbitration will be seated; the parties often do so in their arbitration agreement. See Restatement (Third) of The Foreign Relations Law of the United States § 487, Comment *b* ("The place of the award for purposes of the Convention is the place designated for the arbitration in the agreement to arbitrate; if no place is mentioned, the place of the award is determined in accordance with the agreement to arbitrate by the arbitrators or by the appointing authority."). If the parties fail to name the seat, it is typically selected by an institution, if any, or the arbitral tribunal. See, e.g., UNCITRAL Arbitration Rules, art. 18(1) (failing party designation, place shall be determined by the tribunal having regard to the circumstances of the arbitration); UNCITRAL Model Law on International Commercial Arbitration, art. 20(1) (same; circumstances to include convenience of the parties). The parties may change the arbitral seat by agreement, but such a change will not be inferred merely from convening the proceedings away from the seat. The intention of the parties to change seats, rather, must be clear and unambiguous.

bb. Set-aside proceeding. The FAA's use of "vacate" or "vacatur" to describe the consequences of the process leading to nullification of an award has not been widely adopted in the international realm. The UNCITRAL Model Law, enacted in over 40 jurisdictions, uses the New York Convention phrase "set aside." See UNCITRAL Model Law on International Commercial Arbitration, arts. 34 & 36; see also §4-16, infra. The Panama Convention uses the term "annulment," rather than "set aside." These terms are essentially interchangeable.

cc. State. The term "state" (without capitalization) refers to any of the 50 subsidiary units that constitute the United States, and such other units as fall under the United States' jurisdiction, whether denominated districts, commonwealths, territories, or the like. The consistent use of lower-case spelling distinguishes states from "foreign States," as defined in paragraph (p); see also paragraph (dd) ("United States").

dd. United States. The Restatement definition of "United States" is consistent with the one adopted by the Foreign Sovereign Immunities Act. See 28 U.S.C. § 1603(c). By including territories of the United States within the definition, the term can in most cases be used without further qualification. Thus, the term "court," see paragraph (j), may be taken to include, for instance, the territorial courts of the U.S. Virgin Islands.

Chapter 4
POST-AWARD RELIEF
TOPIC 1.
GENERAL PROVISIONS

§ 4-1. Post-Award Actions—Generally

(a) A party may seek confirmation of a U.S. Convention award in a competent court of the United States. A court confirms such an award unless a ground for vacatur set out in Sections 4-12 through 4-18 is established. If confirmed, the award becomes a judgment of the confirming court.

(b) A party may seek vacatur of a U.S. Convention award in a competent court of the United States. A court vacates such an award only on the grounds set out in Sections 4-12 through 4-18. If vacated, the award becomes a nullity within the jurisdiction of the court.

(c) The defendant in a proceeding to confirm or vacate a U.S. Convention award may, in addition to defending against that action and in accordance with applicable procedural rules, make a cross-motion to confirm or vacate the award. The law of the forum on compulsory counterclaims governs whether such relief must be sought by cross-motion or may be sought through an independent proceeding.

(d) A party may seek enforcement of a foreign award in a competent court of the United States. A court enforces a foreign Convention award unless a ground for denying enforcement set out in

Sections 4-12 through 4-18 is established. A court enforces a foreign non-Convention award unless a ground for denying enforcement set out in Sections 4-19 through 4-22 is established. If enforced, the award becomes a judgment of the enforcing court.

(e) A court may grant partial post-award relief regarding an international arbitral award. A grant of partial post-award relief is appropriate only if the portion of the award as to which relief is granted is reasonably separable from the remainder of the award and is otherwise eligible for the relief requested.

Comments:

a. Confirmation of a U.S. Convention award as a cause of action. A party prevailing in a U.S. Convention award may bring a confirmation action in a competent court of the United States. If successful, the confirmation action renders the award a judgment of the confirming court, having all the legal characteristics of a final judgment of that court.

b. Vacatur of a U.S. Convention award as a cause of action. A party dissatisfied with a U.S. Convention award may bring a vacatur action in a competent court of the United States. If successful, the vacatur action renders the award a nullity within the jurisdiction of the rendering court. A judgment by the court vacating an award has all the legal characteristics of a final judgment of that court, including the possibility of the judgment's recognition elsewhere. Vacatur of a U.S. Convention award constitutes a

ground under Article V(1)(e) of the New York Convention and Article 5(1)(e) of the Panama Convention for denying the award recognition or enforcement abroad.

c. Cross-motions to confirm or vacate. Motions to confirm or vacate a U.S. Convention award are subject to cross-motions to vacate or confirm the award, respectively. The Federal Arbitration Act does not itself treat cross-motions to confirm or vacate as compulsory counterclaims. To that extent, a defendant in the principal action is not required to seek relief through a cross-motion in the same proceeding, but may instead bring an independent action to confirm or vacate, as the case may be, subject to jurisdictional requirements and the applicable limitations periods. On the other hand, the general procedural rules of the forum may treat motions to confirm or vacate arbitral awards as compulsory counterclaims. Such is the case of Federal Rule of Civil Procedure 13, which governs post-award actions in federal court, where the vast majority of post-award actions in the U.S. are brought.

d. Enforcement of a foreign award as a cause of action. A party prevailing in a foreign award may bring an enforcement action in a competent court of the United States. The applicable FAA chapter depends on whether the award is a Convention or non-Convention award. Such actions are generally summary proceedings made upon the motion of the prevailing party. See § 4-33, infra. Provided formal requirements are met, a foreign award is entitled to enforcement, unless a ground for denying enforcement under Sections 4-12 through 4-18 (for Convention awards) or Sections 4-19 through 4-22 (for non-Convention awards) is established. See §§ 4-4 and 4-6, infra.

If successful, the action renders the award an order of the enforcing court, having all the legal characteristics of such an order or judgment.

e. Recognition of an international arbitral award. The Restatement does not contemplate a cause of action for recognition, as such, of an international arbitral award. The principal function served by recognition of an award is to serve as a basis for giving the award preclusive effect in subsequent litigation or arbitration, thus barring a party from reasserting the claim in the subsequent action. While recognition is in effect a precondition to enforcement, and is governed by the same standards as enforcement, it is not sought affirmatively, but rather as a barrier to relitigation of a matter. For this reason, the Restatement includes recognition (alongside confirmation, vacatur and enforcement) as a form of "post-award relief," but does not include a request for recognition as a form of "post-award action."

f. Partial post-award relief. In some situations, a ground for vacating or denying confirmation, recognition or enforcement of an international arbitral award affects only part of the award. Accordingly, in appropriate circumstances, a court may grant post-award relief in connection with only a portion of the award, while denying post-award relief as to the rest. Both the New York and Panama Conventions expressly permit a court to recognize or enforce an award in part, but only if the part of the award that is within the tribunal's jurisdiction can be separated from the part that is beyond the tribunal's jurisdiction. Article V(1)(c) of the New York Convention provides 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." Article 5(1)(c) of the Panama Convention provides that "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." However, there is no reason to limit the possibility of partial post-award relief to challenges on the ground that the tribunal decided matters beyond the scope of the agreement to arbitrate, provided the portion of the award as to which post-award relief is granted is reasonably separable from the rest of the award and provided the standards for post-award relief, as applied to that portion of the award, are otherwise met.

Illustrations:

1. The arbitral tribunal awards breach of contract damages as well as the costs of arbitration to the prevailing party. The court determines that the damages award was within the scope of the arbitration agreement, but that the award of costs was not. The court may enforce the award to the extent it awards damages, but may refuse to enforce the award of costs.

2. The arbitral tribunal makes an award against both a signatory and a nonsignatory of the arbitration agreement. The court determines that the tribunal's award against the signatory was within its authority, but that it lacked the authority to make an award against the

nonsignatory. The court may enforce the award against the signatory, but may refuse to enforce the award against the nonsignatory.

g. Outcome of failed confirmation or vacatur action. Even though the standards for confirming and vacating U.S. Convention awards are essentially mirror images, the two actions remain independent. Accordingly, if the prevailing party brings an action to confirm an award and is unsuccessful on the merits, the resulting judgment does no more than deny confirmation. It does not result in vacatur of the award. In order to have the award vacated, the party opposing confirmation must prevail either in a cross-motion for vacatur of the award or in an independent action to that effect. Analogously, if the losing or disappointed party brings suit to vacate the award and is unsuccessful on the merits, the resulting judgment does no more than deny vacatur. It does not result in a judgment confirming the award. In order to have the award confirmed, the party opposing vacatur must prevail either in a cross-motion for confirmation of the award, or in an independent action to that effect.

This position is consistent with parties' expectations. A party in U.S. litigation is generally granted only the affirmative relief it has specifically requested. Accordingly, a party may not anticipate that failure to prevail in a confirmation action will in itself render the award a nullity. Moreover, treating a denial of confirmation as tantamount to vacatur would create uncertainty under the New York and Panama Conventions—specifically, uncertainty over whether an award whose confirmation has been refused on the merits by a competent authority is an award that has been "set aside or

suspended" or "annulled or suspended," within the meaning of the New York and Panama Conventions' Articles V(1)(e) and 5(1)(e), respectively, and subject to denial of recognition or enforcement. The risk of unfair surprise is less relevant when the unsuccessful action was one for vacatur, since a party that has sought vacatur and failed on the merits may reasonably expect that a decision denying vacatur of an award necessarily implies its confirmation. Even so, clarity is served by keeping the notions separate. Accordingly, an unsuccessful vacatur action does not automatically result in the award's confirmation.

h. Outcome of failed enforcement action. A judgment of a court denying enforcement of a foreign award operates as a bar to recognition or enforcement of the award within the jurisdiction of the rendering court. It is entitled in all U.S. courts to the same preclusive effect that judgments of the rendering court ordinarily receive.

However, a judgment of a court denying enforcement of a foreign award does not result in the award's annulment. Only a court of the place of arbitration, or of the place whose law was chosen by the parties to govern the arbitration, is competent to annul such an award. See § 4–2, infra.

REPORTERS' NOTES

a. Confirmation of a U.S. Convention award as a cause of action. The party prevailing in a Convention award made in the United States (a "U.S. Convention award") may bring a confirmation action in a competent U.S. court.

By virtue of the Convention implementing legislation, the New York and Panama Conventions apply to the enforcement not only of awards made on the territory of other Contracting States, but also of awards made in the United States that are considered as "non-domestic" under 9 U.S.C. § 202 (extended to Panama Convention awards by 9 U.S.C. § 302). Section 202 provides:

> An arbitration agreement or arbitral award arising out of a legal relationship . . . which is considered as commercial 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.

See Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 18-19 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998) (citing Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983)) ("Awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction."); see also Stone & Webster, Inc. v. Triplefine Int'l Corp., 118 Fed. Appx. 546, 548-49 (2d Cir. 2004) (unpublished opinion) (finding action to confirm a non-domestic award is subject to the Convention because it involves a foreign entity and a contract to be performed abroad).

Thus, an award made in the United States may, on the basis of its reasonable relation with a foreign State, be considered a Convention award and governed by FAA Chapters Two or Three. The Restatement refers to such awards as "Convention awards made in the U.S." or "U.S. Convention awards." See § 1-1(i).

Section 207 of the FAA goes on expressly to provide that "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." Thus, a party seeking confirmation of a U.S. Convention award may do so by invoking the relevant Convention, as implemented through Chapters Two and Three of the Federal Arbitration Act. 9 U.S.C. §§ 207, 302. As discussed in detail in Section 4-3, a party prevailing in a U.S. Convention award may not, as an alternative, seek confirmation of the award under FAA Chapter One. See Comment *c* to Section 4-3, infra. FAA Sections 208 and 307 provide for the residual application of FAA Chapter One under Chapters Two and Three only to the extent that Chapter One is not in conflict with either those chapters or the applicable Convention. Because Chapter One conflicts with Chapters Two and Three in a variety of respects, see id., parties seeking confirmation or vacatur of a U.S. Convention award must proceed under either Chapter Two or Three, as applicable.

Once confirmed, a U.S. Convention award becomes a final judgment of the confirming court with all legal characteristics of a final judgment. Yusuf Ahmed Alghanim & Sons, 126 F.3d at 23 ("[T]he confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court."); Trans Chem. Ltd. v. China Nat. Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 313 (S.D. Tex. 1997), aff'd sub nom., 161 F.3d 314 (5th Cir. 1998) (judgment confirming a U.S. Convention award has same effect as any other judgment entered by the court).

The judgment of confirmation may be executed in the same manner as any other judgment of a local court. Usher v. Soltz, 176 Cal. Rptr. 746, 748 (Cal. Ct. App. 1981) (upon confirmation, an award may be enforced like any other judgment of the court that enters it). The judgment is entitled to full faith and credit in other U.S. jurisdictions. 4 Am. Jur. 2d Alternative Dispute Resolution § 204 ("A judgment confirming an award comes within the full faith and credit clause of the Federal Constitution."); P. M. Mfg. Co. v. Trustees of William Skinner & Sons, 194 N.E.2d 706, 707 (Mass. 1963) (" . . . . judgment of the Supreme Court of the State of New York is judicata and entitled to full faith and credit in Massachusetts court."); Brinker v. Superior Court, 1 Cal. Rptr. 2d 358, 360 (Cal. Ct. App. 1991) (sister state judgment confirming an arbitral award is entitled to full faith and credit). It enjoys recognition or enforcement in foreign jurisdictions in accordance with those jurisdictions' rules and policies on the recognition and enforcement of foreign country judgments.

Importantly, confirmation of an award is not essential to the award's recognition or enforcement abroad. Among the principal purposes of the New York and Panama Conventions was to eliminate any need to reduce an award to judgment in the place of rendition in order for it to be given effect abroad. Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571, 582 (7th Cir.

2007) (New York Convention meant to facilitate enforcement of arbitral awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs); Eric Chafetz, Looking into A Crystal Ball: Courts' Inevitable Refusal to Enforce Parties' Contracts to Expand Judicial Review of Non-Domestic Arbitral Awards, 9 Pepp. Disp. Resol. L.J. 63, 117 (2008) (New York Convention eradicated the "double exequatur" requirement that a court in the rendering state recognize an award before it may be taken and enforced abroad."). Thus, the prevailing party may directly seek enforcement of an award abroad. Gary Born, International Commercial Arbitration: Commentary and Materials 704 (2d ed. 2001).

b. Vacatur of a U.S. Convention award as a cause of action. A party dissatisfied with a U.S. Convention award may seek its vacatur in a competent state or federal court. Nothing in FAA Section 207 immunizes U.S. Convention awards from vacatur by a competent court. See Reporters' Note to Comment *a*, Section 4-11, infra. As noted in Comment *a*, of this Section, a party seeking confirmation of a U.S. Convention award may proceed under FAA Chapter Two or Three, as applicable, but not under Chapter One. The Restatement takes the view that vacatur of a U.S. Convention award likewise may be had under FAA Chapter Two or Three, as applicable, but not under Chapter One. See Comment *c* to Section 4-3, infra. This position only reinforces the alignment of grounds for denying confirmation of U.S. Convention awards with the grounds for their vacatur, as explained more fully in Section 4-11, infra.

A motion to vacate may be raised either as an independent cause of action or as a cross-motion in an action to confirm the award. Whether vacatur is regarded as a compulsory counterclaim to a confirmation action is determined by the procedural rules of the forum. Vacatur, as an independent cause of action, is in one important respect distinctive as compared to confirmation, recognition, or enforcement. Ordinarily, a party may resist confirmation, recognition, or enforcement of an award merely by objecting to the grant of such post-award relief within the action in which such relief is sought. By contrast, to achieve vacatur of an award, a party must affirmatively request such relief. It may seek vacatur even if its opponent has not sought confirmation, recognition, or enforcement of the award.

A vacatur motion, if successful, results in annulment of the award, meaning that the award has no further legal effect within that jurisdiction, including no preclusive effect or entitlement to enforcement. There is no reason why a vacatur judgment should be any less final than a confirmation judgment. See Comment *a*, supra. Cf. Bulko v. Morgan Stanley DW Inc., 450 F.3d 622 (5th Cir. 2006) (overturning U.S. district court judgment vacating a domestic arbitral award on the premise that the vacatur judgment is a final judgment of the lower court).

General judgment recognition principles in the United States suggest that the award, having been vacated, will also have no legal effect in other U.S. jurisdictions. Its legal effect in jurisdictions outside the U.S. will depend on those jurisdictions' foreign judgment recognition policies. At a minimum, however, Article V(1)(e) of the New York Convention authorizes courts in other Contracting States to deny recognition and enforcement of the award by reason of its vacatur by a competent authority of the arbitral seat. Though courts of Contracting States have discretion to recognize an award despite it having been annulled by a competent authority of the situs, in practice they rarely do so. See § 4-16, infra.

c. Cross-motions to confirm or vacate.

(i). Cross-motions to confirm in vacatur actions. The defendant in an action to vacate a U.S. Convention award may make a cross-motion to confirm the award. See, e.g., Matthew v. Papua N.G., 2009 U.S. LEXIS 117274 (S.D.N.Y Dec. 9, 2009), aff'd 398 Fed. Appx. 646 (2d Cir. Sept. 30, 2010) (unpublished opinion) (denying motion for vacatur of arbitral award and granting cross-motion to confirm); P.T. Reasuransi Unum Indon. v. Evanston Ins. Co., 1992 U.S. Dist. Lexis 19753 (S.D.N.Y. Dec. 23, 1992) (allowing a cross-motion to confirm on a motion to vacate brought under both 9 U.S.C. § 10 and the Convention).

The FAA does not itself treat a cross-motion to confirm in vacatur actions as compulsory. However, most proceedings for vacatur are brought in federal court and thus subject to Rule 13 of the Federal Rules of Civil Procedure on compulsory counterclaims. According to Rule 13, "[a] pleading must state as a counterclaim any claim that — at the time of its service — the pleader has against an opposing party if the claim: (A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and (B) does not require adding another party over whom the court cannot acquire jurisdiction." Most, if not all, courts that have addressed the matter have concluded that motions to confirm represent compulsory counterclaims in vacatur proceedings under Rule 13. InterCarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 70 (S.D.N.Y. 1993); CSX Transp., Inc. v. United Transp. Union, 765 F. Supp. 797, 809 (W.D.N.Y.), rev'd on other grounds, 950 F.2d 872 (2d Cir.1991); Dzanoucakis v. Chase Manhattan Bank, USA, No. 06-5673, 2008 WL 820047 (E.D.N.Y. Mar. 25, 2008); White Motor Corp. v. UAW, Local Union No. 932 , 365 F. Supp. 314, 317 (S.D.N.Y.1973), aff'd, 491 F.2d 189 (2d Cir. 1974); Burlington N. Inc. v. Am. Ry. Sup'rs Ass'n, 527 F.2d 216, 223 (7th Cir. 1975) (also noting the importance of the statute of limitations). State court procedural rules may likewise treat a cross-motion to confirm or vacate as a compulsory counterclaim. See, e.g., C & L Enters., Inc. v. Citizen Band Potawatomi Tribe of Okla., 72 P.3d 1, 8 (Okla. 2002) (applying the Oklahoma rules of civil procedure to a cross-motion in a post-award action). For support for treating cross-motions to confirm or vacate as compulsory counterclaims, see Alan Scott Rau, The New York Convention in American Courts, 7 Am. Rev. Int'l Arb. 213 (1996).

In any event, a party prevailing in an arbitration runs a real risk in not seeking confirmation of a U.S. Convention award by way of cross-motion in a vacatur proceeding. If the vacatur action is successful, the court must necessarily have found that a ground for vacatur was present. The judgment on which that finding is based will likely be given preclusive effect in any later action to confirm the award brought within the United States, and thus effectively bar confirmation.

(ii). Cross-motions to vacate in confirmation actions. Defendants in actions to confirm a U.S. Convention award commonly cross-move to vacate the award. See Telenor Mobile Commc'ns AS v. Storm LLC, 584 F.3d 396, 404 (2d Cir. 2009) (appeal of cross-motion to vacate award on a confirmation action between two foreign parties); Kurke v. Oscar Gruss & Son, Inc., 454 F.3d 350, 353 (D.C. Cir. 2006) (appeal of a motion to vacate cross-filed in a confirmation action); Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998) (affirming lower judgment that entertained but denied cross-motion to vacate or modify and granted confirmation of Convention award). As in the case of cross-motions to confirm, supra, the FAA does not by its terms treat cross-motions to vacate as compulsory in confirmation actions. But, again as in the case of cross-motions to confirm, the procedural law of the forum – typically Federal Rule of Civil Procedure 13 – will almost always treat cross-motions to vacate as compulsory.

Failure to cross-move for vacatur raises other risks as well. In PMS Distributing Co. v. Huber & Subner, A.G., 1992 U.S. App. LEXIS 32624, at *2-*3 (9th Cir. Dec. 3, 1992), the losing party in an arbitration failed to appeal from a judgment confirming the award, but then brought a separate action to vacate the award. The court found the vacatur action barred, even though it was brought within 90 days of the award's issuance. Although the court spoke in terms of the vacatur motion being a compulsory counterclaim, the plaintiff's difficulty arose because the confirmation judgment had by that time become final and had not been appealed. In effect, a vacatur action was then barred due to claim preclusion. Id. at *5.

Moreover, as in the case of cross-motions to confirm, a party seeking to challenge a Convention award runs an additional risk in not pursuing vacatur by way of cross-motion in a confirmation proceeding. If the confirmation action is successful, the court must necessarily have found that the ground advanced for vacatur was not established. That finding will presumably be given preclusive effect in any later action to vacate the award brought within that jurisdiction, and thus effectively bar vacatur. See the early decision in The Hartbridge, 57 F.2d 672, 673 (2d Cir. 1932), cert. denied, 288 U.S. 601 (1933) ("[A] motion to confirm puts the other party to his objections. He cannot idly stand by, allow the award to be confirmed and judgment thereon entered, and then move to vacate the award just as

though no judgment existed."). If the party prevailing in arbitration seeks confirmation of the award, its opponent thus has a strong incentive to cross-move for vacatur, assuming the time limit for seeking vacatur has not passed.

d. Enforcement of a foreign award as a cause of action. Historically, voluntary compliance with foreign arbitral awards has been high and most foreign awards do not require judicial enforcement. See Pierre Lalive, Enforcing Awards, in ICC, 60 Years of ICC Arbitration 317, 319 (1984). If necessary, however, the party prevailing in a foreign award may bring an enforcement action in a court having jurisdiction.

(i). Enforcement of foreign Convention awards. A party may seek to enforce a foreign Convention award by invoking the relevant Convention, as implemented through Chapter Two or Three of the Federal Arbitration Act (9 U.S.C. §§ 201, 301, as applicable), in a manner similar to that in which confirmation of U.S. Convention awards may be sought. As with confirmation of U.S. Convention awards, foreign Convention awards enjoy a strong presumption in favor of enforcement. Article III of the New York Convention requires each Contracting State to "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," subject to satisfaction of the Convention's requirements for enforcement and the absence of a Convention ground for denying enforcement. See §§ 4-4 and 4-6, infra. Even then, the Conventions provide only that recognition and enforcement of the award "may be refused," leaving the court discretion to enforce a Convention award even in the presence of a ground that would permit denying enforcement. See § 4-11, infra. Subject to the Convention defenses, enforcement of foreign Convention awards is "self-evidently mandatory," See Gary B. Born, International Commercial Arbitration 2717 (2009). U.S. judicial practice buttresses this view. See Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1292 n. 3 (11th Cir. 2004) (foreign Convention awards are "presumed to be confirmable"); Yusuf Ahmed Alghanim & Sons, W.L.L v. Toys "R" Us, 126 F.3d 15, 23 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998) (showing required to avoid enforcement of Convention awards in U.S. courts is high).

As in the confirmation of U.S. Convention awards, Article VII of the New York Convention arguably also gives a party prevailing in a foreign Convention award the option of seeking enforcement of the award under FAA Chapter One. However, most courts have rejected this interpretation of Article VII as inconsistent with FAA Sections 208 and 307. These sections provide that Chapter One may be applied to foreign Convention awards only "to the extent" that Chapter One "is not in conflict" with the applicable Convention or its implementing legislation. For the same reasons that permitting confirmation actions for U.S. Convention awards under FAA Chapter One would conflict with FAA Chapters Two and Three, see Comment *d* to Section 4-3, infra, permitting a party to seek recognition or enforcement of a foreign award under FAA Chapter One would conflict with those chapters. Accordingly, a party cannot resort to FAA Chapter One for recognition or enforcement of a foreign Convention award.

Through enforcement by a U.S. court, a foreign arbitral award becomes a final judgment of the enforcing court with all the legal characteristics of a final judgment, just as in the case of confirmation of a U.S. Convention award.

(ii). Enforcement of non-Convention awards. Foreign awards made on the territory of States that are not parties to the New York or Panama Convention are by definition non-Convention awards. Such awards are therefore not capable of enforcement under FAA Chapters Two or Three, whose application is limited to Convention awards. See 9 U.S.C. §§ 207, 302. As explained in Section 4-3, Reporters' Note to Comment *e*, infra, enforcement of such awards may be sought under FAA Chapter One, and is subject to that chapter's jurisdictional and procedural limitations.

e. Recognition of an international arbitral award. Recognition of an award entails giving the award preclusive effect, so that the claim, having been finally determined on the merits in arbitration, is not subject to relitigation. The New York and Panama Conventions require recognition of Convention awards to the extent that they meet the formal requirements for recognition set out in the Conventions

and no Convention ground for denying recognition is established. Thus, Article III of the New York Convention requires each Contracting State to "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."

Although the Restatement presents recognition as a form of post-award relief, it does not present it as constituting a distinct cause of action. Recognition is generally sought when one party seeks to relitigate a claim that has already been finally determined in arbitration, and the opposing party invokes the prior award as a bar to such relitigation. Recognition accordingly figures as a form of "post-award relief," as defined in Section 1-1(y), but not as a "post-award action," as defined in Section 1-1(x).

Recognition typically takes the form of "claim preclusion," meaning that a party to the arbitration may not thereafter relitigate the claim adjudicated in the award. See § 4-9, infra. A party may also seek recognition in the form of "issue preclusion," which, if granted, bars relitigation of one or more specific issues determined in the prior proceeding. On issue preclusion generally, see § 4-10, infra.

f. Partial post-award relief. A court may grant post-award relief only in respect of a portion of the award if it determines that that portion of the award is otherwise eligible for the relief sought and is reasonably separable from the remainder of the award. The rest of the award remains unaffected by the court's decision to grant partial relief. See Carte Blanche (Singapore) PT., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260 (2d Cir. 1989) (affirming the district court's confirmation of an award of damages that reduced the amount of interest awarded by the arbitrators).

The New York and Panama Conventions expressly contemplate partial recognition or enforcement in connection with the grounds set forth in Articles V(1)(c) and 5(1)(c), respectively. The legislative history suggests that this clause was included to permit courts to refuse to enforce awards to the extent they dealt improperly with incidental matters (such as costs), while enforcing the rest of the award. For example, the delegate from India argued in favor of the provision as follows:

> [I]n a commercial arbitration, the extraneous matter introduced by the arbitrator into the award might be of a very incidental nature. If the enforcing court was not authorized to sever that matter from the remainder of the award and was obliged to refuse enforcement altogether merely because a small detail fell outside the scope of the arbitral agreement, the applicant might suffer unjustified hardship.

United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting 9, U.N. Doc. E/CONF.26/SR.17 (Sept. 12, 1958) (remarks of Mr. Daphtary), available at http://www.uncitral.org/pdf/english/travaux/arbitration/NY-conv/e-conf-26-sr/17-N5815630.pdf (last visited Mar. 19, 2010). Albert Jan van den Berg contends that this drafting history should guide the courts in exercising their discretion to enforce awards in part: "A guideline for the exercise of the discretion may be that partial enforcement is of a very incidental nature and the refusal of enforcement would lead to unjustified hardship for the party seeking enforcement." van den Berg, supra, at 322.

Nothing in the Conventions' texts supports such a limitation, however. As long as the court is able to "separate[]" the enforceable part of the award from the unenforceable part, Articles V(1)(c) and 5(1)(c) impose no additional requirement that the unenforceable part be incidental to the award. Likewise, the lone American case relying on Article V(1)(c) to enforce an award in part does not limit use of the provision to incidental matters. In FIAT S.p.A. v. Ministry of Fin. & Planning, 1989 U.S. Dist. LEXIS 11995 (S.D.N.Y. Oct. 12, 1989), the arbitrators had made an award against two parties, one of which had signed the arbitration agreement and the other of which had not. The court vacated the award against the nonsignatory on the ground that the arbitrators had exceeded their authority, but confirmed the award against the signatory. Id. at *14. Relying on the second clause of Article V(1)(c), the court enforced the award in part, explaining that "the award against [the signatory] is separable from that against [the nonsignatory] because [the signatory] was a party to the arbitration agreement, actually participated in the arbitration and the panel's award with regard to [the signatory] results from issues properly submitted to arbitration." Id. at *15.

The court's reliance on Article V(1)(c) in *FIAT* can be criticized on several grounds. First, the nonsignatory was seeking to vacate the award, not to defeat enforcement of the award. In vacating the award, the court should have relied on § 10(a)(4) of the FAA, not Article V of the New York Convention. Second, even if the New York Convention applied, arguably the court should have relied on Article V(1)(a) (no valid agreement to arbitrate), rather than Article V(1)(c) (the award exceeded the scope of the submission to arbitration). Compare Born, supra, at 2801 n.476 (describing *FIAT* as "a rare decision finding Article V(1)(c) satisfied on the grounds that the arbitrators exceeded their authority by issuing an award against parties not signatory to arbitration agreement."). The court's decision to enforce the award in part is a sensible one, however, and suggests that partial recognition and enforcement should not be limited to cases involving matters incidental to the award. See also Comment *b* to § 5-6, supra.

The fact that the Conventions expressly contemplate partial recognition or enforcement in connection with claims that the tribunal exceeded the scope of its authority by deciding matters not submitted to it does not mean that partial recognition or enforcement cannot be had in connection with other Convention grounds. Nor is there reason to exclude the possibility of partial relief in vacatur actions. A court may grant partial post-award relief in all these circumstances, provided the portion of the award affected is reasonably separable from the rest of the award and provided that portion meets all the conditions for grant of the relief requested. *Illustration 1* is based on an example from the drafting history of the New York Convention. See Summary Record of the Seventeenth Meeting 9, U.N. Doc. E/CONF.26/SR.17 at 9 (remarks of Mr. Daphtary).

Illustration 2 is based on FIAT S.p.A., 1989 U.S. Dist. LEXIS 11995 (S.D.N.Y. Oct. 12, 1989).

For a comparison of a court's authority to partially vacate a U.S. Convention award when a tribunal exceeds its mandate and its power to modify such an award when it "determines a matter not submitted to the arbitral tribunal," see Comment *b*, to § 4-35, infra.

g. Outcome of failed confirmation or vacatur action. The failure of a confirmation action does not automatically result in the award's vacatur. United States v. Park Place Assocs., 563 F.3d 907, 934 n.19 (9th Cir. 2009) (confirmation does not follow as the "necessary and automatic consequence of denying the motion to vacate . . . ."). First, the FAA contains no language to the effect that an award must be vacated unless confirmed. Second, considerable confusion would arise over the question whether a denial of confirmation necessarily constitutes a vacatur, within meaning of Article V(1)(e) of the New York Convention or Article 5(1)(e) of the Panama Convention, thus furnishing a foreign court a ground for denying recognition or enforcement of the award. (These provisions entitle a court to deny recognition or enforcement of an award that "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."). See Zeiler v. Deitsch, 500 F.3d 157, 166 n.6 165 (2d Cir. 2007) ("While the distinction between [vacatur] of an arbitration award and refusal to confirm an arbitration award may be of negligible significance within the United States, it can affect the remaining force of an unconfirmed award outside this country, if a party seeks to confirm and enforce the award under the Convention abroad."). More generally, the Restatement position is supported by considerations of avoiding unfair surprise. A party may simply not appreciate that its failure to prevail in a confirmation action will in itself render the award a nullity.

The converse proposition – that failure of a vacatur action automatically results in the award's confirmation – would be more plausible. It might be inferred from FAA Section 9, stating that an award must be confirmed unless vacated, that the failure of a vacatur action automatically results in the award's confirmation. Also, the risk of unfair surprise is lessened when the unsuccessful action was one for vacatur, since a party that has sought vacatur and failed on the merits may reasonably expect that a decision denying vacatur of an award necessarily implies its confirmation. Treating a failed vacatur action as a confirmation might also be thought to serve judicial economy by eliminating duplicative actions.

The Restatement does not take this position, however. It is fundamental to U.S. litigation that courts afford only the relief that a party properly requests. Nor is a party, even if prevailing, under any obligation to seek affirmative relief of any kind, in the form of confirmation of an award or otherwise.

See Park Place Assocs., 563 F.3d at 934 n.19 ("The requirement that a party actually move to confirm preserves the possibility that neither side will do so because neither side is satisfied with the award."). Accordingly, though a vacatur action may fail, the award will not, by virtue of that fact alone, result in a judgment of confirmation.

h. Outcome of failed enforcement action. While a judgment of a court denying recognition or enforcement of a foreign award ordinarily operates as a bar to future recognition or enforcement of the award within the jurisdiction of the rendering court, it does not result in the award's vacatur. See Gary B. Born, International Commercial Arbitration 2671 (2009). Only a court of the arbitral seat, or of the place whose law was chosen by the parties to govern the arbitration, is competent to vacate or set aside such an award. See §§ 4-2 & 4–16, infra.

This is not to say that a denial of recognition or enforcement of a foreign award will have no effect on subsequent proceedings in relation to the award. A U.S. court judgment denying recognition or enforcement is entitled in all other U.S. courts to the same preclusive effect that judgments of the rendering court ordinarily receive. To that extent, further attempts to recognize or enforce the award in the U.S. will be barred.

Even though a U.S. court has denied recognition or enforcement of a foreign award, the party prevailing in the arbitration may seek and possibly obtain its recognition or enforcement in a jurisdiction outside the U.S. Whether the U.S. judgment will have an impact on the courts of other jurisdictions is determined by the recognition policies of those courts.

§ 4-2. No Authority to Vacate Foreign Awards

A court may not vacate a foreign award, unless the parties expressly agreed that the arbitration proceeding was to be governed by federal arbitration law or state arbitration law.

Comments:

a. Generally. Courts in the United States may deny recognition or enforcement of a foreign award if a basis for doing so is established under the applicable Convention (or the FAA in the case of a non-Convention award). However, courts ordinarily lack power to vacate such an award. An exception to the general rule arises in the rare event that parties have agreed to subject an arbitration having its seat outside the United States to the FAA or state arbitration law. Such a designation would ordinarily be set forth in the arbitration agreement and, in order to have effect, should be clearly expressed. See Comment *c*.

b. Power to vacate awards. Subject to Comment *c,* the competent authority at the seat of arbitration has exclusive power to vacate awards rendered there. Under the Conventions, an award that has been set aside by such an authority may, for that reason alone, be denied recognition or enforcement by the courts of other jurisdictions. See § 4-16, infra. By contrast, courts not at the seat of arbitration do not have the power to vacate an award. They may only decline to recognize or enforce the award, doing so only if they find that one or more of the Convention's limited grounds for denying recognition or enforcement has been established. That the courts of one State

have refused to recognize or enforce an award is not in itself a ground under the Conventions for another State's courts to decline to recognize or enforce the award.

c. Party choice of U.S. arbitration law. The Conventions recognize one exception to the general rule that only courts at the seat of arbitration have authority to set aside an award. The New York and Panama Conventions, in Articles V(1)(e) and 5(1)(e), respectively, contemplate that if the parties have agreed that the arbitral proceedings will be governed by the arbitration law of a State other than the arbitral seat, the appropriate authorities of that State also have authority, concurrently with the competent authorities of the seat, to set aside the award. In that circumstance, the courts of the non-seat State are entitled to apply that State's own law governing annulment. Thus, if the parties have agreed that U.S. arbitration law governs an arbitral proceeding seated outside the United States, not only courts in the arbitral seat, but also courts in the United States may set aside the award resulting from that arbitration. If so, the U.S. court may vacate the award on the same grounds as apply to U.S. Convention awards.

REPORTERS' NOTES

a. Generally. Issues concerning the authority of courts to vacate foreign awards arise in two settings: (1) when a party seeks to have a U.S. court vacate an award made elsewhere; and (2) when a party opposes recognition or enforcement of an award in a U.S. court based on a judgment vacating the award in a country other than the arbitral seat. This section addresses the first of those settings; the second is addressed in Section 4-16, infra. The rule reflected in both sections is the same, however—that courts generally lack the power to vacate a foreign award.

b. Power to vacate awards. Neither the Conventions nor the FAA expressly addresses the authority of courts to vacate foreign awards. However, by permitting courts to deny recognition or enforcement of an award on the ground that "[t]he 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," the New York Convention implies that (with one very narrow exception) only courts in the country in which the

award was made have the authority to vacate an award. See New York Convention, art. V(1)(e) (1958); Panama Convention, art. 5(1)(e) (1975) ("in which, or according to the law of which, the decision has been made"); see also Gary B. Born, International Commercial Arbitration 2404 (2009). Stated otherwise, under the Conventions, courts lack the authority to vacate a foreign award. Although the FAA contains no comparable provision, principles of comity should lead courts to follow a similar approach for non-Convention awards. But see IV Ian R. Macneil, Federal Arbitration Law § 44.9.1, at 44:63 (1995) (concluding that if a U.S. court has personal and subject matter jurisdiction, it "should be able, under FAA § 10, to vacate an award made in a nonsignatory state" because "the Convention limitation to nonenforcement as distinct from vacation does not apply").

Courts and commentators strongly support this proposition under the Conventions. Gulf Petro Trading Co. v. Nigerian Nat'l Petroleum Corp., 512 F.3d 742, 747 (5th Cir. 2008) ("[A] United States court . . . lacks subject matter jurisdiction over claims seeking to vacate, set aside, or modify a foreign arbitral award."); M&C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 848 (6th Cir. 1996) (district court properly held it lacked authority to vacate award made in England, even though substantive law governing the contract was Michigan law). See Steel Corp. of the Phil. v. Int'l Steel Servs., Inc., 2009 U.S. App. LEXIS 25404, at **12 (3d Cir. Nov. 19, 2009) (unpublished opinion) (holding that court may not deny enforcement under Article V(1)(e) on basis of default judgment in Indonesia vacating award made in Singapore); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 125 (2d Cir. 2007) ("Cayman Islands courts have no power to modify or annul the Award under the Convention" when award was made in Switzerland), cert. denied, 554 U.S. 929 (2008); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 309-10 (5th Cir.) (because "the Award was made in Switzerland and was made under Swiss procedural law . . . the Indonesian court's annulment ruling is not a defense to enforcement under the New York Convention"), cert. denied, 543 U.S. 917 (2004); see also Born, supra, at 2404 ("[T]he [New York] Convention's language and structure clearly . . . requir[e] that actions to annul a Convention award be pursued exclusively in the place where the award was made or under whose laws the award was made."); id. ("Most commentators have accepted this analysis, concluding that Articles V(1)(e) and VI forbid actions to annul an award except in the country where it is was 'made' or 'under the law of which' it was made. National courts have also repeatedly reached the same conclusion, including in the United States, England, Canada, Germany, France, Belgium, Hong Kong, Spain, Austria, South Africa, Luxembourg and Columbia.") (footnotes omitted); Albert Jan van den Berg, The New York Arbitration Convention of 1958, at 20 (1981) ("These provisions affirm the well-established principle of current international commercial arbitration that the court of the country of origin is exclusively competent to decide on the setting aside of the award."); Albert Jan van den Berg, Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 28, 2009, 27 J. Int'l Arb. 179, 182 (2010) ("It is a generally accepted rule that the authority to set aside an arbitral award is vested exclusively in the courts of the country in which the arbitral award was made (also referred to as 'country of origin')."); Alan Scott Rau, Understanding (and Misunderstanding) "Primary Jurisdiction," 21 Am. Rev. Int'l Arb. 47, 49 n.4 (2010) (describing distinction between powers of courts at arbitral seat and courts in other states where award might be enforced as "universal and commonplace"); Jan Paulsson, The Role of Swedish Courts in Transnational Commercial Arbitration, 21 Va. J. Int'l L. 211, 242 (1981) ("[T]he fact is that setting aside awards under the New York Convention can take place only in the country in which the award was made.").

c. Party choice of U.S. arbitration law. Article V(1)(e) implies that not only courts at the arbitral seat, but also courts in a country "under the law of which . . . the award was made," have authority to vacate an award. Accordingly, Article V(1)(e) provides a very narrow circumstance in which U.S. courts have authority to vacate an award even though the arbitral seat was not in the United States.

For this exception to apply, the parties must agree to have federal or state arbitration law govern the arbitral proceeding. A choice-of-law clause specifying the substantive law of a country other than the arbitral seat does not give that country the power to vacate the award. See, e.g., Steel Corp. of the Phil. v. Int'l Steel Servs., Inc., 2009 U.S. App. LEXIS 25404, at **10 (3d Cir. Nov. 19, 2009)

(unpublished opinion) (contract provision specifying that "enforcement" of contract be governed by Philippine law does not give Philippine courts power to vacate award); M&C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 848 (6th Cir. 1996) ("under the law of which" in Article V(1)(e) "'refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted'.") (quoting Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. y Comercial, 745 F. Supp. 172, 178 (S.D.N.Y. 1990)); see also Gary B. Born, International Commercial Arbitration 2410 (2009) ("The correct interpretation of Article V(1)(e)'s second alternative is that it refers exclusively to the procedural law of the arbitration which produced an award, and not to other possible laws (such as the substantive law governing the parties' underlying dispute or governing the parties' arbitration agreement).").

This exception is a very narrow one. It is extremely unusual for contracting parties to specify a governing arbitration law that differs from the law of the arbitral seat:

> 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."

Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 291 (5th Cir. 2004) (quoting Albert Jan van den Berg, The Application of the New York Convention by the Courts, in Improving the Efficiency of Arbitration and Awards: 40 Years of Application of the New York Convention 25, 26 (Albert Jan van den Berg ed., 1999) (ICCA Congress Series No. 9); Michael J. Mustill & Stewart C. Boyd, The Law and Practice of Commercial Arbitration in England 64 (2d ed. 1989); Martin Hunter, Case and Comment: International Arbitration, 1988 Lloyd's Mar. & Comm. L.Q. 23, 26)) (footnotes omitted), cert. denied, 543 U.S. 917 (2004) [hereinafter Karaha Bodas II]. The practice may become more common, however, if more countries enact arbitration laws like the 2009 Bahrain arbitration law. See John M. Townsend, The New Bahrain Arbitration Law and the Bahrain "Free Arbitration Zone," 65 Disp. Resol. J., Feb./Apr. 2010, at 74, 79 ("The New York Convention, as has been seen, permits a proceeding to vacate an arbitration award to be brought before either the courts of the country in which the arbitration has taken place, or the courts of the country 'under the law of which' the award was made. Article 25 [of the new Bahrain arbitration law] . . . permit[s] the parties to elect the latter of those options, to the exclusion of the former, in their agreement.").

A number of commentators have argued that courts of the arbitral seat lack the authority to vacate an award if the parties have agreed that the arbitration law of another country governs the arbitration proceeding. See Born, supra, at 2416 ("Although Article V(1)(e) appears to refer to the possibility of annulment by both the courts of the state where the award was made and the state 'under' whose laws the award was made, only one of these two possible forums should have competence to annul any single award. This is the almost uniform conclusion of both national courts and commentators. It is also consistent with the structure of the Convention, and the objective of centralizing all judicial supervision of the international arbitral process in a single forum; indeed, the possibility of multiple, and therefore conflicting, judicial supervisory forums would be both highly inefficient and unjust."); Alan Scott Rau, Understanding (and Misunderstanding) "Primary Jurisdiction," 21 Am. Rev. Int'l Arb. 47, 77-78 (2010) (arguing that a contrary "result is not in any way mandated by the text of the Convention—the elusive disjunctive does not lend itself so readily to dogmatism."); Pieter Sanders, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 6 Neth. Int'l L. Rev. 43, 55 (1959) ("Here only one competent authority is meant; either the Court of the country where the award was made, or the Court of the country under the law of which the award was made."); see also Karaha Bodas II, 364 F.3d at 308 ("Although an arbitration agreement may make more than one country eligible for primary jurisdiction under the New York Convention, the predominant view is that the Convention permits only one in any given case."). But see W. Michael Reisman & Heide Iravani, The Changing Relation of National Courts and International Commercial Arbitration, 21 Am. Rev. Int'l Arb. 5, 13 (2010) ("A comparable primacy is given to the law under which the award was made. This means

that if the award were rendered in Switzerland but under, let us say, Indian law (a mix of venue and law available to the parties), and the award were subsequently nullified by an Indian court, that nullification, like nullification in Switzerland, would terminate the validity of the award in all other jurisdictions.").

The Restatement takes the position that both courts in the arbitral seat and courts in the country "under the law of which" the award was made have the power to vacate the award. See § 4-16, Comment b, infra. First, the language of Article V(1)(e) ("the country in which, or under the law of which, that award was made") suggests that both jurisdictions have that authority. Second, giving exclusive authority to vacate an award to the jurisdiction under whose law the award was made would permit parties to circumvent U.S. regulatory authority over awards made in its territory. As long as the parties had agreed that another country's arbitration law governed the proceeding, U.S. courts would have no power to vacate the award, even if all other aspects of the proceeding involved the United States. For both of these reasons, U.S. courts have the authority to vacate an award when either the award is made in the United States or the award is subject to U.S. arbitration law, even though made elsewhere.

§ 4-3. Law Applicable to Post-Award Relief

(a) The law applicable to confirmation or vacatur of a U.S. Convention award and to recognition or enforcement of a foreign Convention award is:

(1) the relevant Convention as implemented by the Federal Arbitration Act; or

(2) state law, to the extent it is not preempted by applicable federal law.

(b) The law applicable to recognition or enforcement of a non-Convention award is:

(1) Chapter One of the Federal Arbitration Act; or

(2) state law, to the extent it is not preempted by applicable federal law.

(c) In giving effect to the grounds set forth in Sections 4-12 through 4-18 and Sections 4-19 through 4-22, a court may be required to interpret and apply the law of a foreign jurisdiction.

(d) If a foreign award has been reduced to judgment by a court in the arbitral seat, a party may seek either:

(1) recognition or enforcement of the award in accordance with the provisions of this Chapter; or

(2) recognition or enforcement of the judgment in accordance with the foreign judgment recognition and enforcement standards of the forum in which such relief is sought.

Comments:

a. Generally. It is fundamental, in determining the law applicable to post-award relief in international commercial arbitration, to distinguish between awards governed by international conventions on that subject (notably the New York and Panama Conventions) and those governed exclusively by domestic law (notably FAA Chapter One). The distinction is not as clear as it may appear, however, since both Conventions have been implemented domestically by legislation at the federal level (through FAA Chapters Two and Three).

The Restatement is principally concerned with the New York and Panama Conventions and the three chapters of the Federal Arbitration Act as applicable law. However, it should be noted that, within important limits, the law applicable to post-award relief in the United States may derive subsidiarily from state law as well as from ancillary federal law sources, such as bilateral treaties of friendship, navigation and commerce.

b. The Conventions and their implementing legislation. The New York and Panama Conventions are central to any consideration of the law applicable to post-award relief in international commercial arbitration. As suggested by the term "foreign" in their titles, the Conventions are most obviously applicable to the

recognition and enforcement of foreign Convention awards. However, as stated in Comment *c* of this Section Sections Two and Three of the FAA also apply to the confirmation of Convention awards made in the United States, as well as to their vacatur.

The applicability of the New York or the Panama Convention to any given international arbitral award – whether for confirmation, vacatur, recognition or enforcement purposes – is determined by the requirements set out in the relevant Convention and its implementing legislation. See Comment *h* to Section 1-1, supra. These requirements may be summarized as follows. First, the award must arise from a "commercial" relationship. See Section 1-1(e), supra. Second, the award must concern a "defined legal" relationship, whether contractual or not. Third, the award must satisfy any requirements of reciprocity of the applicable Convention. See Section 4-5, infra.. Fourth, a Convention award must be either "foreign" or "made in the United States," as those terms are defined in Section 1-1(n) and (i), supra. Fifth, the award must arise out of an "agreement in writing" as defined in Section 2-___,[2] supra. When these requirements are satisfied, the relevant Convention applies to the request for post-award relief. In that instance, the Convention supersedes prior inconsistent federal law and preempts conflicting state law. See Section ___,[3] supra.

[2] Cross-reference to Section to be drafted on definition of agreement in writing.

[3] Cross-reference to Section to be drafted on FAA preemption.

The FAA provides the implementing legislation for the Conventions: Chapter Two of the FAA implements the New York Convention, while Chapter Three of the FAA implements the Panama Convention. The Conventions and their relevant implementing legislation should, to the extent possible, be read and interpreted as consistent with each other. Domestic awards, as that term is defined in Section 1-1(k), are governed by Chapter One of the FAA, provided the requisite connection with interstate commerce is present; FAA Chapters Two and Three have no application to them. Such awards are in any event beyond the ambit of the Restatement. See Comment *k* to Section 1-1.

c. Law applicable to confirmation and vacatur of U.S. Convention awards. When implementing the Conventions through FAA Chapters Two and Three, Congress declared that these chapters would govern not only foreign awards rendered in Convention States, but also international awards made in the U.S. (U.S. Convention awards). A party seeking to confirm or vacate a U.S. Convention award may therefore do so under the FAA chapter implementing the relevant Convention.

The Restatement takes the position that FAA Chapters Two and Three govern confirmation and vacatur of U.S. Convention awards to the exclusion of FAA Chapter One. Confirmation or vacatur may, however, also be sought under (a) any federal statute outside the FAA that might specifically authorize such relief in connection with international awards made in the United States, (b) a bilateral treaty of the United

States to that effect, or (c) state law to the extent it is not preempted by applicable federal law. See Comment *a* of this Section.

There are several reasons for confining confirmation and vacatur of U.S. Convention awards under the FAA to Chapters Two and Three. The Conventions, as implemented by the FAA, are applicable not only to the enforcement of foreign awards made on the territory of Contracting States, but also to the confirmation of awards made in the United States that, due to their reasonable relationship with a foreign State, are considered "non-domestic" for these purposes. It would defeat Congress' purpose of subjecting U.S. Convention awards to the Conventions and to FAA Chapters Two and Three if parties could resort to FAA Chapter One instead of the Conventions. The disparity between FAA Chapter One, on the one hand, and Chapters Two and Three, on the other, is apparent in several respects: the availability of federal subject matter jurisdiction under Chapters Two and Three but not Chapter One; differences in the length of the applicable statutes of limitations; and formulation of the grounds for granting or denying post-award relief. (On the latter, see Section 4-11, infra.) Making only Chapters Two and Three of the FAA available for the confirmation of U.S. Convention awards thus better effectuates Congress' intention to align the treatment of foreign and U.S. Convention awards. The position is also consistent with the general Restatement objective of contributing to simplification of the law.

d. Law applicable to recognition and enforcement of foreign Convention awards. The New York and Panama Conventions by their terms directly govern the recognition

and enforcement of foreign Convention awards. Recognition and enforcement of such awards may therefore be sought under FAA Chapters Two or Three, depending on which Convention applies. The Restatement position is that those Chapters apply to the exclusion of FAA Chapter One.

In maintaining that FAA Chapter One is not applicable to the recognition or enforcement of foreign convention awards, the Restatement rejects the view that Article VII of the New York Convention allows resort to Chapter One. Article VII provides that the Convention does not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon." Although some sources hold that this language authorizes a party seeking recognition or enforcement of a foreign Convention award to elect FAA Chapter One procedures and standards, most courts have rejected this interpretation of Article VII as inconsistent with FAA Sections 208 and 307.

There are several textual and structural reasons for accepting the dominant view among courts. Sections 208 and 307 provide that FAA Chapter One may be applied to Convention awards only "to the extent" that Chapter One "is not in conflict" with the applicable Convention or its implementing legislation. Yet, Chapter one is incompatible with both the text and structure of the Conventions and their implementing legislation in material respects. First, the grounds for denying confirmation of an award under FAA Chapter One differ from the grounds for denying

recognition or enforcement of a foreign Convention award under FAA Chapters Two and Three. For example, the Conventions contemplate that a foreign Convention award may be denied recognition or enforcement if it has been set aside by a competent tribunal at the seat of arbitration, whereas FAA Chapter One contains no such ground. By excluding this basis for denying recognition or enforcement, application of FAA Chapter One to foreign Convention awards would undercut the supervisory function that the Conventions assign to the courts of the seat.

A second incompatibility between FAA Chapter One, on the one hand, and the Convention chapters, on the other, results from the position, accepted by the Restatement, that the grounds available for vacating or denying confirmation of U.S. Convention awards are exclusively the grounds set out in the Conventions. See Comment *c* of this Section. It would be anomalous to permit election of FAA Chapter One grounds to govern foreign Convention awards, while disallowing application of those same grounds to U.S. Convention awards. Since application of Chapter One is incompatible with both the text and structure of the Conventions and the U.S. implementing legislation, the Restatement takes the position that a party cannot resort to it for confirmation or vacatur of a foreign Convention award.

Although FAA Chapter One cannot appropriately be applied to the recognition or enforcement of a foreign Convention award, recognition or enforcement of such an award may be sought under (a) any federal statute outside the FAA that might specifically authorize such relief in connection with international awards made in the

United States, (b) a bilateral treaty of the United States to that effect, or (c) state law to the extent it is not preempted by applicable federal law. See Comment *a* of this Section.

e. Law applicable to recognition and enforcement of non-Convention awards. A non-Convention award is a foreign arbitral award that is not subject to either the New York or the Panama Convention, or the ICSID Convention. See Section 1-1(t), supra.

Having been made outside the U.S., a non-Convention award is in principle subject neither to confirmation nor vacatur in the U.S. The only circumstance in which a U.S. court would have competence to confirm or vacate such an award is the unusual situation in which the parties chose the law of the United States or one of the states to govern the arbitration, despite the arbitral seat being abroad.

Non-Convention awards, like foreign Convention awards, are of course subject to recognition and enforcement in the United States. However, such awards do not fall under either Chapter Two or Chapter Three of the FAA, since both chapters are confined to awards made on the territory of a Convention State. The law that governs the recognition and enforcement of non-Convention awards is accordingly uncertain.

The Restatement takes the position that recognition and enforcement of non-Convention awards are governed by Chapter One of the Federal Arbitration Act, so long as the award otherwise is within the scope of Chapter One. While authorities at and before the time of U.S. accession to the New York Convention indicated that Chapter One of the FAA did not apply to foreign awards, subsequent interpretations of the Act have undercut that view.

A subsidiary source of law applicable to the recognition and enforcement of non-Convention awards is state arbitration law, derived either from state statute or state common law. For example, several states have enacted international arbitration statutes that provide for the recognition and enforcement of foreign awards in the courts of the state. Parties may seek the recognition and enforcement of non-Convention awards under such state statutes, or under other applicable state arbitration statutes or state common law, as long as the relevant statutes or common law are not preempted by Chapter One of the FAA.

f. Application of foreign law. Although the Conventions and the FAA (thus, U.S. law) provide the exclusive grounds for granting or denying post-award relief in connection with Convention awards, those grounds on occasion refer by their terms to the substantive law of a foreign jurisdiction, for example, the law of the place where the arbitration agreement was made, the law of the place whose law was designated as governing the arbitration, or the law of the place where the arbitration was conducted or the award was made. Thus, the terms in which a ground recognized by U.S. law is expressed may require a court to apply the substantive law of another jurisdiction to determine whether the ground is present in an individual case. The foreign law, if any, to be applied in those circumstances is the law designated for those purposes in Sections 4-12 through 4-18 and Sections 4-19 through 4-22, infra.

Illustration:

1. *A* resists enforcement of an award on the ground that the arbitral agreement is invalid. The parties' agreement provides for country *X* to be the arbitral seat and does not designate any other law applicable to the arbitral agreement. The *availability* of a ground for challenge based on the invalidity of the agreement is based on the provisions of the applicable Convention and its implementing legislation. The invalidity of the agreement, and hence the *existence* of the ground in this particular case, is determined by reference to the law of country *X*.

g. Recognition and enforcement of confirmed foreign awards. Once an award has been confirmed by a foreign court at the arbitral seat, the prevailing party may seek to have it recognized or enforced either as an award or as a foreign judgment, or both. If a party seeks recognition or enforcement of a foreign award as a foreign judgment, the forum applies its own standards on the recognition or enforcement of foreign judgments, including any rules of reciprocity that may be applicable.

REPORTERS' NOTES

a. Generally. The law applicable to post-award relief varies according to whether the award that is the subject of the action is a Convention or non-Convention award. The principal Conventions – the New York and Panama Conventions – have been implemented in the United States through Chapters Two and Three, respectively, of the Federal Arbitration Act. The Conventions and their implementing legislation must be read together. Congress formulated FAA Chapters Two and Three in such a way that the Conventions apply not only to awards rendered on the territory of other Convention States, but equally to international arbitral awards rendered in the U.S.

As a consequence of the reciprocity requirement imposed by Congress in the Conventions' implementing legislation, awards rendered abroad, but not on the territory of a Convention State, are by

definition not governed by the Convention. For reasons detailed below, see Reporters' Note *f*, these "non-Convention awards" are governed by FAA Chapter One.

While the Restatement deals principally with the Conventions and the FAA as the law applicable to actions for post-award relief, it recognizes the possibility of additional sources. Since the FAA does not preempt state law in the sense of occupying the field, state law may provide a basis for confirming, vacating, recognizing or enforcing international awards made in the United States. However, state law may be applied to the grant of post-award relief only insofar as it does not conflict with the applicable Convention and its implementing legislation (in the case of Convention awards) or FAA Chapter One (in the case of non-Convention awards). See § 1-___,[4] supra.

Bilateral treaties of friendship, navigation, and commerce entered into between the United States and a number of other countries are another possible source of authority for enforcing non-Convention awards. See Martin Domke, Enforcement of Foreign Arbitral Awards in the United States, 13 Arb. J. 91, 96-97 (1958); see also Chapter 5, infra (discussing investment arbitration). Those treaties may have some residual application to non-Convention awards, although most are with countries that are parties to the New York Convention. See U.S. Dep't of Commerce, Trade Compliance Center, Trade Agreements, available at http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/index.asp (last visited June 25, 2011). For those countries, the arbitration provisions of the bilateral treaties are largely supplanted by the Conventions. See Gary B. Born, International Commercial Arbitration 2799 (2009) ("For the most part, these treaty provisions have been effectively superseded by the terms of the New York Convention and other multilateral treaties, which generally provide substantially more expansive protections.").

b. The Conventions and their implementing legislation. By their terms, the New York and Panama Conventions govern the recognition and enforcement of awards made on the territory of a foreign country. The provisions of the Conventions specify the requirements that a foreign award must meet in order to qualify as a Convention award. They also indicate the grounds, and the only grounds, on which a Convention award may be denied recognition or enforcement by the courts of a Contracting State. If a foreign award qualifies as a Convention award and if no ground for denying recognition or enforcement is present, the award must be recognized or enforced as requested.

The New York Convention also applies to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." New York Convention, art. I(1). The Convention leaves the definition of "not considered as domestic" to local law. FAA Section 202 says little on the subject, though it does expressly preclude application of the Convention to an award between two citizens of the United States if their relationship does not "involve property located abroad, envisage performance or enforcement abroad, or have some other reasonable relation with one or more foreign states." 9 U.S.C. § 202. This language has been applied by many courts to determine when the Convention applies to awards made in the U.S.

The Panama Convention does not contain any similar language, but its implementing legislation refers back to Section 202. Under both Conventions, therefore, U.S. law determines whether an award made in the U.S. is not considered as domestic for these purposes.

The seminal case is Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983), which held:

> [A]wards "not considered as domestic" denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving

[4] Cross-reference to Section to be drafted on FAA preemption.

> parties domiciled or having their principal place of business outside the enforcing jurisdiction.

Id. at 932; see also Lander Co. v. MMP Invs., Inc., 107 F.3d 476 (7th Cir. 1997) (Convention's implementing legislation authorized enforcement thereunder of arbitral awards in disputes wholly between U.S. citizens); Jain v. de Mere, 51 F.3d 686, 689 (7th Cir. 1995) (interpreting § 202 to mean that "any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign States, falls under the Convention."). Under this reasoning, an award that is made in the United States is "not considered as domestic" if it is subject to "the legal framework of another country." Such awards may be subject to one of the Conventions if they otherwise satisfy the requirements for application of the relevant Convention. The Restatement refers to this category of awards as "Convention awards made in the United States," or simply "U.S. Convention awards." See Section 1-1(i), supra.

The New York Convention in particular has been described as the "the cornerstone of current international commercial arbitration." Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 1 (1981). It succeeded the 1923 Geneva Protocol and 1927 Geneva Convention and improved the legal framework provided by those agreements. See Born, supra, at 93. One of the primary objectives of the Convention's drafters was to promote international uniformity through development of "a single uniform set of international legal standards for the enforcement of arbitration agreements and arbitral awards." Id. at 96. The goal of the New York Convention was to make foreign arbitral awards more readily enforceable than they had been under previous regimes, such as the 1927 Geneva Convention.

The drafting history of the Panama Convention and the legislative history of FAA Chapter Three demonstrate that the Panama Convention was intended to provide the same results as the New York Convention, although it also contained some innovations. Productos Mercantiles Industriales, SA v. Faberge USA, 23 F.3d 41, 45 (2d Cir. 1994) (explaining that "the legislative history of the Inter-American Convention's implementing statute . . . clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention."). Together, the Conventions and the relevant implementing legislation establish the contemporary framework for enforcing awards that are subject to those Conventions.

Both Conventions establish the criteria that must be satisfied for their application, as set forth in Comment *h* to Section 1-1, supra. If either of the Conventions applies, it supersedes prior inconsistent federal law and preempts conflicting state law. See § 1-___,[5] supra.

The FAA provides the implementing legislation for the Conventions. The New York Convention's implementing legislation is found in Chapter Two of the FAA and applies to awards and agreements falling under that Convention. 9 U.S.C. §§ 201-208. The Panama Convention's implementing legislation, found in Chapter Three of the FAA, applies to awards and agreements falling under the Panama Convention. Id. at §§ 301-307. Pursuant to § 302 of the FAA, §§ 202, 203, 204, 205, and 207 also apply in cases subject to the Panama Convention.

The Conventions and the legislation implementing them should be read and interpreted insofar as possible as consistent with each other. In light of the fact that the Conventions and their implementing legislation are sparsely written and leave unanswered many specific questions, courts have developed a fairly expansive "federal common law" of arbitration to interpret and apply the Conventions. Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 417 (4th Cir. 2000) (FAA and New York Convention "create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.") (quoting Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983)). Judicial authorities developed for domestic

[5] Cross-reference to Section to be drafted on FAA preemption.

arbitration under Chapter One of the FAA are also used to fill gaps to the extent that such authorities do not conflict with the Conventions. See Comment *d*. In this respect, many important court decisions concerning domestic awards provide the rule of decision for cases concerning awards governed by the Conventions. See, e.g., Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 960 (10th Cir. 1992) (applying Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967), to case governed by the New York Convention).

c. Law applicable to confirmation and vacatur of U.S. Convention awards. Congress, in enacting FAA Section 202, established the category of Convention awards made in the U.S. and declared those awards to be subject to the New York Convention. Accordingly, as a general matter, Chapter Two of the FAA provides the law applicable to U.S. Convention awards.

(i). Law applicable to confirmation of U.S. Convention awards. FAA Section 207 authorizes any party, within three years of the issuance of an award, to "apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration," and mandates confirmation of the award unless a Convention ground for refusing to do so is established.

The question then arises whether a party prevailing in a U.S. Convention award may, as an alternative, seek confirmation of the award under FAA Chapter One. Article VII of the New York Convention provides that the Convention's availability "shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon." Most courts have held that the Convention and FAA Chapter One have "overlapping coverage" and that the prevailing party may opt to proceed under the one or the other. Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998) (citing Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir. 1983)) ("[T]he FAA and the Convention have 'overlapping coverage' to the extent that they do not conflict."); Lander Co. v. MMP Invs., 107 F.3d 476, 481 (7th Cir. 1997), cert. denied, 522 U.S. 811 (1997) (agreeing with Second Circuit holding in *Bergeson* in a case to enforce an arbitral award).

However, the grounds for denying confirmation of a U.S. Convention award are furnished exclusively by the Convention. See Bautista v. Star Cruises, 396 F.3d 1289, 1297 (11th Cir. 2005) ("Congress gave the treaty-implementing statutes primacy in their fields, with FAA provisions applying only where they did not conflict."); Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 (5th Cir. 1985) ("[T]he Convention must be enforced according to its terms over all prior inconsistent rules of law."). It would cause unnecessary confusion to invite actions to confirm U.S. Convention awards under FAA Chapter One, only to substitute the Convention grounds for denying confirmation for FAA Chapter One's grounds for denying confirmation. Confining confirmation of U.S. Convention awards to FAA Chapters Two and Three enhances consistency in other respects as well. Chapters Two and Three automatically provide federal subject matter jurisdiction, while Chapter One does not (see § 4-26, infra). Also, confirmation actions under FAA Chapter One are subject to a one-year statute of limitations, while actions under Chapters Two and Three are subject to a three-year statute of limitations (see § 4-32, infra).

Moreover, the purpose of New York Convention Article VII was to permit parties to take advantage of domestic rules and standards that facilitate confirmation or enforcement, and are therefore advantageous to the prevailing party. With the possible exception of the writing requirements of the Convention (which seldom operate as a barrier to confirmation or enforcement), FAA Chapters Two and Three are in all respects more favorable to confirmation and enforcement than FAA Chapter One.

(ii). Law applicable to vacatur of U.S. Convention awards. Although FAA Chapters Two and Three expressly govern Convention awards made in the U.S., they do not expressly refer to the vacatur of such awards. Section 207 provides simply that a court exercising jurisdiction under Section 203 "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition . . . of the award specified in the said Convention." The Second Circuit accordingly ruled in Zeiler v. Deitsch, 500

F.3d 157, 166 (2d Cir. 2007), that FAA Chapter Two allows a court to refuse confirmation, but not to grant vacatur, of a U.S. Convention award, and that vacatur of such an award can accordingly only be had under FAA Section 10. See, to the same effect, Tesoro Petroleum Corp. v. Asamera (South Sumatra) Ltd, 798 F. Supp. 400, 404-05 (W.D. Tex. 1992) (finding a lack of jurisdiction to vacate a Convention award under Chapter Two); HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122, 1127 n.8 (C.D. Cal 1999) (finding no cause of action to vacate under Chapter Two); see also Ingaseosas Int'l Co. v. Aconcagua Investing Ltd., 2011 U.S. Dist. LEXIS 13064, at *7-8 (S.D.Fla. Feb 10, 2011) ("Courts that have spoken on the issue, even in dicta, universally agree that federal district courts do not have original jurisdiction to hear a motion to vacate an arbitral award pursuant to the Convention, when the motion to vacate is the sole basis for subject matter jurisdiction."). Under this view, an action to vacate a U.S. Convention award may only be brought under FAA Chapter One, which does not itself create federal subject matter jurisdiction, with the result that, absent an independent basis of federal jurisdiction, vacatur of a U.S. Convention award may only be sought in state court.

However, the FAA lends itself to an alternative reading which would permit a vacatur action to be maintained under FAA Chapters Two or Three. Section 208 provides for the incorporation into FAA Chapter Two of all provisions of FAA Chapter One that are not inconsistent with it. Since vacatur is not addressed in FAA Chapter Two (other than as a basis for denying recognition or enforcement under Article V(1)(e) of the New York Convention), incorporating a vacatur action from Section 9 is not inconsistent with Chapter Two. Lower federal courts in New York have allowed an action to vacate a U.S. Convention award to be brought under FAA Chapter Two, although the survival of these rulings after the Second Circuit's decision in *Zeiler* is doubtful. 500 F.3d 157; See Jam. Commodity Trading Co. v. Connell Rice & Sugar Co., 1991 U.S. Dist. LEXIS 8976 (S.D.N.Y. 1991) (finding jurisdiction over an action to confirm under Chapter One as well as a cross-motion to vacate under Chapter Two and the New York Convention); P.T. Reasuransi Unum Indon. v. Evanston Ins. Co., 1992 U.S. Dist. LEXIS 19753 (S.D.N.Y. Dec. 23, 1992) (vacatur action entertained under both 9 U.S.C. § 10 and the Convention); Jain v. De Mere, 51 F.3d 686, 689-91 (7th Cir. 1995) (in a case to compel arbitration, discussing the incorporation of Chapter One's Sections 4 and 5 into Chapter Two through Section 208 on a case-by-case basis).

The Restatement adopts this latter position rejecting, as inconsistent with Section 208, cases holding that an action to vacate a Convention award is not available under Chapter Two. Principally, Congress' determination to treat awards of an international character rendered in the U.S. as Convention awards requires that actions to confirm them be subject to FAA Chapters Two and Three, which create federal subject matter jurisdiction. The reading of the FAA to be preferred is one that puts confirmation and vacatur actions on the same jurisdictional plane, just as provided by FAA Chapter One.

Moreover, denying any authority of US courts to vacate U.S. Convention awards would amount to insulating such awards from any annulment whatsoever, since under the Convention the only courts that have authority to vacate such awards are U.S. courts. Congress did not intend for awards made in the U.S. to escape any possibility of vacatur merely because they happen to be Convention awards, and such an approach would not represent sound policy.

Accordingly, FAA Chapters Two and Three provide the law applicable to actions to vacate U.S. Convention awards, just as they provide the grounds for denying confirmation of those awards. However, the fact that those chapters provide the applicable law does not in itself necessarily determine the grounds on which U.S. Convention awards may be vacated. That issue turns on an interpretation of FAA Section 207, which might be construed as permitting vacatur either on the grounds set out in Article V of the New York Convention or on the grounds set out in Section 10 of the FAA. As discussed in detail in the Reporters' Note to Comment *a*, Section 4-11, infra, the Restatement takes the position that Section 207 should be construed as providing for vacatur of U.S. Convention awards exclusively on Article V grounds.

d. Law applicable to recognition and enforcement of foreign Convention awards. As their titles indicate, the New York and Panama Conventions were entered into chiefly with a view to the recognition and enforcement of foreign awards. The grounds for denying recognition or enforcement of

a foreign Convention award are exclusively those provided for in the relevant Convention. It would be inconsistent with U.S. obligations under the Conventions for a foreign Convention award to be denied recognition or enforcement on any ground other than one specified in the Conventions.

Some courts and commentators have suggested that a foreign Convention award may also be enforced, at the prevailing party's option, under FAA Chapter One. San Martine Compañía de Navegacíon, S.A. v. Saguenay Terminals, Ltd., 293 F.2d 796, 800-802 (9th Cir. 1961) (applying Section 10 grounds to test the enforceability of an award made in Canada); Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co., 415 F. Supp. 133, 137 (D.N.J. 1976) (applying Sections 9 and 10 to test enforceability of foreign award); see also Standard Magnesium Corp. v. Fuchs, 251 F.2d 455, 456 (10th Cir. 1957) (pre-Convention case holding that the FAA applied to an award made in Norway resolving a dispute between an American company and a German company). The courts and commentators taking this position rely on the savings clauses in §§ 208 and 307 of the FAA, both of which provide that Chapter One "applies to proceedings brought under this chapter [i.e., Chapters Two and Three] to the extent" that Chapter One "is not in conflict with this chapter" or the applicable Convention. But for the same reasons that permitting confirmation actions for U.S. Convention awards under FAA Chapter One would conflict with FAA Chapters Two and Three, see Comment *c*, permitting a party to seek recognition or enforcement of a foreign award under FAA Chapter One would likewise conflict with those chapters. Accordingly, a party cannot resort to FAA Chapter One for recognition or enforcement of a foreign Convention award.

Adherents of the view that FAA Chapter One is available for the recognition and enforcement of foreign Convention awards also point to the "most favorable provisions" language in Article VII of the New York Convention. Article VII states:

> 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 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.

Those advancing the view that FAA Chapter One may be applied to foreign Convention awards interpret this language as permitting parties to pursue confirmation under FAA Chapter One to the extent that it offers greater opportunities for enforcement than are available under the Convention. Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907, 910 (D.D.C. 1996); see also Kenneth R. Davis, Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 37 Tex. Int'l L.J. 43, 46 (2002).

The better view, and the position adopted by the Restatement, is that Article VII does not permit a foreign Convention award to be confirmed or vacated under FAA Chapter One. As discussed above, in enacting the Chapters of the FAA implementing the New York and Panama Conventions, Congress made Chapters Two and Three the exclusive means of enforcing foreign Convention awards. Eric A. Schwartz, A Comment on *Chromalloy*: *Hilmarton*, à l'américaine, 14 J. Int'l Arb. 125, 132 n.28 (1997); see also Stephen T. Ostrowski & Yuval Shany, Chromalloy: United States Law and International Arbitration at the Crossroads, 73 N.Y.U. L. Rev. 1650, 1675-1679 (1998).

This understanding of Article VII is more consistent with the express provisions and structure of the FAA, the legal framework of the Conventions, and the procedural and conceptual distinctions between confirmation and vacatur, on the one hand, and recognition and enforcement, on the other. See Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 197 (2d Cir. 1999) (rejecting interpretation of Article VII as allowing FAA Chapter One to apply to enforcement of foreign awards); M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 851 (6th Cir. 1996) (refusing to apply Section 10 to foreign

Convention award because Section 207 of Chapter 2 of the FAA says that Article V of the Convention provides the exclusive grounds for non-enforcement). It should be recalled that Article V's grounds for denying recognition or enforcement are permissive only. In effect, Article VII simply confirms the permissive nature of Article V's grounds for denying recognition or enforcement. See Born, supra at 2724 ("Article VII only makes sense if non-recognition under Article V is permissive, in the sense of leaving Contracting States free to apply their local laws to recognize awards if they choose[.]").

e. Law applicable to the recognition and enforcement of non-Convention awards. Non-Convention awards are international arbitral awards that do not fall within the scope of the New York Convention, the Panama Convention, or the ICSID Convention. See Section 1-1(t), supra. The most common scenario involves an arbitral award made in a country that is not a party to either the New York or the Panama Convention. Because the reciprocity reservation made by the United States is not satisfied in such a case, see Section 4-5, infra, the Conventions by their terms do not apply. The question then is what law does apply to such awards.

There are at least three bodies of law that might be thought to govern the recognition and enforcement of non-Convention awards:

(i). FAA Chapter One as law applicable to recognition and enforcement of non-Convention awards. A first position is that as a general matter, non-Convention awards are governed by Chapter One of the FAA, and state law to the extent it does not conflict with the FAA. This is the position that the Restatement adopts.

The argument for applying Chapter One begins with the text of the FAA. By its terms, FAA Chapter One applies to arbitration agreements giving rise to non-Convention awards. See 9 U.S.C. § 2 (making enforceable an arbitration agreement in a "contract evidencing a transaction involving commerce");; Id. § 1 (defining "commerce" as "commerce among the several States or *with foreign nations*") (emphasis added). As such, Chapter One as applied to non-Convention awards should be construed in accordance with the "emphatic federal policy in favor of arbitral dispute resolution." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985).

Consistent with this federal policy, the phrase "confirming the award" in § 9 of the FAA should be construed as providing for enforcement of non-Convention awards. Section 9 provides for a federal district court to enter an order "confirming" an arbitral award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. As used by Congress elsewhere in the FAA, the term "confirm" means not only to enter judgment on an arbitral award made in the United States, but also to enter judgment on a foreign award. Id. at § 207. Indeed, the parallelism is striking between "the court must grant [a confirmation] order unless the award is vacated" (language of FAA § 9), and "the court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award" (language of FAA § 207). Accordingly, in the particular context of non-Convention awards, Section 9 is reasonably construed as providing a statutory basis for recognition and enforcement.

In enacting the FAA in 1925, Congress acted to the full extent of its power to regulate interstate and, presumably, foreign commerce. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995). This certainly includes the power to legislate concerning foreign arbitral awards. Construing FAA Chapter One as not applicable to non-Convention awards would categorically carve out those awards from federal law, imputing to Congress the intent to exclude such awards from the uniform federal rules otherwise applicable to arbitration awards in interstate and foreign commerce.

Although courts are divided on whether FAA Chapter One applies to non-Convention awards, recent decisions have undercut the reasoning of the cases declining to apply Chapter One. See San Martine Compañía de Navegacion293 F.2d at 800-801 (enforcing award made in Canada and citing Chapter One of the FAA; admiralty case that assumed rather than discussed whether the FAA applied); Int'l Bechtel Co. v. Dep't of Civil Aviation of Dubai, 360 F. Supp. 2d 136, 137 (D.D.C. 2005) (dismissing action to confirm Dubai arbitration award because "Bechtel and DCA did not agree that a judgment

would be entered upon the award made pursuant to the arbitration and did not specify a United States court pursuant to 9 U.S.C. § 9.") (citing Restatement (Third), The Foreign Relations Law of the United States § 487, Reporters' Notes); Splosna Plovba of Piran v. Agrelak S.S. Corp., 381 F. Supp. 1368, 1370 (S.D.N.Y. 1974) (refusing to enter judgment on award made in London, explaining that "there is no express language in the arbitration clause providing that a judgment of the court shall be entered upon the award. Rather, the parties agreed that the award 'shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court.'"); Konstantinidis v. S.S. Tarsus, 248 F. Supp. 280, 288 (S.D.N.Y. 1965) (citing two cases, both involving actions seeking to enforce arbitration agreements rather than awards as conflicting authority on whether under the FAA a "court has power to confirm an award of foreign arbitrators made after an arbitration in a foreign country" and concluding that "[i]t is not necessary to decide these questions in order to dispose of the present case."); see Richard W. Hulbert, Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone, 13 Foreign Inv. L.J. 124, 136-137 (1998) ("With one possible exception, however, no case has been found in which the Federal court acted to confirm a foreign arbitral award in reliance on the Arbitration Act," citing *San Martine*).

While commentators likewise are divided, more recent commentaries tend to favor application of Chapter One to non-Convention awards. Compare Born, supra at 887 ("The domestic FAA also contains provisions setting forth procedures for seeking to confirm an arbitral award. These provisions, in Section 9 of the FAA, will generally be applicable to international awards not subject to the New York Convention."); Howard M. Holtzmann & Donald Francis Donovan**,** United States**,** in IV International Handbook on Commercial Arbitration**,** at United States 88 (Jan Paulsson ed., 1999) ("A foreign arbitration award generally can be enforced even if no convention or bilateral treaty applies. Such an award can be enforced by bringing an ordinary contract action in state or federal court *or under the FAA*.") (emphasis added); IV Ian R. Macneil et al., Federal Arbitration Law § 44.9.1, 44:61-44:62 (Supp. 1995) ("Where that view [that the FAA § 9 venue provision is permissive] prevails, a party may secure confirmation of an award under FAA § 9 even though the award was made in a non-signatory State."); also J. Stewart McClendon, Enforcement of Foreign Arbitral Awards in the United States, 4 Nw. J. Int'l L. & Bus. 58, 61 n.23 (1982) (asserting that "there should be no impediment to using Section 9" to enforce a "foreign arbitral award involving foreign parties."); with Hulbert, supra, at 135 ("Whether the Arbitration Act was ever intended to apply to a foreign award must be seriously doubted."); John P. McMahon, Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States, 2 J. Mar. L. & Com. 735, 739 (1971) ("In the United States the Federal Arbitration Act of 1925 and the arbitration statutes of the several states have been construed as inapplicable to foreign awards. Consequently, such awards could be enforced only by a common law suit on the award or on a foreign judgment rendered on the award."); and James van R. Springer, The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 Int'l L. 320, 328 (1968) ("Foreign awards have, therefore, frequently been enforceable only in common law actions, which may be somewhat cumbersome.").

Several textual arguments, chiefly based on FAA § 9, have been asserted against application of FAA Chapter One to the enforcement of non-Convention awards. Each of those arguments, however, has lost much if not all of its force in light of recent court decisions.

First, Chapter One does not expressly refer to foreign awards. See Martin Domke, The Law and Practice of Commercial Arbitration § 44.01, at 361 (1968) ("[N]o arbitration statute in the United States, neither the Federal Arbitration Act, nor the arbitration law of any state—not even the modern arbitration statutes in twenty-three states which provide for the enforcement of future arbitration clauses—nor the Uniform Arbitration Act, includes any provision for the enforcement of foreign arbitral awards or judgments rendered on awards."). But the question is not whether Chapter One expressly mentions non-Convention awards, but rather whether non-Convention awards nevertheless come within the plain meaning of its language. Cf. Southland Corp. v. Keating, 465 U.S. 1, 15 (1984) (holding that FAA § 2 applies in state courts even though the language of § 2 does not specifically mention them). As discussed above, a strong argument can be made that they do.

Second, § 9 of the FAA begins: "[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration." 9 U.S.C. § 9. It is unlikely that an arbitration clause providing for arbitration in a non-Convention jurisdiction would include such an entry-of-judgment provision. Hulbert, supra at 134-135. However, many courts, no longer require an express entry-of-judgment provision before confirming an award.

Third, § 9 goes on to provide that if the entry-of-judgment provision specifies a court, the enforcement action may be brought in that court; if it does not specify a court, the action "may be made in the United States court in and for the district within which such award was made." 9 U.S.C. § 9. It is unlikely that an arbitration clause providing for arbitration in a non-Convention country would specify a U.S. court as the venue for an enforcement action. See Restatement (Third) of The Foreign Relations Law of the United States Section 487, Reporters' Note 8 (explaining that Chapter One of the FAA "applies to an award rendered abroad only if the parties had agreed that judgment on the award may be entered in a specified United States court.");Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1058 (1961) ("The Federal Arbitration Act is of little use with regard to enforcement of a foreign award in a federal court unless the arbitral agreement specifies a court in which an order conforming the award may be made."). By definition, § 9's alternative—i.e., that the action be brought in the U.S. federal district where the award was made—has no application to foreign awards.

However, the Supreme Court held in Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 195 (2000), that the § 9 venue provision is permissive, not mandatory. Thus, as long as venue is proper under the U.S. general venue statute, a party may file a petition to confirm an award under § 9, even if the arbitration clause does not specify a U.S. forum for enforcement and even if the arbitration award was made elsewhere. Indeed, the Court justified its holding in part as facilitating the enforcement of non-Convention awards under FAA Chapter One:

> [R]eading §§ 9-11 to restrict venue to the site of the arbitration would preclude any action under the FAA in courts of the United States to confirm, modify, or vacate awards rendered in foreign arbitrations not covered by either convention. Cf. 4 I. MacNeil, R. Speidel & T. Stipanowich, Federal Arbitration Law § 44.9.1.8 (1995) (discussing difficulties in enforcing foreign arbitrations held in non-signatory states). Although such actions would not necessarily be barred for lack of jurisdiction, they would be defeated by restrictions on venue, and anomalies like that are to be avoided when they can be.

Id. at 203. Although courts and commentators have objected to the suggestion that U.S. courts might vacate foreign awards, they have raised no similar objections to the suggestion that U.S. courts might confirm (i.e., enforce) foreign awards under Chapter One. See Alan Scott Rau, Federal Common Law and Arbitral Power, 8 Nev. L.J. 169, 201 n.102 (2007); William W. Park, Amending the Federal Arbitration Act, 13 Am. Rev. Int'l Arb. 75, 125 (2002); see also Int'l Bechtel Co. v. Dep't of Civil Aviation of Dubai, 360 F. Supp. 2d 136, 138 (D.D.C. 2005) (limiting ability to vacate foreign awards to rare case in which parties provide for U.S. law to govern an arbitral proceeding having its seat abroad) (dicta). Moreover, under the position that the Restatement adopts in the context of Convention awards made in the United States (see Comment *c*), parties seeking to avoid enforcement presumably could rely on the § 10 grounds even after the 90-day period for seeking vacatur has run, until the statutory time limit for bringing a confirmation action has expired.

Fourth, the language of § 9 directs the district court to enter an order confirming the award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. Typically (certainly under the New York Convention, and likely under principles of international comity as well), only the arbitral seat has the authority to vacate an award. See Section 4-1(b), supra. Applying FAA Chapter One to non-Convention awards might be viewed as permitting U.S. courts to vacate awards made abroad. The better view, instead, is that the Section 10 grounds may be understood, in the context of non-Convention awards, as designating the bases on which an award may

be denied recognition and enforcement in the United States. Thus, rather than automatically enforcing non-Convention awards under Section 9 (because the award could not be vacated under Section 10), the Section 10 grounds for vacating awards should be construed as grounds for denying enforcement, which operate in a manner similar the New York and Panama Conventions' grounds for denying enforcement. Accordingly, a district court would enter an order enforcing a non-Convention award unless the party seeking to avoid recognition or enforcement establishes one of the grounds in § 10 of the FAA.

Application of FAA Chapter One to non-Convention awards would of course bring about a substantial harmonization of standards across the United States, as well as, a convergence between the treatment of foreign non-Convention awards and the treatment of awards in interstate commerce under the domestic FAA chapter. At the same time, treatment of foreign awards would differ as between those that constitute Convention awards (hence governed by FAA Chapters Two and Three) and those that constitute non-Convention awards (hence governed by FAA Chapter One). Given the laws governing international arbitral awards in the United States, complete harmonization is not possible, consistent with congressional mandates. Indeed, there is no completely satisfactory answer to the question of what law governs non-Convention awards in the United States. The Restatement position is that applying FAA Chapter One to non-Convention awards is most consistent with the text of the FAA and the federal policy in favor of arbitral dispute resolution.

(ii). State law as applicable to recognition and enforcement of non-Convention awards. In addition to FAA Chapter One, non-Convention awards also are subject to recognition and enforcement under state law, to the extent that state law does not conflict with the FAA. A dozen U.S. states have enacted international arbitration statutes, in some cases based on the UNCITRAL Model Law on International Commercial Arbitration. Some of those statutes by their terms authorize enforcement of non-Convention awards. Conn. Gen. Stat. §§ 50a-101(2), 50a-135(1); Fla. Stat. § 684.25; Ga. Code § 9-9-42 (applicable to foreign awards but subject to reciprocity requirement); Or. Rev. Stat. § 36.522(1). Others by their terms do not authorize enforcement of non-Convention awards, and essentially apply only when the arbitration proceeding takes place within the state. Cal. Code Civ. P. § 1297.12; Hawaii Rev. Stat. § 658D-4(d) (or if Hawaii law governs); § 710 Ill. Comp. Stat. 30/1-5(b); Ohio Rev. Code Ann. § 2712.02(B); Tex. Civ. Prac. & Rem. Code Ann. § 172.001(b). Still others are unclear whether they authorize enforcement of non-Convention awards, see N.C. Gen. Stat. § 1-567.31, or do not address award enforcement at all, see Colo. Rev. Stat. § 13-22-505; Md. Code Ann. Cts. & Jud. Proc. § 3-2B-01.

For states without international arbitration statutes, general state arbitration statutes may provide a basis for enforcing foreign arbitral awards. The interpretative issues are similar to those discussed above in connection with Chapter One of the FAA. Neither the Uniform Arbitration Act (UAA) nor the Revised Uniform Arbitration Act (RUAA) expressly references foreign arbitral awards as within their scope. See Unif. Arb. Act, prefatory note, 7 U.L.A. 6 (2005) ("Because few international cases are likely to be dealt with in state courts and because of the diversity of state law already enacted for international cases, the Drafting Committee decided not to address international arbitration as a specific subject in the revision of the UAA."). Likewise, both the UAA and RUAA provide for confirmation of the award unless the award is vacated. Unif. Arb. Act. § 11, 7 U.L.A. 472 (2005) ("the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13"); Unif. Arb. Act § 22, 7 U.L.A. (2005) ("the court shall issue a confirming order unless the award is modified or corrected pursuant to Section 20 or 24 or is vacated pursuant to Section 23"). Commentators are divided on whether state arbitration statutes apply to non-Convention awards. See Gary B. Born, International Commercial Arbitration: Commentary and Materials 901 (2d ed. 2001) ("In many states, local legislation provides for the enforcement of arbitral awards, including foreign arbitral awards. For example, § 11 of the Uniform Arbitration Act permits actions to confirm arbitral awards in much the same fashion as § 9 of the FAA. Nevertheless, there is precedent in some states suggesting that state arbitration statutes are available only to enforce awards made within the state."); Quigley, supra, at 1057 ("In the United States, no state arbitration statute makes any provision for the enforcement of

foreign arbitral awards; therefore, there is no summary procedure to confirm an interstate or foreign award in the state courts.").

To the extent that no state arbitration statute is applicable, non-Convention awards may be enforced under state common law. See Gilbert v. Burnstine, 174 N.E. 706, 709 (N.Y. 1931) (enforcing arbitration award made in London, and finding that parties "are bound by an award, made after due compliance with the requirements of the procedural machinery established by the British statute, unless they are able to show that no contract has been made or broken."); Standard Magnesium Corp. v. Fuchs, 251 F.2d 455, 458 (10th Cir. 1957) (enforcing award made in Norway on basis of common-law action seeking judgment on award). For example, the district court in Weizmann Institute of Science v. Neschis seems to have applied a common law comity-based approach to the recognition of a non-Convention award made in Liechtenstein. Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654, 674-675, n.21 (S.D.N.Y. 2005) (using approach analogous to that used for enforcement of foreign judgments, applying state common-law preclusion principles to state-law claims and federal common-law preclusion principles to federal-law claims); see also Restatement (Third) of The Foreign Relations Law of the United States Section 487, Comment *h* ("Foreign arbitral awards not falling under the Convention are generally enforceable in the United States in the same manner as foreign judgments (§§ 481-482), whether or not they have been judicially confirmed in the state where made. An action to enforce such an award proceeds under state law and not under the United States Arbitration Act, and access to federal courts apart from admiralty is ordinarily available only on the basis of diversity of citizenship.").

(iii). Federal common law as law applicable to recognition and enforcement of non-Convention awards. A final possibility the Reporters considered was having federal common law, rather than FAA Chapter One, govern the recognition and enforcement of non-Convention awards. As noted above, the Supreme Court has recognized an "emphatic federal policy in favor of arbitral dispute resolution," a "policy [that] applies with special force in the field of international commerce." Mitsubishi Motors Corp., 473 U.S. at 631. That policy might provide the basis for applying federal common law to non-Convention awards. Moreover, a number of courts of appeals have developed federal common-law rules applicable to international arbitration agreements. See, e.g., Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571, 579 (7th Cir. 2007); InterGen N.V. v. Grina, 344 F.3d 134, 144 (1st Cir. 2003); Smith/Enron Cogeneration L.P. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 96 (2d Cir. 1999). As the Seventh Circuit stated in *Certain Underwriters at Lloyd's*: "We believe that this overarching federal concern with the uniformity of treatment of international arbitration agreements requires that the issue before us be resolved by a federal common law rule, rather than by a state rule of decision." 500 F.3d at 579. Arguably, a similar concern for uniformity might justify application of federal common law rules to non-Convention awards.

The question naturally arises whether the recognition and enforcement of non-Convention awards should parallel the recognition and enforcement of foreign court judgments. In that setting, "[s]tate courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules." Restatement (Third) of The Foreign Relations Law of the United States Section 481, Comment *a*; see also Restatement (Second) of Conflict of Laws § 98, Comment *c* ("The Supreme Court of the United States has never passed upon the question whether federal or [s]tate law governs the recognition of foreign nation judgments. The consensus among the [s]tate courts and lower federal courts that have passed upon the question is that, apart from federal question cases, such recognition is governed by [s]tate law and that the federal courts will apply the law of the [s]tate in which they sit."). Numerous commentators have argued for application of federal common law to the enforcement of foreign court judgments, even while acknowledging that the issue currently is addressed by state law. E.g., Charles Alan Wright et al., Federal Practice and Procedure § 4473, at 403 (2002); Andreas F. Lowenfeld, Nationalizing International Law: Essay in Honor of Louis Henkin, 36 Colum. J. Transnat'l L. 121, 130 (1997); Robert C. Casad, Issue Preclusion and Foreign Country Judgments: Whose Law?, 70 Iowa L. Rev. 53, 79-80 (1984). Likewise, the ALI proceeded on the basis of a similar understanding in adopting The Foreign Judgments Recognition and Enforcement Act, a proposed federal statute that would govern the recognition and enforcement of foreign judgments.

Of course, unlike in the foreign judgments setting, in the arbitration setting Congress has enacted a major federal statute making arbitration agreements and awards enforceable when they arise in interstate commerce. Likewise, the United States is a party to a number of international conventions providing for the enforcement of arbitration agreements and awards, which is not the case for recognition and enforcement of foreign judgments. Accordingly, the case for a uniform federal common-law rule for such awards is stronger than for foreign judgments.

There appear, however, to be no cases applying federal common law to the enforcement of non-Convention awards, and no commentators specifically arguing for the application of federal common law to non-Convention awards. Moreover, the cases identifying a federal policy in favor of arbitration, like the cases adopting federal common-law rules applicable to international arbitration, all involve Convention awards, not non-Convention awards. Those courts consistently ground the federal policy, and the federal common law rule, in the New York or Panama Convention—which by definition do not apply to non-Convention awards. See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 631 (1985)) ("[A]t least since this Nation's accession in 1970 to the Convention . . . and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act, that federal policy applies with special force in the field of international commerce."); Certain Underwriters at Lloyd's, 500 F.3d at 579 ("We stress that we deal here with more than a generalized federal interest in uniformity that might be insufficient to warrant application of a federal rule . . . The uniformity at issue here is one that implicates *the 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.") (emphasis added) (internal quotations omitted).

As noted, the Restatement takes the position that FAA Chapter One governs the recognition and enforcement of non-Convention awards, as long, of course, as that chapter otherwise applies (e.g., the transaction affects commerce, including "commerce . . . with foreign nations"). See 9 U.S.C. § 1; see also Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974) (holding that purchase by American company of companies organized in Germany and Liechtenstein, with contract signed in Austria, "constituted 'commerce . . . with foreign nations'"); Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Co., 978 F. Supp. 266, 300-302 (S.D. Tex. 1997) (holding that transaction between two foreign corporations to be performed in Pakistan "'related to' or 'affected' foreign commerce within the meaning of the FAA," based on various contacts with the United States), aff'd, 263 F.3d 162 (5th Cir. 2001). This approach is consistent with the most straightforward interpretations of the text of the FAA in recent court decisions like *Cortez Byrd Chips*, and promotes greater uniformity to the recognition and enforcement of non-Convention awards.

f. Application of foreign law in actions for post-award relief. While certain Convention grounds refer specifically to U.S. law (see §§ 4-15, 4-17, 4-18, infra), others may require the court to apply the substantive law of another jurisdiction, such as the law of the place where the arbitration agreement was made, the law of the place whose law was designated as governing the arbitration, or the law of the place where the arbitration was conducted or the award was made (see §§ 4-12, 4-14, infra). To the extent that those grounds incorporate elements of foreign law, foreign law becomes incidentally applicable to the determination of whether a ground for granting or denying post-award relief in a U.S. court is established. See IV Ian R. Macneil et al., Federal Arbitration Law § 44.40.1, at 44:279 (Supp. 1999) ("In applying Convention grounds for nonenforcement, it is essential to recognize that the applicable law varies according to the ground in question.").

Courts also occasionally consider foreign decisions interpreting provisions of the Conventions as persuasive authority for their proper interpretation. See, e.g., Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274 (5th Cir.) (citing English, Hong Kong, Swiss, and other authorities), cert. denied, 543 U.S. 917 (2004). Such consideration is appropriate, particularly given that one of the primary objectives of the Conventions is to promote uniform interpretation of their provisions.

g. Recognition and enforcement of confirmed foreign awards. The Conventions expressly contemplate the effect in an enforcement jurisdiction of a decision by a competent authority to set aside an award, and they eliminate the double exequatur requirement that an award necessarily be confirmed at the seat in order to be recognized and enforced. They do not, however, directly address the effect of a decision by a competent authority to confirm the award on subsequent efforts at recognition and enforcement in another jurisdiction. One possible approach would be to treat the arbitral award as "merged" into the judgment confirming it, so that the judgment nullifies the award and requires the party to seek enforcement of the judgment. This approach has been criticized by scholars as severely curtailing application of the Conventions in many cases. See van den Berg, supra at 347-348. As a consequence, no U.S. court has adopted it and it is rejected by the Restatement.

Alternatively, a foreign judgment confirming an award could be treated as either irrelevant to award recognition and enforcement or as an alternative vehicle for recognition and enforcement. While there has not been extensive analysis of these two options, courts have generally followed the latter approach, permitting a party to seek enforcement of either the award or the foreign judgment confirming the award. See Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 29 F.3d 79 (2d Cir. 1994); Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987); Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973); Oriental Commercial & Shipping Co. v. Rosseel, N.V., 769 F. Supp. 514 (S.D.N.Y. 1991); accord In re Waterside Ocean Navigation Co., 737 F.2d 150 (2d Cir. 1984); Fotochrome, Inc. v. Copal Co., 517 F.2d 512 (2d Cir. 1975). This approach has been characterized by commentators as the "parallel entitlement" approach since it allows the prevailing party two parallel strategies for recognition and enforcement. See van den Berg, supra at 346; see also Martin L. Roth, Note, Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments Under the Parallel Entitlements Approach, 92 Cornell L. Rev. 573 (2007); Tibor Várady et al., International Commercial Arbitration: A Transnational Perspective 688 (3d ed. 2006). The Restatement adopts this approach. It is least problematic when the award is made in a State that has adopted the UNCITRAL Model Law on International Commercial Arbitration, since in those jurisdictions the grounds for annulment of awards are essentially coterminous with the grounds for denying recognition or enforcement under the Conventions. Karaha Bodas Co., 364 F.3d at 367 n.48.

The parallel entitlement approach can, however, give rise to certain anomalies. See Roth, supra at 588-590 (explaining that enforcing a foreign judgment confirming an arbitral award may permit a party to avoid expired statute of limitations, circumvent grounds for refusing enforcement under U.S. law, alter applicable choice-of-law rules, and avoid federal jurisdiction). In seeking enforcement of a judgment confirming an award, as opposed to the award itself, a party could effectively obtain enforcement despite the fact that the underlying award would not satisfy the terms of the applicable Convention. This situation might arise, for example, if the losing party defaults in the action to confirm the award, or if certain bases for challenging an arbitral award are not actually litigated in the foreign proceeding because local law permits parties to exclude consideration of such an issue. See Born, supra, at 2662 n.592 (noting that the Swedish Arbitration Act permits parties to waive or limit grounds for challenge in annulment proceedings). In those instances, however, the foreign judgment may be subject to challenge under those grounds that exist for denying recognition or enforcement of a foreign judgment. For an analysis of those grounds, see Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute (2006). Notably, most States that restrict review in annulment or set-aside proceedings do so by precluding, or allowing the parties to preclude by agreement, such proceedings altogether. See Born, supra, at 2658. In those contexts, since there would be no set-aside proceeding, there would also not be any proceeding through which an award could be confirmed.

It may happen that a court of the arbitral situs partially confirms and partially vacates a local award. Should that occur, a U.S. court to which the award is later brought directly for recognition or enforcement may deny such relief in regard to the portion of the award that was vacated, in reliance on Articles V(1)(e) and 5(1)(e) of the New York and Panama Conventions, respectively. See Section 4-16, infra. However, in the event that a court of the arbitral situs confirms the award partially, but merely denies confirmation of the rest (rather than setting it aside), the judgment of the situs court will be given

the effect provided for by Section 4-8, infra ("Effect of Prior Judicial Determinations on the Grant of Post-Award Relief").

The possibility that a judgment confirming an award may do so under less exacting standards than those provided in the Conventions for award review may appear to create an exception to the position of the Restatement that parties may not agree to reduce or eliminate the grounds for denying recognition or enforcement of an award. This possible result, however, is consistent with the opportunity that parties have to effectively obtain expanded review of an arbitral award by selecting a seat where local law provides for such expanded review. Moreover, permitting parties to enforce either a confirming judgment or the award itself is consistent with the language of the Conventions and their underlying purpose to increase the potential enforceability of arbitral awards.

A distinct, but not unrelated, possibility is that, instead of seeking confirmation of an award in a court of the seat *A*, the prevailing party may seek to have the award reduced to judgment by the court of a third country *C*, which is neither the seat nor the place *B* where recognition or enforcement will be sought. This approach may be strategically attractive if a judgment from country *C* appears more likely to be enforced in country *B* than either the award or a judgment from country *A*. There is apparently no published decision squarely addressing this issue, though it has been known to arise in practice. Nor will this route frequently be followed, if only because it requires two successive enforcement steps: enforcement of the country *A* award in country *C*, followed by enforcement of the country *C* judgment in Country *B*, with both of these steps subject to defenses against enforcement.

Initially, the Country *C* judgment would seem entitled to recognition and enforcement in Country *B*, provided it meets the judgment recognition and enforcement standards in Country *B*. To the extent this is allowed, not only judgments of confirmation by a court of Country *A*, but also judgments of enforcement by a court of Country *C* could come to Country *B* for recognition and enforcement. This would be quite logical, since enforcement of foreign awards, as defined in the Restatement, results precisely in a judgment which presumably is capable of recognition and enforcement abroad under the relevant standards. Moreover, the result would appear to enhance the prospects for the effective recognition and enforcement of awards generally.

However, the same analysis could, under different circumstances, have the opposite effect. If the enforcement action in country *C* is unsuccessful, the losing party in the arbitration could, by the same logic, invoke that judgment in Country *B* to prevent recognition or enforcement of the award there, even though Country *B* would have recognized and enforced the award if it had judged the award independently by Convention standards. And yet, it is difficult as an analytic matter to justify treating Country *C*'s decision to enforce the award as worthy of recognition and enforcement in Country *B*, but its decision not to enforce the award as unworthy of recognition and enforcement. Nor is it certain that the standard defenses to recognition and enforcement of foreign judgments, as set forth in the Uniform Act, which are meant to be exclusive, would even provide a basis for denying recognition or enforcement of a judgment under these circumstances.

By an alternative reasoning, judgments to recognize and enforce foreign arbitral awards, or to deny them recognition or enforcement, are inherently "territorial" and do not require, and may not even be eligible for, recognition or enforcement outside the territory of the rendering State. As one authority has suggested, "[a] judgment relating to recognition or enforcement – like an exequatur on a judgment – does not necessarily have territorial scope and thus need not be 'recognized.'" Linda Silberman, The New York Convention After Fifty Years: Some Reflections on the Role of National Law, 38 Ga. J. Int'l & Comp. L. 25, 36 (2009). Under this view, Country *C*'s judgment enforcing the Country *A* award would not be entitled to recognition or enforcement in Country *B*, or indeed anywhere outside the territory of Country *C*. The immediate effect would be to accord courts of the seat exclusive power, through confirmation, to render a judgment that both reduces the award to judgment locally and is capable of recognition and enforcement elsewhere. This approach would in any event obviate the difficulty of justifying non-recognition or non-enforcement of judgments under the Uniform Act and similar enactments that, by their terms, would not permit such a result under these circumstances.

In short, the full implications of the strategy discussed here are not clear and, as noted, no court appears to have addressed it. While recent developments in parallel actions to enforce foreign arbitral awards (such as in the *Yukos* litigation in the Dutch, U.K. and other courts) suggest that there may soon be more experience upon which to draw, that experience is still extremely thin. The Restatement accordingly takes no position on whether a U.S. court should recognize or enforce a judgment (whether granting or denying enforcement) where the court rendering that judgment was neither a court of the arbitral seat nor a court of a jurisdiction whose arbitration law the parties expressly adopted.

§ 4-4. Formal Requirements for Post-Award Relief

(a) A party seeking confirmation of a U.S. Convention award or recognition or enforcement of a foreign award must:

(1) if in federal court, submit the original or an authenticated copy of the arbitration agreement and arbitral award; or

(2) if in state court, comply with the formal filing requirements of the law of the forum to the extent that those requirements are not preempted by federal law.

(b) The arbitration agreement referred to in paragraph (a)(1) must be an "agreement in writing" as defined in Section 2-___.[6]

(c) A party seeking vacatur of a U.S. Convention award must:

(1) if in federal court, submit the original or an authenticated copy of the arbitral award; or

(2) if in state court, comply with the formal filing requirements of the law of the forum to the extent that those requirements are not preempted by federal law.

(d) Whether vacatur or confirmation of a U.S. Convention award or recognition or enforcement of a foreign award is sought in federal or state court, the materials referred to in subsections (a) and (c) must be in a language that the court accepts for filings, or, if the original is not in such a

[6] Cross-reference to section to be drafted dealing with the writing requirement for enforcing arbitration agreements.

language, must be accompanied by an accurate and certified translation into such language.

Comments:

a. Formal requirements for post-award relief in federal court. Article IV(1) of the New York Convention provides that a party seeking recognition or enforcement of a Convention award "shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; [and] (b) The original agreement referred to in Article II or a duly certified copy thereof." Additionally, Article IV(2) requires that the moving party provide a certified translation of the agreement or the award if either is not in an official language of the country in which recognition or enforcement is sought.

By comparison, Section 13 of the FAA (made applicable to Panama Convention awards by FAA Section 307, and applicable as well to U.S. Convention awards and non-Convention awards) sets out the documents to be filed upon "entry of judgment" confirming the award. Except in unusual circumstances, Section 13 requires a party to submit to the court the same documents as are required by the New York Convention—i.e., the arbitration agreement and the arbitral award. FAA Chapter One does not expressly impose the additional New York Convention requirement that the agreement and the award submitted to the court be authenticated originals or certified copies thereof. A court is nevertheless likely to require authentication of the agreement and the award as an evidentiary matter.

Although not made explicit in the FAA, it is sound to require a party seeking vacatur to supply the original or an authenticated copy of the arbitral award that is sought to be vacated. Unless the challenge to the award is based on the arbitration agreement itself, however, the party seeking vacatur need not supply the arbitration agreement (or a copy thereof).

Consistent with the pro-enforcement policy of the FAA and the Conventions, courts have applied the above requirements in a flexible manner. A similar flexibility is reflected in courts' willingness to confirm U.S. Convention awards even when the parties have not expressly consented to entry of judgment upon the award in their agreement to arbitrate.

b. Formal requirements for post-award relief in state court. Post-award relief may be sought in state as well as federal courts, and under state law to the extent that state law is not preempted by the applicable Convention or other applicable federal law. Some state arbitration laws do not require the party to provide a copy of the arbitration agreement in support of the sought post-award relief. This Section identifies the formal requirements for post-award relief in state court by reference to state law, to the extent such law is not preempted by the FAA.

c. Agreement in writing. Under Article II(1) of the New York Convention, the obligation of Contracting States to enforce an arbitration agreement applies only to an

"agreement in writing." See § 2-___,[7] supra; see also Panama Convention, art. 1 (1975); FAA § 2 ("written provision"). In turn, Article IV(1) of the New York Convention requires a party seeking recognition or enforcement of an award to supply to the court the arbitration agreement "referred to in article II," and, Article V(1)(a) of the Convention provides that a court may deny recognition or enforcement of an award if "the agreement referred to in article II . . . is not valid." See also Panama Convention, art. 5(1)(a) (1975) ("the agreement is not valid"); FAA § 13(a) (requiring party seeking confirmation of award to file "the following papers with the clerk: (a) The [arbitration] agreement").

Authorities are split on the nature and effect of the writing requirement when a party is seeking post-award relief. The Restatement takes the position that the arbitration agreement a party submits when seeking confirmation, recognition, or enforcement of an international arbitral award must be an agreement in writing within the meaning of the applicable Convention or the FAA, depending on the instrument invoked. This position is consistent with the text of Article IV of the New York Convention and with judicial authority. The similar language in Section 13 of the FAA supports reaching an equivalent result in cases arising under Chapter One of the FAA. Although the Panama Convention does not include any provision comparable to Article IV, the incorporation of § 13 into FAA Chapter Three, together with the policy of

[7] Cross-reference to Section to be drafted on the agreement-in-writing requirement for enforcing arbitration agreements.

construing the two conventions consistently, supports finding a similar requirement for Panama Convention awards.

To satisfy the writing requirement, the party need only provide evidence of an arbitration agreement that constitutes an "agreement in writing" under Section 2-___,[8] supra. It need not prove the existence or validity of the arbitration agreement. Those issues must be raised, if at all, by the party seeking vacatur or opposing confirmation, recognition, or enforcement, and that party bears the burden of proof. See § 4-6(b) & (c), infra.

REPORTERS' NOTES

a. Formal requirements for post-award relief in federal court. Article IV of the New York Convention sets out the formal requirements for the recognition and enforcement of New York Convention awards. The party seeking recognition or enforcement must supply to the court the original or a certified copy of the arbitration agreement and the arbitral award, together with a translation into a language in which the court accepts filings, as necessary. New York Convention, art. IV(1) & (2). The Convention adds that "[t]he translation shall be certified by an official or sworn translator or by a diplomatic or consular agent." Id. at art. IV(2). Case law provides little guidance on this requirement of a certified translation. See Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc., 2005 U.S. Dist. LEXIS 8810, at *14 (D. Kan. May 10, 2005) (finding translation of award accompanied by "Certification of Translation" and stamped "'Certified Translation' on each page" satisfies translation requirement of New York Convention). Cf. 8 C.F.R. § 1003.33 (2010) (immigration court rules) ("Such certification must include a statement that the translator is competent to translate the document, and that the translation is true and accurate to the best of the translator's abilities."); Kaciqi v. Holder, 2009 U.S. App. LEXIS 22906, at **6-7 (6th Cir. Oct. 19, 2009) (unpublished opinion) ("Like many of the other documents submitted at the court hearing, the letter also had an improperly certified translation: the translator had affixed his own notary seal to the document, instead of certifying that he was competent to translate it and have his declaration notarized."). Some states certify interpreters for court proceedings, but official certification of translators is uncommon in the United States. E.g., Cal. Govt. Code § 68566 ("certified court interpreter"); National Center for State Courts, Court Interpreting Consortium Member States: Consortium for Language Access in the Courts, available at http://www.ncsconline.org/D_Research/CourtInterp/10KeystoSuccessfulLangAccessProgFINAL.pdf (last visited July 20, 2011). A translation done by a certified translator presumably satisfies the Convention requirement that the translation be done by an "*official* or sworn translator." New York Convention, Article IV(2) (emphasis added). But the translation need not be done by a certified

[8] Cross-reference to Section to be drafted on the agreement-in-writing requirement for enforcing arbitration agreements.

translator. Under the Convention, it is enough if the translation is "certified" by a "sworn translator." The accuracy of the translation, should it be challenged, is, of course, a separate issue from whether the translation satisfies the formal requirements of Article IV.

The Panama Convention does not address the formal requirements for recognition and enforcement. But Section 13 of the FAA, which is incorporated into FAA Chapter Three and which applies as well to non-Convention awards and Convention awards made in the U.S., imposes similar requirements, as explained in Comment *b*, infra. 9 U.S.C. §§ 13, 307. While Section 13 of the FAA is silent on the certification and translation requirements of Article IV, see IV Ian R. Macneil et al., Federal Arbitration Law § 38.3.3.1, at 38:44 n.48 (Supp. 1999), requirements similar to those under the New York Convention likely apply. Evidentiary rules would require that the agreement and award be authenticated, and courts generally require parties to submit translations of foreign language documents, which presumably would include arbitration agreements and awards as well. See United States v. Diaz, 519 F.3d 56, 64 (1st Cir. 2008) ("It is clear, to the point of perfect transparency, that federal court proceedings must be conducted in English . . . . [P]arties are required to translate all foreign documents into English.") (quoting United States v. Rivera-Rosario, 300 F.3d 1, 5, 7 n.4 (1st Cir. 2002)); MDG Int'l, Inc. v. Australian Gold, Inc., 606 F. Supp. 2d 926, 939 (S.D. Ind. 2009) ("A number of documents relating to the calculation of lost profits are inadmissible because they are offered only in a foreign language. Documents in a foreign language are widely considered not properly authenticated."); Rivas-Montano v. United States, 2006 U.S. Dist. LEXIS 31893, at *3 (M.D. Fla. May 22, 2006). Cf. International Enforcement of Foreign Judgments 374-579 (Paul Hopkins ed. 2006) (listing state statutes, rules, or practices that require translation of foreign judgments that are in language other than English). But see Jazz Photo Corp. v. United States, 353 F. Supp. 2d 1327, 1360 (Ct. Int'l Trade 2004) ("That some of the documents contained within the business records are written in a foreign language or not produced upon company letterhead does not defeat admissibility but instead affects only the probative value of such documents . . . .").

Courts "have generally rejected efforts to complicate the proof requirements under Article IV, taking a practical and relatively flexible approach towards proof requirements." Gary B. Born, International Commercial Arbitration 2703 (2009); see also Julian D.M. Lew et al., Comparative International Commercial Arbitration 705 (2003) ("The few reported cases suggest that the enforcing courts have taken a rather liberal attitude in respect of authentication and certification."); Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 249 (1981) (Article IV "has . . . not formed an impediment for several courts to allow a claimant to cure, subsequent to the application, the non-fulfillment of the conditions"). For example, in Bergesen v. Joseph Muller Corp., 710 F.2d 928 (2d Cir. 1983), the Second Circuit held that an affidavit of the chair of the arbitral tribunal certifying the arbitration agreement and the award was sufficient to satisfy the requirements of Article IV(1). Id. at 934. Likewise, in Overseas Cosmos, Inc. v. NR Vessel Corp., 1997 U.S. Dist. LEXIS 19390 (S.D.N.Y. Dec. 8, 1997), the court held that "the certification of petitioner's solicitor, who participated in the London arbitration and has personal knowledge that the agreement and the award are genuine, is sufficient to satisfy the requirements of Article IV," at least when the existence of the arbitration agreement and the genuineness of the award were not disputed by the parties. Id. at *15-16. Indeed, one court accepted uncertified copies of the arbitration agreement and award, despite Article IV(1), when neither party disputed that they were genuine. See Hewlett-Packard, Inc. v. Berg, 867 F. Supp. 1126, 1130 n.11 (D. Mass. 1994), vacated on other grounds, 61 F.3d 101 (1st Cir. 1995).

While most courts appear willing to adopt a flexible approach to the formal requirements, that is not uniformly the case. The court in Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc., 2005 U.S. Dist. LEXIS 8810/ / (D. Kan. May 10, 2005), refused to enforce an award when the formal requirements of Article IV(1) were not met and one party disputed the existence of an arbitration agreement. The court explained:

> However, the Court finds that Guang Dong has not provided the Court with any documentation of the Joint Venture agreement that it claims is also subject to the arbitration panel's findings. The only submission of this agreement is an unsigned

> draft of the agreement made by ACI, which does not include an agreement to arbitrate. Guang Dong's interpretation of the requirement here would render . . . article IV of the Convention superfluous, as an agreement to arbitrate would be unnecessary so long as an arbitration tribunal determined that the parties executed a valid agreement to arbitrate. Although the Court acknowledges that the Joint Venture agreement is discussed in the arbitration award, the Court is without jurisdiction to confirm the award to the extent that it adjudicates the meaning of any Joint Venture agreement, as Guang Dong fails to meet the jurisdictional prerequisites for confirmation.

Id. at *14-15. See Born, supra, at 2705 (describing *Guang Dong* as one of several "surprising and ill-considered exceptions" to the general flexibility of courts in applying Article IV(1)).

Courts likewise have generally been flexible in confirming arbitral awards even when the parties have not expressly consented to entry of judgment on the award in their arbitration agreement. The issue arises because of FAA Section 9, which provides that a party may seek confirmation of an award "[i]f the parties in their agreement have agreed that a *judgment of the court shall be entered upon the award* made pursuant to the arbitration." 9 U.S.C. § 9 (emphasis added). Certainly this requirement is satisfied if the arbitration agreement incorporates by reference institutional rules such as those of the American Arbitration Association, which provide that "[p]arties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof." American Arbitration Association, Commercial Arbitration Rules, Rule R-48(c) (June 1, 2009). See, e.g., P & P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 867-68 (10th Cir. 1999); Rainwater v. Nat'l Home Ins. Co., 944 F.2d 190, 194 (4th Cir. 1991). But even if the parties have not agreed to such institutional rules, "[a] majority of the federal circuits addressing this issue hold that explicit consent to judicial confirmation is not required by section 9. Rather, the courts that have followed this approach focus on whether the parties expected the arbitration award to be final and binding." Erika Van Ausdall, Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act, 49 Drake L. Rev. 41, 49-50 (2000); see, e.g., Qorvis Comm'cns, LLC v. Wilson, 549 F.3d 303, 308 (4th Cir. 2008) ("It is true that the arbitration clause in this case does not, *in haec verba*, provide that 'a judgment of the court shall be entered upon the award.' 9 U.S.C. § 9. But the nature of the arbitration commitment and the parties' use of it leave little doubt that both Qorvis and Wilson contemplated binding arbitration with enforcement of any award through the entry of a judgment in a court."); Booth v. Hume Publ'g, Inc., 902 F.2d 925, 930 (11th Cir. 1990) ("We conclude that the provision in the employment agreement that the arbitrator's determination would be final and binding, along with Hume's full participation in the arbitration process, is sufficient under the Act to confer authority on the district court to confirm the award."); Place St. Charles v. J.A. Jones Constr. Co., 823 F.2d 120, 124 (5th Cir. 1987) ("[E]ntry of judgment can be implied from the language and behavior of the parties."); Milwaukee Typographical Union No. 23 v. Newspapers, Inc., 639 F.2d 386, 389-90 n.3 (7th Cir.) (stating that "[t]he agreement contemplated by § 9 . . . need not be explicit" and holding that the requirement was satisfied because the arbitration agreement provided that any award "shall be final and binding upon both parties"), cert. denied, 454 U.S. 838 (1981); I/S Stavborg v. Nat'l Metal Converters, Inc., 500 F.2d 424, 426-27 (2d Cir. 1974) (holding entry-of-judgment requirement satisfied when arbitration agreement provides that award will be final and when parties sought to have federal courts appoint arbitrator); see also Born, supra, at 2788 (entry-of-judgment requirement "reflects historical (and archaic) U.S. domestic practice, which has largely been abandoned even in the United States"); Macneil, supra, at § 44.38.1 (stating that Article II of the New York Convention and FAA Sections 203 and 207 "leave no room for conditioning confirmation on the parties' having 'agreed that judgment of the court shall be entered upon the award' as some courts have unfortunately done respecting FAA domestic arbitration. To the extent that courts have so interpreted FAA § 9, that section is in conflict with the Convention and with FAA §§ 203 and 207. Thus interpreted, FAA § 9 is superseded by them."). But see PVI, Inc. v. ratiopharm GmbH, 135 F.3d 1252, 1254 (8th Cir. 1998) ("[W]e do not agree that the mere inclusion of the phrase 'final and binding' in an agreement to arbitrate makes the award enforceable under the FAA."); Oklahoma City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 793-94

(10th Cir. 1991) ("The clear import of this [entry-of-judgment] phrase [in § 9] is that there is no federal court jurisdiction to confirm under the FAA where such jurisdiction has not been made a part of the arbitration agreement.") (emphasis omitted); Splosna Plovba of Piran v. Agrelak Steamship Corp., 381 F. Supp. 1368, 1371 (S.D.N.Y. 1974) (non-Convention award) ("[I]in the instant situation, the arbitrators have made a final award to plaintiff but plaintiff has failed to have judgment entered upon that award in London. Until such judgment is entered in London, without express language providing for entry of judgment in the arbitration agreement, this court does not have jurisdiction to enter judgment on this arbitration award.").

b. Formal requirements for post-award relief in state court. Not all state arbitration laws require a party seeking post-award relief to submit a copy of the arbitration agreement to the court. See, e.g., Cal. Code Civ. Proc. § 1285.4 (petition to confirm award "shall . . . [s]et forth the substance of or have attached a copy of the agreement to arbitrate unless the petitioner denies the existence of such an agreement"). Accordingly, this Section describes the form requirement for state courts as based on state law, to the extent not preempted by the FAA.

c. Agreement in writing. Courts and commentators are split on the proper relationship between the "agreement in writing" requirement in Article II and the recognition or enforcement of Convention awards under Article IV of the New York Convention. Although the case law and commentators focus on the New York Convention in discussing this issue, similar arguments can be made under the Panama Convention and the FAA (as applicable to Convention awards made in the U.S. and non-Convention awards). See Comment *a*, supra.

One view is that the party opposing confirmation, recognition, or enforcement has the burden of showing the lack of an agreement in writing as a ground for denying such relief. Pieter Sanders and Albert Jan van den Berg argue that "[t]he express reference in Art. V, para. 1 under *a*, to Art. II, incorporates the formal requirement of a writing, as provided for by Art. II, into Art. V. A party against whom enforcement is sought can therefore also invoke Art. II after the award has been made." Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 284 (1981) ("Except for the Italian Supreme Court, no court has doubted that Article II(2) is also applicable at the stage of the enforcement of the arbitral award."); Pieter Sanders, Consolidated Commentary, IV Y.B. Comm. Arb. 231, 247 (1979). These commentators rely in part on the drafting history of the New York Convention to support their position. The delegate from the Netherlands (Professor Sanders) expressed the view that an earlier version of Article V(1)(a), which did not include the reference to Article II, "would include not only agreements in express terms but also tacit agreements, and he felt that that should have been made clear." United Nations Economic and Social Council, United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-Fourth Meeting, U.N. Doc. E/CONF.26/SR.24, at 2 (Sept. 12, 1958) (remarks of Mr. Sanders). Initially, his proposal to reconsider the provision was rejected, id., but a later amendment proposed by Sanders, for the stated reason of specifying the law applicable to claims of lack of capacity, added the reference to Article II as well. Id. at 7. According to van den Berg, "[i]t is true that the amendment is somewhat awkwardly worded as it does not state expressly as cause for refusal of enforcement that the arbitration agreement is invalid under Article II, but the legislative history makes it clear that this was the intent." van den Berg, supra, at 285; see also Gary B. Born, International Commercial Arbitration 2706 (2009) ("[M]ost national courts and other authorities have (correctly) held that Article II's form requirements are relevant to the application of Article V(1)(a), as to which the award-debtor bears the burden of proof, but not to the provision of an arbitration agreement under Article IV.").

A second view is that the formal requirements of Article II need not be met for an award to be enforced under the Convention. Instead, because Article V does not expressly make lack of an agreement in writing a ground for denying recognition or enforcement, parties seeking to enforce Convention awards may rely on more lenient form requirements in national arbitration laws. See Julian D.M. Lew et al., Comparative International Commercial Arbitration 709-710 (2003) ("The alternative view is that formal validity is governed by the law chosen by the parties or the law of the place of arbitration. The reference to Article II is considered a superfluous additional description of the

arbitration agreement."); Lanificio Walter Banci S.a.S. v. Bobbie Brooks Inc., VI Y.B. Comm. Arb. 233, 235 (Corte di Cassazione 1980) ("In the case at hand concerning the enforcement in Italy of an award rendered in the United States *inter partes*, the above-mentioned Art. V—and not Art. II—of the Convention must be applied.").

U.S. courts have taken a third approach, which is reflected in this section. They have relied on Article IV's incorporation of the agreement-in-writing requirement as setting out a prerequisite that must be met for the New York Convention to apply. Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1292 (11th Cir. 2004) ("[W]e hold that the party seeking confirmation of an award falling under the Convention must meet article IV's prerequisites to establish the district court's subject matter jurisdiction to confirm the award."); Moscow Dynamo v. Ovechkin, 412 F. Supp. 2d 24, 29 (D.D.C. 2006) (dismissing enforcement action for lack of subject-matter jurisdiction) ("This Court does not reach the issue of whether, under Russian contract law, the parties agreed to a 2005-2006 contract and, in doing so, to arbitration. Rather, the Court makes the narrow determination that the documents identified by Dynamo and the Arbitration Committee do not satisfy Article II's requirement that there be an 'agreement in writing . . . .'"). But see China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 293-94 (3d Cir. 2003) (Alito, J., concurring) ("The better reading of Article IV—which comports with fundamental principles of arbitration—requires that the party seeking enforcement both (1) supply a document purporting to be the agreement to arbitrate the parties' dispute and (2) prove to the court where enforcement is sought that such document is in fact an 'agreement in writing' within the meaning of Article II, Section 2. In the present case, accordingly, Minmetals was required to demonstrate to the District Court that an officer of Chi Mei signed the purported nickel contracts. Because the District Court ordered the award enforced without requiring Minmetals to make that showing, its decision must be vacated.").

While this Section states that the agreement-in-writing requirement is a prerequisite for an award to be enforceable under the New York Convention, it does not define what constitutes an agreement in writing within the meaning of the Convention. In 2006, UNCITRAL issued a recommendation that the definition of "agreement in writing" in Article II(2) of the Convention "be applied recognizing that the circumstances described therein are not exhaustive," and that, consistent with Article VII, a party be permitted to "avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement." 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, Done in New York, 10 June 1958 (July 7, 2006), available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf. The issues of what constitutes an agreement in writing and the effect of the UNCITRAL Recommendation are addressed in Section 2-___,[9] supra.

[9] Cross-reference to Section to be drafted on agreement-in-writing requirement for enforcing arbitration agreements.

§ 4-5. Reciprocity

(a) Recognition or enforcement of a Convention award is subject to a requirement of reciprocity. The requirement is satisfied if the seat of the arbitration that produced the award is a Contracting State to the applicable Convention. Recognition or enforcement of a Convention award is not subject to any other reciprocity requirement.

(b) Recognition or enforcement of a non-Convention award is not subject to any reciprocity requirement unless recognition or enforcement is sought under a treaty or state arbitration law that imposes such a requirement.

Comments:

a. Territorial limitation on obligations under the Conventions. The rule stated in paragraph (a) of this Section reflects the legal position of the United States under both the New York and Panama Conventions. The United States has made the reciprocity reservation under Article I(3) of the New York Convention, which permits a State to declare that it will apply the Convention "on the basis of reciprocity" only to "those awards made in the territory of another Contracting State." Upon ratification of the Panama Convention, the United States made a comparable reservation. As such, those Conventions require a U.S. court to recognize or enforce a foreign arbitral award only if the award was made in the territory of a Contracting State.

Satisfaction of this reciprocity requirement depends on the *seat* of the arbitration and not the *nationality* of the parties, the *law* governing the substance of the dispute, or the *place* where the arbitration hearing is held or other procedural steps are taken. U.S. Convention awards necessarily satisfy the reciprocity requirement because they were made in the United States, which is a party to the Conventions.

Illustrations:

1. The claimant is a national of State *A*, which has not ratified the New York Convention. The respondent is a national of State *B*, which has not ratified the New York Convention. The arbitral seat is State *C*, which has ratified the New York Convention. A court will find that the award satisfies the reciprocity requirement of this Section.

2. The claimant is a national of State *D*, which has ratified the New York Convention. The respondent is a national of State *E*, which has ratified the New York Convention. The arbitral seat is State *F*, which has not ratified the New York Convention. A court will find that the award does not satisfy the reciprocity requirement of this Section.

b. No additional reciprocity requirement for Convention awards. Paragraph (a) of this Section sets out the exclusive reciprocity requirement applicable to Convention awards. No additional reciprocity requirement for the recognition or enforcement of Convention awards may be imposed or enforced. For example, Article XIV of the New

York Convention provides that "[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." Some commentators have argued that this provision creates an additional reciprocity requirement for awards subject to the New York Convention (neither the Panama Convention nor the reservations that the U.S. made in ratifying the Panama Convention contain a comparable provision). By its terms, however, Article XIV addresses only the rights of one Contracting State vis-à-vis another under the Convention, and does not purport to apply to private-party actions to enforce awards brought in national courts. Accordingly, the Restatement takes the position that Article XIV does not impose a reciprocity requirement in addition to that stated in paragraph (a).

c. Non-Convention awards. Due to the reciprocity requirements in the U.S. reservations to the New York and Panama Conventions, those Conventions do not apply to a foreign award not rendered in a Convention State. An award that does not satisfy the reciprocity requirement may nevertheless be presented to a court for recognition or enforcement as a non-Convention award. As specified in Section 4-3(b), supra, as a general matter non-Convention awards are governed by Chapter One of the Federal Arbitration Act, which does not impose a reciprocity requirement. Accordingly, unless recognition or enforcement is sought under a treaty or state law requiring reciprocity, no reciprocity requirement applies to the recognition or enforcement of non-Convention awards.

REPORTERS' NOTES

a. Territorial limitation on obligations under the Conventions. As indicated in Comment *a*, the United States has made the reciprocity reservation authorized by Article I(3) of the New York Convention. See 9 U.S.C. § 201 app. ("The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State."). Although Chapter Two of the FAA does not expressly refer to the reciprocity requirement, Section 201 makes clear that the Chapter is implementing the New York Convention, 9 U.S.C. § 201, and courts and commentators have concluded that reciprocity is required under Chapter Two. E.g., E.A.S.T., Inc. v. M/V ALAIA, 876 F.2d 1168, 1172 (5th Cir. 1989); Int'l Bechtel Co. v. Dep't of Civil Aviation of Dubai, 360 F. Supp. 2d 136, 137 n.3 (D.D.C. 2005); Restatement of the Law (Third) Foreign Relations Law of the United States § 487 cmt. b (1987); IV Ian R. Macneil et al., Federal Arbitration Law § 44.9.6, at 44:91-44:92 (Supp. 1999); Gary B. Born, International Commercial Arbitration 2389-2393 (2009); see Martin Domke, The United States Implementation of the United Nations Arbitral Convention, 19 Am. J. Comp. L. 575, 576 (1971) ("[T]he implementing law does not indicate the exact meaning of [the reciprocity] reservation."). Conversely, although the Panama Convention does not expressly authorize Contracting States to make a reciprocity reservation, the United States has made such a reservation and incorporated the reservation into Chapter Three of the FAA. 9 U.S.C. § 304 ("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."); see H.R. Rep. No. 101-501, at 5 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678 ("Another provision applies the same rule followed under the earlier New York Convention, that foreign arbitral awards, on the basis of reciprocity, will only be recognized from countries that have also ratified the Convention.").

Under both Conventions, this reciprocity requirement refers to the *seat* of the arbitration and not to the *nationality* of the parties or the *law* governing the substance of the dispute. See E.A.S.T., Inc., 876 F.2d at 1172; La Societe Nationale Pour La Recherche v. Shaheen Natural Res. Co., 585 F. Supp. 57, 64 (S.D.N.Y. 1983), aff'd, 733 F.2d 260 (2d Cir. 1984); Restatement of the Law (Third) Foreign Relations Law of the United States § 487 cmt. b (1987) ("For those states, including the United States and nearly all of the principal commercial states, the critical element is the place of the award: if that place is in the territory of a party to the Convention, all other Convention states are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration."). Thus, the reciprocity requirement is met when the arbitral seat is a Contracting State to the Convention; the nationality of the parties and the governing law are irrelevant to this determination.

Courts have uniformly rejected the argument that the Conventions do not apply to awards made in the United States because those awards are not made "in the territory of *another* Contracting State" as required by the reciprocity reservations (emphasis added). See Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 481-82 (7th Cir. 1997); Productos Mercantiles e Industriales, S.A. v. Faberge U.S.A., Inc., 23 F.3d 41, 44 (2d Cir. 1994) (Panama Convention); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 931-32 (2d Cir. 1983); Republic of Arg. v. BG Grp., 715 F. Supp. 2d 108, 118 (D.D.C. 2010). When awards made in the United States have a sufficient international nexus, they are "Convention awards made in the United States" and are subject to the applicable convention. See § 1-1(i), supra. For such awards, the reciprocity requirement is satisfied by definition because the United States is a party to the conventions.

Illustrations 1 and *2* are based on modified versions of the facts in E.A.S.T., Inc., 876 F.2d at 1172.

b. No additional reciprocity requirement for Convention awards. Aside from the reciprocity requirements of the U.S. reservations to the New York and Panama Conventions, recognition and enforcement of Convention awards are not subject to any additional reciprocity requirements. Of course, nothing prevents the United States from entering into a convention on the recognition of arbitral awards that dispenses with any requirement of reciprocity or from withdrawing a reservation incorporating a requirement of reciprocity.

Article XIV of the New York Convention provides that "[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" (the Panama Convention does not contain a comparable provision). Article XIV has been described as a "general reciprocity clause" that "renders the phrase 'on the basis of reciprocity' in the first reservation of Article I(3) even more redundant." Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 14 (1981). American parties have sought to rely on Article XIV's reciprocity requirement to avoid enforcement of foreign awards in the United States. Such efforts run up against ambiguities in the language of Article XIV.

By its terms, Article XIV imposes a reciprocity requirement when a "Contracting State" seeks to "to avail itself of the present Convention against other Contracting States." Nothing in the terms of Article XIV permits private parties to rely on its provisions. See M.A. Indus. Inc. v. Maritime Battery Ltd., 118 N.B.R. 2d 127, para. 14 (Q.B. 1991) ("While article XIV says a Contracting State cannot avail itself of the Convention against other Contracting States except to the extent it is itself bound to apply the Convention, this is not a case involving Contracting States, but rather two private commercial entities.").

The drafting history of the Convention provides mixed support for such an interpretation. In a discussion of the provision before it was moved to Article XIV, several delegates asked "whether [the provision] did not mean that an arbitral award could not be relied upon by the party seeking enforcement except to the extent that the Convention was observed in the federal or non-unitary State in which the award was given." United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-Fourth Meeting, U.N. Doc. E/CONF.26/SR.24, at 5 (June 10, 1958), available at http://www.uncitral.org/pdf/english/travaux/arbitration/NY-conv/e-conf-26-sr/24-N5815724.pdf. In response,"[t]he PRESIDENT explained that paragraph 2 referred to States rather than to any parties to awards because it was the State which would invoke the Convention if it felt that one of its nationals had been denied his rights under the Convention." Id. On the other hand, in proposing adoption of Article XIV, the Norwegian delegate described the provision as a "general reciprocity clause," and the Swedish delegate opposed adoption on the ground that "[d]ue provision for reciprocity had already been made in all the contexts where it had some significance." Id. at 6-7.

If Article XIV is construed as applying in litigation between private commercial parties, its interpretation still is uncertain. Gary B. Born suggests several possible ways that Article XIV might be construed in such a case:

> [I]t is unclear whether reciprocity is established by demonstrating that a state: (a) is a party to the New York Convention; (b) is a party to the Convention without having made reservations that would preclude recognition of the award in question; or (c) is a party to the Convention and in practice enforces the Convention's provisions in accordance with their terms.

Gary B. Born, International Commercial Arbitration 2394 (2009). Under the first of these possible interpretations, Article XIV would require a court only to examine whether the State was a Contracting State to the New York Convention. Under the second interpretation, the court would examine the State's reservations as well. If the State had made a reservation that would preclude recognition or enforcement of the award if sought in that State, the party resisting enforcement could rely on that reservation to avoid recognition or enforcement of the award. Under the third interpretation, the court would examine not only the reservations made by the State, but also how those reservations had been applied in practice by the courts of the State. Under this interpretation, a U.S. court could invoke Article XIV to restrict its obligation to recognize and enforce a foreign award based on the interpretation of a reservation (or perhaps some other provision of the applicable convention) by the State where those awards were made.

Commentators tend to favor construing Article XIV as applicable in litigation between private parties. See Born, supra, at 2393-95 ("Article XIV qualifies the rights conferred by the Convention on Contracting States, and therefore derivatively upon private parties in the courts of Contracting States.

By imposing a general reciprocity limitation on the rights granted by the Convention, Article XIV restricts the ability of private parties to rely on those rights in national court litigation . . . . Given the purposes of the reciprocity reservation, at least some scrutiny of Contracting States' reservations to the Convention and how Contracting States' courts actually apply the Convention is appropriate and arguably necessary"); van den Berg, supra, at 14 ("Article XIV might be invoked in a case where enforcement is sought in a Contracting State which has not used the commercial reservation, in respect of an award relating to a non-commercial matter made in a Contracting State which has used the commercial reservation. In such a case the court of the State where the enforcement is sought may be inclined to refuse enforcement on the basis of lack of reciprocity . . . ."); Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1074 (1961) ("The adotion (*sic*) of this Article gives States a defensive right to take advantage of another State's reservations with regard to territorial, federal or other provisions. The clause presumably will also cover the case where the courts of a State have placed a restrictive interpretation upon its obligations under the Convention.").

But such views conflict with the plain language of Article XIV, which by its terms applies only between the Contracting States to the Convention, not private parties. In Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948 (S.D. Ohio 1981), the party challenging the award argued that the award would not be enforceable in India because Indian courts had construed the "commercial" reservation under the Convention narrowly. Accordingly, it argued that the court should rely on Article XIV and refuse to enforce the award. The district court rejected the argument, reasoning as follows:

> The Court is persuaded that the reciprocity required by the Convention is satisfied in this case. With regard to the wording of Article I, paragraph 3, it is an elementary rule of statutory construction that where express language is used in one part of a statute, its omission from another part is presumed to be deliberate. It is undisputed that India is a signatory to the Convention; therefore, the reciprocity of the first sentence in question is satisfied.

Id. at 953. The court specifically refused to follow the language from the Leonard Quigley article quoted above (see Quigley, supra, at 1074 (Article XIV "presumably will also cover the case where the courts of a State have placed a restrictive interpretation upon its obligations under the Convention")), stating that "we do not find this comment determinative." Fertilizer Corp., 517 F. Supp. at 953. Alternatively, the court concluded that even under the broader interpretation of Article XIV, the reciprocity requirement was met: "we are satisfied that the Indian courts are not engaged in a devious policy to subvert the Convention by denying non-Indians their just awards." Id. Thus, contrary to some suggestions, the *Fertilizer* court did not hold that "Article XIV applies in private litigation." See Born, supra, at 2393 & n.348. Rather, the court implicitly rejected that position, finding the Convention's reciprocity requirement satisfied because the arbitral seat was in a Contracting State as required by the U.S. reciprocity reservation. Only in the alternative did the court consider—and reject—the interpretation of Article XIV favored by the commentators.

Accordingly, the Restatement takes the position that Article XIV does not impose any additional reciprocity requirement on the recognition and enforcement of Convention awards.

c. Non-Convention awards. Non-Convention awards are governed by Chapter One of the FAA (see § 4-3(b), supra), and nothing in the text of that chapter imposes any sort of reciprocity requirement. To the extent recognition or enforcement of non-Convention awards is sought under state arbitration statutes, those statutes generally do not require reciprocity. See, e.g., Conn. Gen. Stat. § 50a-135(1); Or. Rev. Stat. § 36.522(1); Unif. Arb. Act. § 12, 7 U.L.A. 12 (2005); Rev. Unif. Arb. Act § 23(b), 7 U.L.A. 74 (2005). An exception is the Georgia international arbitration statute, which provides as follows:

> An arbitration award irrespective of where it was made, on the basis of reciprocity, shall be recognized as binding and shall be enforceable in the courts of this state subject to the grounds for vacating an award under Part 1 of this article and providing that the award is not contrary to the public policy of this state with respect to international

> transactions. Reciprocity in the recognition and enforcement of foreign arbitral awards shall be in accordance with applicable federal laws, international conventions, and treaties.

Ga. Code Ann. § 9-9-42. Similarly, no reciprocity requirement is ordinarily applicable to common law actions for the recognition or enforcement of non-Convention awards. See Martin Domke, Enforcement of Foreign Arbitral Awards in the United States, 13 Arb. J. 91, 93 (1958) ("Enforcement of foreign awards has been had in the United States primarily in New York State courts. Foreign awards have been liberally enforced without any reference to the concept of reciprocity.").

§ 4-6. Burden of Proof for Post-Award Relief

(a) A party seeking confirmation of a U.S. Convention award or recognition or enforcement of a foreign award bears the burden of satisfying the requirements of Section 4-4(a) and (b).

(b) A party seeking vacatur or opposing confirmation of a U.S. Convention award or opposing recognition or enforcement of a foreign Convention award bears the burden of establishing the existence of one or more of the grounds set forth in Sections 4-12 through 4-18.

(c) A party opposing recognition or enforcement of a non-Convention award bears the burden of establishing the existence of one or more of the grounds set forth in Sections 4-19 through 4-22.

Comments:

a. Burden of proof for Convention awards. The Restatement maintains the principle that the moving party ordinarily bears the burden of establishing the elements legally required to justify the grant of the relief sought. Accordingly, a party seeking confirmation, recognition, or enforcement of a Convention award bears the burden of establishing the existence of the award and demonstrating that the other requirements of Sections 4-4(a) and (b), supra, are satisfied. However, it would be inconsistent with the federal policy favoring arbitration and with the wording of the Conventions and the FAA to require that party to prove the non-existence of a ground for vacating or denying confirmation, recognition, or enforcement of an award. This Section consequently requires the party seeking vacatur or opposing confirmation,

recognition, or enforcement of a Convention award to establish a ground that would justify the relief sought.

The references to burden of proof in this Comment denote both the burden of producing relevant evidence and the burden of persuading the court.

b. Burden of proof for non-Convention awards. As stated in Section 4-3(b), supra, the recognition and enforcement of non-Convention awards are governed by Chapter One of the FAA. Because there is no substantial difference between the burden of proof applicable under FAA Chapter One and the burden of proof applicable under FAA Chapters Two and Three, all international arbitral awards are subject to the same rules on burden of proof.

REPORTERS' NOTES

a. Burden of proof for Convention awards. Under the Geneva Convention of 1927, the party relying on an award had the burden of proving that the requirements for recognition and enforcement set out in the Convention were met, including the non-applicability of defenses to recognition and enforcement. Convention on the Execution of Foreign Arbitral Awards, Article 1, Sept. 26, 1927, 92 L.N.T.S. 301. See Julian D.M. Lew et al., Comparative International Commercial Arbitration 20 (2003). An important change made by the New York Convention was to shift to the party opposing recognition or enforcement the burden of establishing the existence of a ground for denying recognition or enforcement set out in the Convention. United Nations Conference on International Commercial Arbitration, 26th Sess., 25th mtg. at 2, U.N. Doc. E/CONF.26/SR.25 (Sept. 12, 1958), available at http://www.uncitral.org/pdf/english/travaux/arbitration/NY-conv/e-conf-26-sr/25-N5815727.pdf (statement of Mr. Schurmann, President) (noting that the New York Convention "placed the burden of proof on the party against whom recognition or enforcement was invoked"); see also Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974) ("While the Geneva Convention placed the burden of proof on the party seeking enforcement of a foreign arbitral award and did not circumscribe the range of available defenses to those enumerated in the convention, the 1958 Convention clearly shifted the burden of proof to the party defending against enforcement and limited his defenses to the seven set forth in Article V.").

Under the New York and the Panama Conventions, the party seeking recognition or enforcement "shall . . . supply" to the court the original or a certified copy of the arbitration agreement and the arbitral award. New York Convention, art. IV(1); 9 U.S.C. §§ 13, 307 (legislation implementing Panama Convention); see also § 4-4, supra. Once it does so, it has made out a prima facie case, and the

burden shifts to the party opposing recognition or enforcement to establish one of the grounds in Article V of the Convention. New York Convention, art. 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* . . . .") (emphasis added); 9 U.S.C. § 207, 302. ; see also Panama Convention, art. 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 able to prove* to the competent authority of the State in which recognition and execution are requested[.]") (emphasis added); Empresa Constructora Contex Limitada. v. Iseki, Inc., 106 F. Supp. 2d 1020, 1024 (S.D. Cal. 2000) ("The burden of proof is on the party defending against enforcement of the arbitral award.") (Panama Convention). See generally, Gary B. Born, International Commercial Arbitration 2718-2719 (2009) ("Consistent with the Convention's text and pro-enforcement purposes, national courts in both common law and civil law jurisdictions have repeatedly held that the party resisting recognition and enforcement of an award bears the burden of showing that one of the Convention's exceptions is applicable.").

The Eleventh Circuit has described the allocation of the burden of proof under the New York Convention as follows:

> Once the proponent of the award meets his article IV jurisdictional burden of providing a certified copy of the award and the arbitration agreement, he establishes a prima facie case for confirmation of the award. That is, the award is presumed to be confirmable. The defendant to the confirmation action can overcome this presumption only by making one of the showings enumerated in the Convention. As the Convention language indicates, the burden of proving these affirmative defenses rests on the defendant, while the burden of establishing the jurisdictional prerequisites rests on the proponent of the award.

Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1292 n.3 (11th Cir. 2004) (citations omitted); see also Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1066 (1961) ("The proponent of the award is required only to supply the original or a certified copy of the award and the arbitral agreement. These establish a prima facie case, and the burden shifts to the defendant to establish the invalidity of the award on one of the grounds specified in Article V 1.").

Although the authorities discussed above deal with foreign Convention awards, a similar allocation of the burden of proof would apply to U.S. Convention awards as well. See 9 U.S.C. §§ 207 & 302. Whether a party is seeking vacatur of a U.S. Convention award or merely denial of confirmation of such an award, it bears the burden of proving the existence of a Convention ground.

For discussion of the burden of proof in actions by and against non-parties to the arbitration proceeding, see the Reporters' Notes to Comment *c*, Sections 4-30 & 4-31, infra.

b. Burden of proof for non-Convention awards. Because the recognition and enforcement of non-Convention awards is governed by Chapter One of the FAA, the allocation of the burden of proof in such cases is the same as that applicable in domestic arbitration cases. Under Section 10 of the FAA, the party opposing recognition or enforcement of a non-Convention award bears the burden of proving that a ground for denying recognition or enforcement exists. E.g., STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC, 2011 U.S. App. LEXIS 11116, at *11 (2d Cir. June 2, 2011) ("'A party moving to vacate an arbitration award has the burden of proof, and the showing required to avoid confirmation is very high.'") (quoting D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 110 (2d Cir. 2006)); Youngs v. Am. Nutrition, Inc., 537 F.3d 1135, 1142 (10th Cir. 2008) (referring to "the heavy burden of proof on a party seeking to vacate an award").

To the extent that state law is applicable, state arbitration statutes likewise allocate the burden of proof to the party opposing recognition or enforcement. See, e.g., Conn. Gen. Stat. §§ 50a-135(2), 50a-136(1)(a); Or. Rev. Stat. §§ 36.522(2), § 36.524; Rev. Unif. Arb. Act. § 23, 7 U.L.A. 73 (2005); Unif. Arb. Act § 12, 7 U.L.A. 497 (2005). For a limited exception under the Revised Uniform Arbitration Act, see Rev.

Unif. Arb. Act § 12(e), 7 U.L.A. 43 (2005) ("An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Section 23(a)(2)."); id. cmt. 4 ("In such cases, it is then the burden of the party defending the award to rebut the presumption by showing that the award was not tainted by the non-disclosure or there in fact was no prejudice."). Even if recognition or enforcement were sought through a common law contract action, the party seeking recognition or enforcement likely would bear the burden of proving that the award should be recognized or enforced; it is less clear who would bear the burden of establishing the existence or non-existence of a ground for denying recognition or enforcement.

§ 4-7. Standard of Review for Granting Post-Award Relief

(a) Except as provided in §§ 4-12 through 4-18, a court determines de novo whether a ground exists to vacate or deny confirmation of a U.S. Convention award or to deny recognition or enforcement of a foreign Convention award.

(b) Except as provided in §§ 4-19 through 4-22, a court determines de novo whether a ground exists to deny recognition or enforcement of a non-Convention award.

Comments:

a. Standard of review generally. Application of the grounds for vacating or denying confirmation, recognition, or enforcement of an international arbitral award is exclusively the province of the court in which such relief is sought. In applying the grounds, courts make a fully independent determination of whether such grounds exist. Although judicial review of grounds for challenging an award is de novo, it is limited in scope (see § 4-11, infra), and generally conducted through summary proceedings (see § 4-33, infra).

b. Review of issues ruled on by the arbitral tribunal. While courts are required to make an independent determination whether grounds exist under applicable law for vacating or denying confirmation, recognition, or enforcement of an award, it is often the case that the arbitral tribunal has previously considered and ruled on the same fact or issue implicated by the applicable ground. For example, the tribunal may have made

a finding that the dispute in question fell within the scope of the parties' agreement to arbitrate. A party seeking such relief remains free to raise that issue again before the court and the court exercises independent judgment on the matter.

There are circumstances, however, in which the tribunal's findings on a matter relevant to the application of a ground for post-award relief may be given weight. First, the agreement to arbitrate may expressly call for deference to the tribunal on a given matter. For example, the parties may validly submit issues regarding the scope of arbitral jurisdiction to the tribunal, provided they do so clearly and unequivocally. See § 4-14, infra, especially Comment *c*. In that event, a court will not revisit the tribunal's finding that a particular claim falls within the scope of the agreement. Of course, whether the parties made such an unequivocal submission of issues of scope to the arbitral tribunal is a matter for independent judicial determination.

Second, courts do not review de novo all procedural decisions by arbitrators that may be a basis for a challenge. Instead, courts afford arbitrators significant deference regarding their procedural decisions in managing the arbitral proceedings, and make an independent determination only regarding the narrower question of whether those rulings are fundamentally unfair or involve material violations of the parties' arbitration agreement or the applicable arbitration law. See §§ 4-13 & 4-15, infra.

Illustration:

1. *B* seeks vacatur of an award on the ground that the tribunal's refusal to allow evidence from an expert that the tribunal determined was redundant. The court does not directly reconsider the tribunal determination that the expert was in fact redundant, or simply defer to it. Instead, the court evaluates de novo the narrower question of whether refusal to allow the expert rendered the proceedings fundamentally unfair.

Third, on rare occasion, a court may not have access to crucial evidence that was available to the arbitral tribunal. For example, a tribunal may have heard direct witness testimony that is essential to determining the existence of a fact on which the applicability of a ground for post-relief depends. That witness may no longer be available or not subject to the court's subpoena power, and the court may have no other probative evidence at its disposal. Such occasions rarely arise in practice. First, since the grounds for challenging an award are extremely narrow, it is rare that a purely factual dispute could give rise to a successful challenge. Moreover, when factual issues are relevant in post-award proceedings, they most often can be satisfactorily resolved on the basis of the arbitral record without need for taking additional evidence during the post-award proceedings.

If such an occasion does arise, the court can give weight to the findings and analysis of the tribunal on the disputed issue; in doing so, the court treats the tribunal's

findings as a source of evidence, while still independently evaluating that evidence in light of the larger record that it available to it.

REPORTERS' NOTES

a. Standard of review generally. In interpreting and applying the grounds for post-award relief, a court exercises independent judgment. Thus, courts do not generally defer to the findings of the arbitral tribunal in determining the factual and legal predicates upon which vacatur, confirmation, recognition, or enforcement of an award depends. See, e.g., Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc., 2005 U.S. Dist. LEXIS 8810, *29 (D. Kan. May 10, 2005) (holding "that this Court should make an independent determination of the Sales Contracts' validity, and therefore the arbitrability of this dispute."); Transmarine Seaways Corp. v. Marc Rich & Co., 480 F. Supp. 352, 358 (S.D.N.Y. 1979) ("When public policy is asserted as the basis for vacating an arbitration award, the court is required to make its own, independent evaluation."). Post-award review is in any event ordinarily conducted through a summary proceeding. See § 4-33, infra. Under no circumstance, should a court take judicial review as an opportunity to revisit the merits of the underlying dispute.

The Restatement does not prescribe a particular standard of review on appeal from decisions granting or denying the enforcement of awards. While the conventional approach in state and federal courts alike is to review findings of fact for clear error and findings of law on a de novo basis (see, e.g., Wartsila Finland OY v. Duke Capital LLC, 518 F.3d 287, 291 (5th Cir. 2008); Zeiler v. Deitsch, 500 F.3d 157, 164 (2d Cir. 2007)), the Restatement leaves the question of the standard of review, along with questions of appellate procedure, to the forum's general rules governing the conduct of appeals. See § 4-34, infra.

b. Review of issues ruled on by the arbitral tribunal. Although courts in principle make de novo determinations on issues on which the grant or denial of post-award relief depends, their assessments may in certain situation be influenced by the arbitral tribunal's findings and analyses.

(i). Submission of the question of scope of the arbitration agreement to the tribunal. First, the parties may have expressly submitted to arbitration the question of the scope of arbitral jurisdiction. If they have clearly and unequivocally done so, a court, when asked in a post-award action to decide whether a tribunal resolved "a difference not contemplated by or not falling within the terms of the submission to arbitration, or . . . decisions on matters beyond the scope of the submission to arbitration" N.Y. Convention Article V(1)(c) will defer to the arbitral tribunal's determination of that issue. See First Options v. Kaplan 514 U.S. 938 (1995) (courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so).

In the case of Rent-a-Center v. Jackson, 130 S. Ct. 2772 (2010), the U.S. Supreme Court held that, even where the parties delegate decision of the scope question to the arbitral tribunal, a court may determine independently whether that delegation is valid and enforceable. However, a court will do so only if the party contesting the award specifically challenges the validity or enforceability of the delegation. It will not do so if that party challenges the arbitration agreement as a whole. In the latter circumstance, the tribunal's exercise of authority to determine the scope of the agreement to arbitrate may not be reviewed.

(ii). Procedural rulings by the arbitral tribunal. Second, arbitrators are afforded significant deference by reviewing courts in regard to their procedural decisions. Deferential treatment in this regard is inherent in the very notion of arbitral procedural discretion. However, such deference is limited by the New York Convention's recognition in Article V(1)(b) that an award may be denied enforcement if "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." Thus, procedural rulings are reviewed only to determine whether they are fundamentally unfair or involve material violations of the parties' arbitration agreement or the applicable arbitration law. See § 4-13, infra; see also Parsons & Whittemore Overseas Co. v. Société Générale de l'industrie du papier, 508 F.2d 969 (2d Cir. 1974).

Illustration 1 is based on Tiong Huat Rubber Factory (SDB) BHD v. Wah-Chang Int'l Co., [1991] H.K.L.Y. 51 (Hong Kong Ct. App. 1991).

(iii). Unavailability to the court of critical testimony. Finally, a court may consider the conclusions of an arbitral tribunal regarding evidence that was originally available to the tribunal, but is not available to the court that is entertaining a request for post-award relief. This is a rare and exceptional circumstance, which may arise, for example, if evidence that is essential for evaluating the existence or nonexistence of a ground for post-award relief was the subject of oral witness testimony at the hearing, and the crucial witness is no longer available. See Section 4-33, infra. In this situation, the court continues to exercise independent judgment, but instead treats the findings of the arbitral tribunal as a source of evidence.

(iv). Effect of agreements to limit the authority of the tribunal. Parties on occasion seek to expand judicial review on matters pertinent to grounds for post-award relief by agreeing to limit the decisional authority of the tribunal in one respect or another. If the parties clearly precluded the tribunal from determining a given matter or defined the tribunal's authority in such a way as to exclude certain specified forms of relief, a court hearing a post-award action will normally determine for itself whether the tribunal exceeded the scope of its jurisdiction in entertaining the matter or affording the relief.

More problematic is the circumstance in which the parties expressly required an arbitral tribunal to "strictly" or "correctly" apply the law. Arguably, such a provision permits a court to evaluate whether the tribunal applied the chosen law strictly or correctly, as the case may be, and to vacate or deny confirmation, recognition, or enforcement of the award if the tribunal did not. The Seventh Circuit took that position in Edstrom Indus., Inc. v. Companion Life Ins. Co., 516 F.3d 546, 550-553 (7th Cir. 2008) (vacating arbitral award on ground that tribunal "exceeded [its] powers" where the contract required it to "strictly apply" Wisconsin law and the tribunal was not "even trying to interpret" the applicable Wisconsin statute). However, the Seventh Circuit has since repudiated its decision in *Edstrom*. See Affymax v. Ortho-McNeil-Janssen Pharms, Inc., 660 F.3d 281, at *7 (7th Cir. 2011) (stating that *Edstrom* did not survive the Supreme Court's decision in *Hall Street*); see also Wood v. Penntex Res. LP., 2008 U.S. Dist. LEXIS 50071 (S.D. Tex. June 27, 2008) (rejecting a similar argument); Raymond Prof'l Group, Inc. v. William A. Pope Co., 397 B.R. 414, 431 (Bankr. N.D. Ill. 2008) ("Until *Hall Street* [Hall Street Assocs, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008)] was decided, the Seventh Circuit panel opinion in *Edstrom Indus.* could have been read to expand the standard of review for vacating an arbitral award. However, after *Hall Street*, the *Edstrom Indus*. opinion must be read more narrowly. Under this reading, the arbitrator's complete disregard of applicable law found by the *Edstrom Indus.* opinion was determined from the face of the award and that justified reversal under accepted standards. *Edstrom Indus.* must therefore be read as limited to those facts. ").

While there are conflicting judicial authorities, the Restatement rejects the idea that parties may effectively expand judicial review through language that defines the arbitrators' mandate as limited to a strict or correct application of legal principles. Allowing the parties to do so would effectively engage the court in a substantive review of the tribunal's findings of law and application of the law to the facts, a result the Supreme Court rejected in *Hall Street*.

§ 4-8. Effect of Prior Judicial Determinations on the Grant of Post-Award Relief

In deciding whether to grant post-award relief, a court may reexamine a matter decided at an earlier stage of the proceedings by a court within the United States or by a foreign court, to the extent allowed by the forum's applicable principles governing the law of the case, claim and issue preclusion, and recognition of foreign judgments.

Comments:

a. Generally. In deciding whether to grant post-award relief, a court may encounter one or more issues that were already decided at an earlier stage of the dispute by itself, by another court in the United States, or by a foreign court. Essentially the same ground may be raised in order to defeat a motion to compel arbitration, vacate the resulting award, or deny confirmation, recognition, or enforcement of the award. For example, the court that compelled the arbitration out of which the award emerged may have determined that the dispute fell within the scope of the agreement to arbitrate. The scope question may well be raised again in connection with an action to confirm or vacate the award. It may resurface yet again on the occasion of a request for recognition or enforcement.

Under some circumstances, it may be appropriate for the court, in acting upon a motion for post-award relief, to give preclusive effect to an earlier judicial decision that considered the same ground for challenging an arbitration agreement or arbitral award. In other situations, de novo consideration of the recurrent issue is appropriate.

The preclusive effect, if any, to be afforded the prior judicial determination will depend on the circumstances of each particular case, but ultimately is determined by the principles of forum law governing the doctrine of law of the case or recognition of domestic or foreign judgments, as applicable.

This Section deals specifically with the impact of prior judicial decisions on a court's determination of an issue relating to a jurisdictional, procedural or other ground on which the availability of post-award relief depends. This matter is to be distinguished from the question whether, in the event of subsequent litigation between the same parties, the arbitral award itself is entitled to recognition with respect to the underlying claims or issues resolved in the arbitration. Depending on how the latter question is resolved, the arbitral award will or will not preclude further litigation regarding the merits of the dispute. For this discussion, see Sections 4-9 and 4-10, infra, on claim and issue preclusion, respectively.

b. Law applicable to the effect of the prior determination. A court applies forum law in deciding the effect of a prior judicial determination on the existence of a ground for post-award relief. When a court is presented with a prior decision of another court – whether located within the domestic interstate system or a foreign system – the court will apply forum law on the claim preclusive effect (or res judicata) or issue preclusive effect (or collateral estoppel) of domestic and foreign judgments, respectively. In this scenario, reference will more often be made to issue than claim preclusion, because the availability of post-award relief usually turns on a specific

finding (e.g., whether the dispute falls within the scope of the agreement to arbitrate, or whether a party had a reasonable opportunity to be heard) rather than on the determination of an entire claim. When the prior determination emanates from a foreign court, the matter is commonly framed in terms of the "recognition of foreign judgments." In the event the prior determination was made within a single continuing lawsuit, the court applies the "law of the case" doctrine of the forum. Regardless of the situation, the court applies forum law to determine whether or not it is foreclosed from entertaining an assertion about the arbitration agreement or arbitral award that a party had advanced at an earlier stage in the arbitration's life cycle.

(i). Prior determination by the same or a sister court. The extent to which a court should consider itself bound by its own prior decision or the prior decision of another court in the U.S. on a matter relevant to its ruling on post-award relief is a question properly governed by the forum's own law. As noted above, if the earlier and later challenges to the same agreement or award were based on the same ground and brought before the same or a sister court in litigation between the same parties, the situation is ordinarily governed by the forum's law on issue preclusion. Because the forum will have at its disposal preexisting issue preclusion principles, the Restatement does not articulate any specific rules regarding the effect of prior judicial determinations in the international arbitration context.

If a court is presented with a determination made at an earlier stage within the same continuing lawsuit in connection with the same arbitration agreement or arbitral

award, the court will instead apply the forum's "law of the case" doctrine. Because, as with issue preclusion, the forum has preexisting principles on "law of the case," the Restatement does not undertake to establish specific "law of the case" rules for cases involving international arbitration.

However, it can be difficult to determine what constitutes a single continuing lawsuit for law of the case purposes in the international arbitration context. Ordinarily, when an international arbitration gives rise to successive judicial determinations concerning the same challenge to an arbitration agreement or an arbitral award, these determinations are not made in the framework of a single piece of litigation in a single court, but rather in the framework of multiple lawsuits in different courts that are often located in different countries. While these different lawsuits concern the same arbitration agreement or arbitral award (thus representing successive stages in the life cycle of a single arbitration), they do not constitute a single lawsuit for purposes of the law of the case doctrine. They constitute a single lawsuit only if a court retains jurisdiction over the case during the pendency of the multiple proceedings and that court is later presented with another issue in the same case.

Illustrations:

1. *A* brings a lawsuit in federal court against *B*. Finding that the parties have a binding arbitration agreement, the court dismisses the case in favor of arbitration. Having prevailed in the arbitration, *B* files a motion in the same court seeking enforcement of the Convention award.

A opposes enforcement on the ground that the arbitration agreement is invalid. *B* seeks to invoke the law of the case doctrine based on the court's earlier decision in dismissing the case. The court does not apply the law of the case doctrine.

2. Same facts as *Illustration 1*, except that instead of dismissing the initial lawsuit, the court stays the lawsuit in favor of arbitration and *B* files a motion seeking both to enforce the award and to dismiss the lawsuit. The court applies the law of the case doctrine if it finds that the requirements of that doctrine are satisfied.

(ii). Prior determination by a foreign court. The prior determination of an issue relevant to the grant or denial of post-award relief may have been made by a court of a foreign country, as when a foreign court enforces an agreement to arbitrate or declines to vacate a local award (because it finds, for example, that the arbitration agreement is valid and applicable to the dispute at hand). In determining the effect to be given to that prior determination, the court in which post-award relief is sought properly applies its general principles and rules on the recognition of foreign country judgments, whether that recognition takes the form of claim or issue preclusion. The Restatement accordingly does not articulate any specific rules regarding the requirements for recognition of foreign court judgments in the international arbitration context. (Note that Articles V(1)(e) and 5(1)(e) of the New York and Panama Conventions, respectively, specifically invite courts to deny recognition and

enforcement of an international award on the basis of a set-aside judgment of a competent court of the country in which or under the law of which the award was made.)

c. Significance of the law applied in the prior determination. Whether a prior judicial determination is given preclusive effect in a post-award action may depend on, among other things, the law that governed that determination in the prior action. With respect to certain grounds for granting or denying post-award relief – such as the invalidity of the arbitration agreement – the law applicable to the ground is the same regardless of whether the ground is raised to defeat a motion to compel arbitration, to vacate the resulting award or to resist confirmation, recognition, or enforcement of the award. Because the applicable law is identical, the prior determination can readily be given preclusive effect.

With respect to other grounds, the law governing the availability of post-award relief may require application of law that is different from the law applied by the court that previously entertained the analogous ground. For example, although multiple courts in the life cycle of an arbitration may entertain claims that a dispute is non-arbitrable or that an agreement or award violates public policy, each court applies its domestic law on arbitrability and public policy. Thus courts of different countries may enforce the same or similar grounds for relief, but apply different bodies of national law in making their determinations. In such instances, it may be inappropriate for a court to treat the prior judicial determination as binding, even though both proceedings relate to the same arbitration agreement or arbitral award.

REPORTERS' NOTES

a. Standard of review generally. When asked to grant post-award relief, a court may find itself revisiting issues that arose in prior litigation regarding the same case. Such prior litigation may have occurred before the same court, another court in the United States, or a foreign court.

This Section addresses the effect that courts should give to prior judicial determinations when addressing requests for post-award relief, which is to be distinguished from the question of the preclusive effect of an arbitral award itself when a party seeks to reopen in court a substantive claim or issue resolved in the arbitration. The Restatement addresses the claim preclusive and issue preclusive effect of arbitral awards in Sections 4-9 and 4-10, infra, respectively.

Many issues raised in a post-award action may already have been addressed by another court earlier in an arbitration's life cycle. A good example is the question whether a dispute falls within the scope of an arbitration agreement. The "scope" issue may arise at the time one party seeks to compel the other to arbitrate, and then again when annulment of the award is sought, and again when the prevailing party seeks to have the award recognized or enforced. Other issues that may recur include whether there exists an arbitration agreement "in writing," as required by the applicable Convention (e.g., New York Convention, Article II(1), (2)), whether the agreement to arbitrate is "null and void, inoperative or incapable of being performed" (Id. Article II(3)), or whether the agreement to arbitrate contemplates "a subject matter capable of settlement by arbitration" (Id. art. II(1)). See, e.g., Sedco, Inc. v. Petroleos Mexicanos Mex. Nat'l Oil Co., 767 F.2d 1140, 1144-1145 (5th Cir. 1985) (setting forth a four-part test for whether to compel arbitration under the New York Convention); Sphere Drake Ins. PLC v. Marine Towing Inc, 16 F.3d 666 (5th Cir. 1994) (writing requirement satisfied); Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd., 186 F.3d 210 (2d Cir. 1999) (essential signature missing); Jain v. de MŽrŽ, 51 F.3d 686 (7th Cir. 1995) (arbitration clause enforceable under the New York Convention though naming no seat of arbitration); Société Générale Surveillance, S.A. v. Raytheon Eur. Mgmt. & Sys. Co., 643 F.2d 863 (1st Cir. 1981) (enjoining domestic arbitration pursued in disregard of parties' agreement to arbitrate in Switzerland). Cf. Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 81 (2d Cir. 1984) (court asked, but declined, to assess arbitrator partiality before award is rendered). In addition to questions about the enforceability of an agreement, procedural challenges, particularly based on alleged arbitrator partiality or misconduct, may be asserted at several junctures during the life of an arbitration. Under this Section, a court determines under forum law what effect, if any, to give to prior judicial determinations on such issues.

b. Law applicable to the effect of the prior determination. When a court entertaining a request for post-award relief is presented with a challenge to the arbitration agreement or arbitral award that was made before the same or a different court at an earlier time, it faces the question of the effect if any to be given to that earlier determination. The Restatement takes the position that a court's ability to give effect to a prior judicial determination is ultimately governed by the law of the forum. Thus, the Restatement does not adopt the position that the question of the existence of a ground for post-award relief has such cardinal importance as to warrant de novo review, regardless of whether a court has previously ruled on them. See generally Arthur von Mehren & Donald Trautman, Recognition of Foreign Adjudications: A Survey and a Suggested Approach, 81 Harv. L Rev. 1601, 1624-1630 (1968) (discussing the "hallmark" nature of the grounds for post-award relief and the warrant for their de novo determination).

(i). Prior determination by the same or a sister court. When the prior determination emanates from the same court or another court within the United States, its impact on the decision whether a ground for post-award relief is established depends on the doctrines of claim or issue preclusion of the forum. The matter will most often entail issue preclusion, rather than claim preclusion, because a party seeking grant or denial of post-award relief ordinarily invokes a particular finding made in the prior litigation, not the disposition of the claim in that litigation. The finding may concern, for example,

whether the arbitration agreement is valid and covers the dispute at hand, or whether a party enjoyed a reasonable opportunity to be heard in the arbitration.

As explained in Sections 4-9 and 4-10, infra, even within the United States, the standards governing claim and issue preclusion are significantly different. Moreover, the standards governing the recognition of foreign country judgments differ from those applicable to the recognition of sister state judgments. Under current law, enforcement of foreign judgments is governed by state law, even if the action is pending in federal court, while recognition of sister state judgments is subject to the Full Faith and Credit Clause of the U.S. Constitution, the Full Faith and Credit Statute, 28 U.S.C. § 1738, and federal court jurisprudence interpreting that clause. See ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, § 2, Comment *c* (2006).

In addition to issue and claim preclusion, most jurisdictions have well-developed jurisprudence on the law of the case doctrine, which determines whether a party may reopen a claim or issue already determined within the same continuing litigation. Compared to the doctrines of claim and issue preclusion, law of the case doctrine is more "amorphous." Arizona v. California, 460 U.S. 605, 618 (1983). "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." Id. The law of the case doctrine exists "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Charles A. Wright, Arthur R. Miller, Edward Cooper, Federal Practice and Procedure § 4478, at 788 (2d ed.1981). As with claim and issue preclusion, courts look to the forum's own law of the case doctrine.

Application of the law of the case doctrine in the international arbitration context is challenging, however. A dispute subject to arbitration often gives rise to multiple pieces of litigation over the arbitration's life cycle, in which a party raises essentially the same challenge to the underlying arbitration agreement or the resulting award. On occasion, all stages of a litigation concerning the agreement and the award will take place before the same court. For example, a court may dismiss a case in favor of arbitration, but find the same parties to the same dispute before it once again at a later stage, as in a motion to vacate the resulting award. If these proceedings are between the same parties and concern the same dispute, they constitute a single lawsuit for law of the case purposes, provided the court has retained continuing jurisdiction over the pendency of the multiple proceedings. Illustrations *1* and *2* describe the procedure underlying this distinction. See In re Pharmacy Benefit Managers Antitrust Litig., 582 F.3d 432, 439 (3d Cir. 2009) (finding a transferee judge violated the law o -the case doctrine by overturning a stay of proceedings in favor of arbitration in which original court retained jurisdiction over the underlying case, and reasoning that "[l]aw of the case rules have developed 'to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'") (quoting *Casey v. Planned Parenthood of Se. Pa.,* 14 F.3d 848, 856 (3d Cir. 1994)); see also Agrico Chem. Co. v. The Williams Co., Inc., 2005 WL 204494 (N.D. Fla. 2005) (district court ordered judgment, but retained jurisdiction in order to award updated relief as necessary, and treated subsequent matters as subject to law of the case doctrine).

(ii). Prior determination by a foreign court. When a court entertaining a post-award action is presented with a foreign court decision on a challenge to the same arbitration agreement or arbitral award, it ordinarily consults its own law on the recognition of foreign country judgments. That body of law will determine the extent to which, and the conditions under which, the prior judgment is preclusive on that issue. In the United States, even in actions in federal court, the recognition of foreign country judgments is governed by state law. See Somportex Ltd. v. Phila. Chewing Gum Corp., 453 F.2d 435 (3d Cir. 1971), cert. denied, 405 U.S. 1017 (1972).

Section 4-16, infra, on the effect at the stage of recognition or enforcement of a foreign award of a prior judgment of a court at the arbitral seat annulling the award, presents a specialized application of the rules stated in this Section. When a court is presented with an award and also a foreign judgment purporting to set aside the award aside, the court considers the effect of the set-aside judgment under its own rules of foreign judgment recognition. Unlike the rule of this Section, however, Section 4-16

specifically provides that recognition may be withheld from a foreign judgment of annulment that otherwise meets the requirements for recognition on account of the existence of "extraordinary circumstances" beyond those embodied in the forum's standard grounds for non-recognition.

The Restatement thus takes the position that these judgment recognition questions are no different in nature from those presented in other situations involving successive court rulings. Rather than propound wholly new rules for the arbitration context, the Restatement embraces the forum's existing rules on claim and issue preclusion, "law of the case," and recognition of foreign country judgments, as the case may be. See, e.g., North Riv Ins. Co. v. Phila. Reins. Corp., 63 F.3d 160, 165 (2d Cir. 1995) (award improperly vacated because earlier decision to consolidate arbitrations was not properly subject to reconsideration because of the law of the case doctrine).

c. Significance of the law applied in the prior determination. Under the forum's law of foreign judgment recognition, the preclusive effect of a prior foreign judgment in a post-award action may in some circumstances depend on the substantive law that the prior court applied in reaching its decision on a given challenge to an arbitration agreement or arbitral award. The potential importance of the choice of law governing a ground for post-award relief becomes especially apparent if the relevant Convention or FAA provision specifies the law applicable to that ground.

At one extreme, the court may be required to apply to a ground the same body of law that was applied to the analogous issue in the prior proceeding. For example, the UNCITRAL Model Law (art. 34(2)(a)(i)) requires a court, in entertaining an action for the annulment of an award, to apply to the question of the validity of the arbitration agreement "the law to which the parties have subjected [their agreement to arbitrate] or, failing any indication thereon, . . . the law of the country where the award was made." A different court may thereafter be called upon to deny recognition or enforcement to the same award on essentially the same ground. The New York Convention (Article V(1)(a)) not only specifies invalidity of the arbitration agreement as an available ground for denying recognition or enforcement, but subjects that ground to exactly the same body of law, namely "the law to which the parties have subjected [their agreement to arbitrate] or, failing any indication thereon, . . . the law of the country where the award was made." The identity in applicable law in the two actions strongly favors giving the first judgment preclusive effect in the second action.

At the other extreme, the law governing post-award relief may mandate that a different body of law be applied to a given ground than the body of law applied at an earlier stage in the arbitration life cycle. For example, in a vacatur action under the UNCITRAL Model Law, a court applies its own law to the question whether the underlying dispute was arbitrable (art. 34 (2)(b)(i)) or whether confirmation of the award would be offensive to public policy (art. 34 (2)(b)(ii)). A court that later considers whether to deny recognition or enforcement of the award on grounds of non-arbitrability (N.Y. Convention, Article V(2)(a)) or public policy (N.Y. Convention, Article V(2)(b)) applies its own law to those questions. The court in which post-award relief is sought on such grounds does not defer to the ruling of the prior court, because each jurisdiction is entitled to make its own determination under its own law on whether a dispute is non-arbitrable or an award violates public policy.

§ 4-9. Claim Preclusion

A court may preclude relitigation of a claim that was previously adjudicated in an international arbitral award to the extent that the party seeking preclusive effect demonstrates that the award:

a) is entitled to recognition under this Chapter;

b) involves the same parties and the same claim as required by the law of the court in which claim preclusion is sought; and

c) barring relitigation of the claim is consistent with the arbitration agreement and the reasonable expectations of the parties.

Comments:

a. Generally. A court grants claim preclusion, or "res judicata," to bar a party from relitigating a previously adjudicated claim. The purpose of claim preclusion is to bring closure to disputes, avoid the costs associated with multiple adjudications of the same claim, otherwise conserve judicial resources, and avoid inconsistent judgments. Meanwhile, one of the fundamental purposes of arbitration is to displace judicial proceedings. Thus, even before entry into force of the Conventions or passage of the FAA, courts consistently granted claim preclusive effect to arbitral awards. This Section acknowledges the binding effect of arbitral awards generally and clarifies the application of claim preclusion in the context of international arbitral awards.

b. Claim preclusive effect of Convention awards. The New York and Panama Conventions are generally understood as entitling international arbitral awards both to enforcement and recognition. The New York Convention includes the term "recognition" in its title and provides 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." Similarly, the Panama Convention provides in Article 4 that awards subject to it "shall have the force of a final judicial judgment" of a Contracting State and that "[i]ts . . . 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." Although this language is generally interpreted as pertaining to the procedures for obtaining recognition, they more generally express the intent that awards be afforded the same status and effect as local judgments. Consistent with this language and interpretation, the notion of recognition in turns implies some degree of claim preclusion since, in the absence of preclusive effect, awards would not be "binding" as required by the Conventions and as expected by the parties when they entered into their arbitration agreement. In other words, a finding that an award is entitled to recognition would be illusory if that determination could not then be given effect.

On the other hand, claim preclusion does not necessarily follow automatically from recognition. In order for an award that is entitled to recognition to enjoy claim preclusive effect, additional requirements must be met. A party seeking to have a claim

precluded must also demonstrate that the claim involves the same parties and claim as the arbitral award, and that the grant of preclusion would be consistent with the parties' agreement and expectations. See Comments *d, e,* and *f* of this Section.

c. Claim preclusive effect of non-Convention awards. FAA Chapter One, which governs non-Convention awards, differs from the Conventions in that it does not use the term "recognition" or expressly refer to arbitral awards as "binding." It is nevertheless well established that arbitral awards subject to Chapter One of the FAA are binding despite the absence of the term "binding" in the statute. For these reasons, non-Convention awards are entitled to claim preclusive effect when they satisfy the applicable requirements. See Comments *d*, *e*, & *f*, of this Section.

d. Requirements for claim preclusion. An award is entitled to claim preclusive effect if (i) it is entitled to recognition under the applicable Convention or Chapter One of the FAA, (ii) there is an identity of claims and parties, as required by forum law on the claim preclusive effect of prior adjudications, and (iii) the grant of preclusive effect is consistent with the parties' arbitral agreement and reasonable expectations. See Comments *e* & *f* of this Section.

In cases in which there is no challenge regarding whether subsequent litigation involves the same parties and the same claims as the arbitral award, factors (ii) and (iii) effectively disappear as independent considerations. Factor (ii) is uncontested, and when the parties agree that the subsequent case involves the same claim and parties, granting claim preclusion is also necessarily consistent with the parties'

agreement and expectations. In those instances, a court effectively need only analyze factor (i), namely whether the award is entitled to recognition. Courts in such cases have no discretion in determining whether to give preclusive effect to an award that is entitled to recognition.

This conclusion is consistent with the fact that the grounds set forth in Article V of the New York Convention and Article 5 of the Panama Convention are the exclusive grounds for denying recognition of an award. See § 4-11, infra. Similarly, subjecting non-Convention awards to additional requirements in order to be recognized would be inconsistent with well established caselaw holding that arbitral awards under FAA Chapter One are binding and that Section 10 provides the exclusive grounds for denying their confirmation or vacating them. Denying claim preclusive effect to an award when the award and the subsequent adjudication clearly involve the same parties and same claims would be tantamount to imposing additional requirements on the grant of recognition.

Illustration:

1. *A* brings an arbitration seeking damages against *B* on a claim for breach of a contract. A Convention award is rendered in favor of *B*. *A* subsequently commences a lawsuit in federal court against *B* for the same breach of contract claim. *B* seeks to preclude relitigation by having the court recognize the arbitral award, and submits to the court authenticated copies of the original arbitration agreement and arbitral

award. *A* does not assert any grounds for denying recognition of the award. The court grants recognition of the award, grants the award preclusive effect in the judicial proceedings, and does permit relitigation of the contract claim.

The requirements for claim preclusion under this Section differ from those that courts have traditionally applied in the context of arbitral awards. Courts often state, incorrectly, that arbitral awards are entitled to claim preclusive effect under the same conditions and qualifications as court judgments. However, while judgments and arbitral awards are both presumptively enforceable and can preclude further litigation, the conditions and qualifications applicable to claim preclusion in the two settings are different.

In the case of arbitral awards, the requirements for claim preclusion are properly determined by reference to the grounds for denying recognition as set forth in the Conventions and FAA Chapter One. For example, under conventional res judicata analysis, an inquiry into whether the court that issued the prior judgment had jurisdiction is often itself subject to claim preclusion, meaning that the original court's determination of its jurisdiction is generally not subject to later challenge. When challenge to the jurisdictional basis of the prior judgment is permitted, such challenge is based on the standards governing personal and subject matter jurisdiction. By contrast, a determination of whether the arbitral tribunal that issued an award had jurisdiction is generally subject to de novo review and involves an inquiry under the relevant Convention (for Convention awards) or Chapter One of the FAA (for non-

Convention awards) into the existence, validity, and scope of the arbitration agreement.

With respect to factor (ii), however, to determine whether the claim and the parties in the subsequent action are the same as in the original adjudication, courts generally apply to arbitral awards the same common law claim preclusion standards applicable to the claim preclusive effect of prior judgments. See Comments *e* & *f* of this Section.

Factor (iii), which requires consideration of whether a grant of claim preclusion is consistent with the parties' expectations, is not generally required with respect to domestic arbitral awards (although it is possible for parties to agree to limit the preclusive effects of domestic awards). International awards, however, often include parties from foreign systems. Most foreign legal systems differ from U.S. law in the extent to which to which they afford claim preclusive effect to arbitral awards. For these reasons, the Restatement requires for claim preclusion not only satisfaction of the criteria for recognition under the Conventions or FAA and an identity of parties and claims, but also a finding that claim preclusion would be consistent with the parties' agreement and expectations. Given that most systems have established doctrines of res judicata, this requirement will not generally be difficult to satisfy.

Illustration:

2. Same facts as *Illustration 1*, except that *A* asserts that the award should be denied recognition on the ground that there was no

> arbitral jurisdiction because the arbitration agreement was invalid and therefore it was not properly a party to the arbitration. The court applies the Convention ground, determines that there was arbitral jurisdiction because the arbitration agreement was valid, and therefore that the award was entitled to recognition under the Convention. Since it is uncontested that the case involves the same parties and same claim and that claim preclusion would be consistent with the parties' agreement and expectations, the court recognizes the award, grants it preclusive effect in the judicial proceedings, and does not permit relitigation of the contract claim.

The role of recognition in satisfying many of the standards for determining the claim preclusive effect of an arbitral award is also relevant to the proper allocation of burdens of proof. See Comment *g* of this Section.

e. The "same" claim. Often the identity of claims in an arbitral award and a subsequent judicial proceeding is clear. In such circumstances, giving preclusive effect to the disposition of a claim in the award is straightforward, and the grant of preclusion necessarily comports with the parties' agreement and reasonable expectations. In those instances, separate analysis under paragraph (c) is not required. See Comment *d* of this Section.

In other instances, however, the identity of claims may be subject to question. Both U.S. and foreign jurisdictions differ in the way they define and apply the relevant

criteria. For example, many U.S. jurisdictions treat as the "same," and thus give preclusive effect to, any claim that arises out of the same transaction or series of connected transactions as the claim that was previously adjudicated. The extent to which claim preclusion is available in such situations is governed by the law of the jurisdiction in which preclusion is sought, and the party invoking preclusion bears the burden of establishing the elements required by that law. See Comments *b*, *g* & *h* of this Section. In these instances, the Restatement imposes the further requirement that a grant of preclusion be consistent with both the arbitration agreement and the reasonable expectations of the parties.

Illustration:

3. Same as *Illustration 1*, except that *A* subsequently commences a lawsuit in federal court against *B* in a court for a breach of warranty regarding goods delivered. Upon finding that the award is otherwise entitled to recognition under the applicable Convention, the court determines under forum law governing claim preclusion whether the breach of warranty claim is the "same claim" decided by the arbitral award and is thus precluded.

f. The "same" parties. Just as res judicata extends only to the same claim originally adjudicated, it also only extends to parties that are, or are deemed to be, the same as were involved in the original adjudication. In the arbitration context, this inquiry into the identity of the parties is often, though not always, closely linked to the

questions of whether the party resisting recognition, and hence claim preclusion, is bound by the arbitration agreement. See §§ 4-12 (for Convention awards) & 4-22 (for non-Convention awards), infra. Thus, while the Restatement leaves to forum law the determination of whether a request for claim preclusion involves the "same parties" as the prior arbitral award, a court ordinarily need not undertake a separate analysis of that issue if it has made an affirmative finding in the recognition context that the party resisting preclusion is bound by the arbitration agreement.

As a general rule, a finding that an award is entitled to recognition necessarily includes a finding that the party against whom recognition is sought is bound by the arbitration agreement. One exception might be, for example, if the party did not dispute that it is bound by the arbitration agreement. Apart from such an unusual exception, as long as the party resisting the grant of claim preclusive effect to an award that is entitled to recognition participated in the proceedings, or had notice but declined to participate, that party can be deemed to be the same party for the purposes of res judicata analysis.

Illustration:

4. Same as *Illustration 1*, except that *A* subsequently commences a lawsuit in federal court against *C*, which purchased *B*'s business during the pendency of the arbitration. *C* participated in the arbitration, but objected to arbitral jurisdiction on the ground that it was not a signatory to the arbitration agreement. The tribunal finds that it has jurisdiction over *C*. *C* subsequently challenges recognition of the award on the

ground that it was not a signatory to the arbitration agreement, and opposes a grant of claim preclusion on the ground that it was not a party to the arbitration proceeding, and therefore is not bound by the award because the tribunal had no jurisdiction over it. A court finds that *C* is bound by the arbitration agreement, and that the award is therefore entitled to recognition under the applicable Convention. The court relies on the fact that *C* is bound by the arbitration agreement to determine that *C* is the "same party" as *B*, and does not permit relitigation of the claim that was decided in the arbitral award.

It can also be that the party against whom preclusive effect is sought did not participate in the original arbitral proceedings. This situation may arise, for example, if there is an assignment during the pendency of the arbitration or an arbitration is financed and controlled by a third party who has an interest in the outcome, but does not formally take part in the proceedings. In such exceptional circumstances, a third party may be treated as the "same party" such that a grant of preclusive effect for or against that party may be appropriate in a subsequent action. Cf. §§ 4-30(b) & 4-31(b), infra (awards may, in extraordinary circumstances, be enforced against parties that did not participate in arbitral proceedings).

g. Applicable law. Some confusion exists regarding the law governing the claim preclusive effect of arbitral awards. "Claim preclusion" and "res judicata" were originally developed in the judicial context to prevent relitigation of claims adjudicated in prior judicial proceedings, whether in the same or in a different jurisdiction, and

courts have developed an extensive body of doctrine on that subject. Although the preclusive effect of arbitral awards is in many respects analogous to the preclusive effect of judgments, most of the traditional common law bases for defeating claim preclusion in the judgments context are superseded by the bases for defeating recognition under the law of arbitration. See Comments *d*, *e* & *f* of this Section. The question remains, however, which jurisdiction's law properly governs these latter questions.

In the context of judgments, as distinct from awards, courts generally hold that the availability of claim preclusion is determined by the law of the jurisdiction that rendered the original judgment, rather than by the law of the jurisdiction in which preclusion is sought. Several rationales have been advanced for basing the claim preclusive effect of a judgment on the law of the jurisdiction where the judgment was rendered. One rationale is that a judgment should have no greater preclusive effect in another jurisdiction than it has according to the law of the place where it was made. Another rationale is that the effect of a judgment should depend on the integrity and resources of the forum in which it was made. However, neither of these rationales applies in the international commercial arbitration context.

An arbitral tribunal is not part of a national court system that has a preexisting framework for determining the preclusive effect of prior adjudications. While the arbitration law of the arbitral situs often governs arbitral procedure and awards,

seeSection 2-____,[10] supra, in the absence of express party agreement, arbitral tribunals are not generally bound by the situs' rules of civil procedure, conflict of laws doctrine, or substantive law. Moreover, national arbitration laws do not generally address the preclusive effect of awards rendered in foreign jurisdictions. In other words, while court judgments are rendered pursuant to laws and procedures that purport to govern their preclusive effect, arbitral awards are generally not. It would be anomalous, therefore, to subject arbitral awards to situs rules on claim preclusion since those rules do not, in themselves, even purport to govern the issue.

More importantly, for purposes of the Restatement, the question of whether an award is entitled to claim preclusive effect arises in the context of a U.S. lawsuit in which both the party invoking and the party resisting preclusion are subject to the court's jurisdiction. Accordingly, a request for claim preclusion legitimately raises the question of whether a U.S. court should expend its resources to permit relitigation of a claim that an arbitral tribunal has arguably already decided. Under these circumstances, a court is legitimately concerned with conservation of its own judicial resources and with judicial economy. For these reasons, the better view, and the view adopted by the Restatement, is that the law applicable to the claim preclusive effect of an international arbitral award is the law of the jurisdiction in which preclusion is sought, including provisions of any relevant convention and the FAA.

[10] Cross-reference to section to be drafted on law governing arbitral procedures

h. Burden of proof. The party asserting the claim preclusive effect of an arbitral award has the burden of establishing: (a) that the formal requirements for recognition, as set forth in Section 4-4, supra, are satisfied, and (b) that the claim for which preclusion is sought is the same claim, and between the same parties, as the claim that was adjudicated in the prior award. The party seeking preclusion does not have the burden of proving the absence of a Convention or FAA ground, as set forth in Sections4-12 through 4-22, infra, for denying recognition. Rather, the party that is opposing the application of claim preclusion must prove the existence of one or more such grounds.

Illustration:

5. Same as *Illustration 1*, except that *A* subsequently commences a lawsuit in federal court seeking specific performance of the parties' contract. *B* submits an authenticated copy of the arbitration agreement, arbitral award, and controlling authority from the forum holding that a claim for specific performance of a contract is treated as the "same claim" for claim preclusion purposes as a claim for damages for breach of the same contract. *A* opposes a grant of claim preclusion on the ground that *A* did not receive notice of the arbitration, but does not contest that the lawsuit involves the same claim as the arbitration. Upon finding that *A* had not satisfied the burden of proof required to deny recognition of the award on the ground that it did not receive notice, the court grants

recognition of the award, gives the award preclusive effect in the judicial proceedings, and does not permit relitigation of the contract claim.

The elements on which the party seeking claim preclusion for an arbitral award bears the burden of proof contrasts with the burden of proof applicable to claim preclusion based on a judicial judgment. Because claim preclusion in the judgments context is usually asserted as an affirmative defense, courts often assign the burden of establishing all elements of the doctrine to the party invoking the doctrine. However, a party seeking preclusion of a claim decided in an arbitral award can satisfy the requirement that the award is entitled to recognition simply by producing the arbitral agreement and award, and need only further prove that award involved the same claim and parties. As noted above, in some instances the question of whether the "same parties" are involved will already have been resolved in determining that the award is entitled to recognition. See Comment *f* of this Section. Thus, the burden of proving the existence of a ground for denying recognition is on the party seeking to avoid claim preclusion based on an arbitral award. See § 4-6, supra. Placing this latter burden on the party seeking claim preclusion would effectively reverse the burdens established by the Conventions and the FAA.

With respect to the final factor, there is little guidance in the caselaw regarding which party should bear the burden of proving that the grant of preclusion would be consistent with the parties' agreement and expectations. However, placing this burden of proof on the party seeking preclusion is generally consistent with the approach of courts with other burdens under preclusion.

i. Authority to decide claim preclusive effect of an award. When claim preclusion is sought with respect to an arbitral award, the dispute over preclusion arguably (even presumptively) falls within the scope of the arbitration agreement pursuant to which the award was made. Accordingly, a request that a claim decided in an arbitral award be granted preclusive effect often raises the related question of whether a court has the authority to decide whether such preclusive effect should be granted, or whether the court should refer that issue to a new arbitral tribunal. This issue is taken up in Chapter 2. See §§ 2- ___ and 2-___,[11] supra.

REPORTERS' NOTES

a. Generally. The purpose of claim preclusion is to bring closure to disputes, avoid the costs associated with multiple adjudications of the same claim, otherwise conserve judicial resources, and avoid inconsistent judgments. It is generally acknowledged that international arbitral awards are entitled to claim preclusive or "res judicata" effect, thus barring a party from seeking to relitigate a claim that was previously adjudicated in the arbitration. See Gary B. Born, International Commercial Arbitration 2891 (2009) (arguing that the Conventions are "best understood as prescribing international standards that ensure the binding character of arbitral awards and that preclude national courts from denying preclusive effects to such awards."); see also Fouchard Gaillard Goldman, International Commercial Arbitration 12 (Emmanuel Gaillard & John Savage eds., 1999); Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 336 (2006) (reviewing decisions of international arbitral tribunals and concluding that "there seems little if indeed any question as to res judicata being a general principle of law or as to its applicability in international judicial proceedings.").

b. Claim preclusive effect of Convention awards. Few commentators have directly analyzed the obligation of courts under the specific provisions of the New York and Panama Conventions to give preclusive effect to awards in subsequent litigation. Those that have, however, generally conclude that the language, purpose, and structure of the Conventions necessarily imply an obligation to give awards claim preclusive effect. Albert Jan van den Berg observes, "[t]he defendant may, on the basis of the award, object to the jurisdiction of the court to entertain the action. It means that the defendant . . . invoke[s] its effect of res judicata concerning a subject matter already decided in a foreign arbitration[.]" Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 244 (1981). Gary Born explains, "avoiding multiplicitous proceedings in national courts is foremost among the parties' objectives in agreeing to international arbitration. Equally, . . . the fundamental purpose of the New York Convention . . . is to facilitate the recognition and enforcement of

[11] Cross-reference to Sections to be drafted regarding reference of claims to arbitration and doctrine of *functus officio.*

international arbitration agreements and arbitral awards—– specifically by ensuring that they are recognized as 'binding' on the parties." Born, supra, at 2890.

c. Claim preclusive effect of non-Convention awards. The nature of claim preclusion with regard to non-Convention awards under Chapter One of the FAA is more complicated. On the one hand, while generally holding that claim preclusion is available for domestic awards, courts and commentators have historically analyzed the claim preclusive effect of domestic arbitral awards by reference to generally applicable common law standards of claim preclusion, with some adjustments to tailor the standards to the arbitration context. See Restatement (Second) of Judgments, Comment *b* to § 84; see also Grand Bahama Petroleum Co., Ltd. v. Asiatic Petroleum Corp., 550 F.2d 1320, 1323-24 (2d Cir. 1977) (dicta); U.S. ex rel. Portland Constr. Co. v. Weiss Pollution Control Corp., 532 F.2d 1009, 1011-13 (5th Cir. 1976); Behrens v. Skelly, 173 F.2d 715, 717-18 (3d Cir.), cert. denied, 338 U.S. 821 (1949); Weizmann Inst. of Science v. Neschis, 421 F. Supp. 2d 654, 677 (S.D.N.Y. 2005); Maidman v. O'Brien, 473 F. Supp. 25, 29 (S.D.N.Y. 1979); Aucoin v. Gauthier, 35 So. 3d 326, 331 (La. Ct. App. 2010); Ruth R. Remmel Revocable Trust v. Regions Fin. Corp., 255 S.W.3d 453, 461 (Ark. 2007).

Parties commonly agree—either through the express terms of the arbitration agreement or by incorporation of arbitration rules containing such provisions—that any award rendered pursuant to their agreement will be final and binding. Idea Nuova, Inc. v. GM Licensing Group, Inc., 617 F.3d 177, 181-82 (2d Cir. 2010) (holding that even without any language in an arbitration agreement expressly incorporating AAA rules, a party's consent to AAA arbitration necessarily incorporates the AAA Rules, which explicitly reference all arbitral awards as binding). Even in the absence of such agreement, most commentators agree that, if arbitral awards did not enjoy claim preclusive effect, "the obligation to arbitrate would be practically illusory." See Restatement (Second) of Judgments, Comment *b* to § 84; see also Born, supra at 2721. For these reasons, it is not surprising that courts had generally held, even prior to enactment of the FAA in 1925, that arbitral awards were entitled to claim preclusive effect. See, e.g., Brazill v. Isham, 12 N.Y. 9, 16-17 (1854); New York Lumber & Wood-Working Co. v. Schneider, 24 N.E. 4, 6 (N.Y. 1890).

Thus, even in the absence of terms like "recognition" or "binding" in the statutory text of FAA Chapter One, courts have generally held that awards governed by the FAA are binding and preclude relitigation of the claim decided in an award. Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907, 910 (D.D.C. 1996) (reasoning that under 9 U.S.C. § 10, arbitration awards are presumed to be binding); Corey v. New York Stock Exchange, 691 F.2d 1205, 1212 (6th Cir. 1982) ("Once an arbitrator has rendered a decision the award is binding on the parties unless they challenge the underlying contract to arbitrate pursuant to section 2 or avail themselves of the review provisions of sections 10 and 11."). Moreover, the doctrinal modifications developed by courts to adapt the common law standards for claim preclusion to arbitral awards effectively mirror the grounds in Section 10 of the FAA for vacating or denying confirmation of awards. For example, claim preclusion standards regarding jurisdiction in the judgments context are inapposite in the arbitration context, where arbitral jurisdiction is based on the existence and validity of the arbitration agreement. See Luca Radicati di Brozolo, Res Judicata and International Arbitral Awards Post Award Issues, ASA Special Series No. 38, at 131 (Pierre Tercier, ed., 2011) (noting that national res judicata law "relate[s] almost exclusively to the effects of the judgments of the courts of the forum, and not of arbitral awards and are therefore not necessarily particularly suitable . . . because an award differs considerably from a judgment, since the authority of the former stems in the first instance from the autonomy of the parties, whilst the latter is determined directly, and exclusively, by the law."). For these reasons, the Restatement takes the position that non-Convention awards are entitled to preclusive effect if no ground for vacating or denying confirmation of the award under Section 10 of the FAA is established, if the award involves the same claim and parties, as determined under the law of the forum in which preclusion is sought, and if the grant of claim preclusion is consistent with the parties' agreement and reasonable expectations.

A few courts have required that an award be confirmed before it can be treated as final. Gruntal & Co., Inc. v. Steinberg, 854 F. Supp. 324, 337-38 (D.N.J. 1994), aff'd, 46 F.3d 1116 (3d Cir. 1994) (requiring domestic award to be confirmed before it can be considered "final"); Ufheil Constr. Co. v.

Town of New Windsor, 478 F. Supp. 766, 768 (S.D.N.Y. 1979), aff'd, 636 F.2d 1204 (2d Cir. 1980) (same). This interpretation misreads the FAA and misunderstands the nature of confirmation. When a court confirms an award, it reduces the award to a judgment. See § 1-1(g), supra. Consequently, once an award has been confirmed, there is no need to give it preclusive effect as an award; the court judgment confirming the award is itself entitled to preclusive effect with respect to its determination that an award is not subject to challenge under the applicable standards.

d. Requirements for claim preclusion. An arbitral award that is entitled to recognition under this Chapter has claim preclusive effect with regard to the same claims involving the same parties, provided that the grant of preclusion would be consistent with the parties' agreement and reasonable expectations. This position is consistent with Article V of the New York Convention and Article 5 of the Panama Convention, both of which provide that the grounds they set forth are the exclusive grounds for denying recognition of an award. See § 4-11, infra; see also 9 U.S.C. §§ 207 (New York Convention) & 302 (Panama Convention); Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997); China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 283 (3d Cir. 2003); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 288 (5th Cir. 2004); see also Gary B. Born, International Commercial Arbitration 2721 (2009). Similarly, imposing additional requirements or conditions on claim preclusion based on non-Convention awards would violate well-established caselaw according to which FAA Section 10 provides the exclusive grounds for challenging awards governed by FAA Chapter One. See Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 584 (2008).

It has been said that the claim preclusive effect of arbitral awards is subject to the same conditions and qualifications as the claim preclusive effect of judgments. Despite the close affinity between claim preclusion in the two settings, this is not correct. The conditions and qualifications that govern the claim preclusive effect of judgments are determined by the general common law of res judicata. By contrast, the obligation to accord claim preclusive effect to arbitral awards, and the grounds for avoiding that effect, derive from the arbitration law applicable to the award, notably the Conventions and their implementing legislation (for Convention awards) and FAA Chapter One (for non-Convention awards). Many of the traditional common law conditions and qualifications, such as notice, adequate jurisdiction, procedural fairness, and finality of the prior adjudication are effectively subsumed under, and displaced by, the grounds provided by the applicable arbitration law for defeating the recognition of awards. See Vandenberg v. Superior Court, 982 P.2d 229, 238 (Cal. 1999) (holding that arbitration is not subject to the same rules of finality that a typical court judgment affords). Most obviously, the jurisdiction of an arbitral tribunal is determined by the parties' contract, not the statutory or common law principles on which the jurisdictional competence of courts depends. The finality of an award and the procedural protections to which parties are entitled in arbitral proceedings are likewise determined by the Conventions and the FAA, not the general common law applicable to court judgments.

The distinction between prior judgments and prior awards as the basis for claim preclusion also has implications for allocation of the burden of proof in regard to claim preclusion. See Comment *g* of this Section. The only exceptions and qualifications applicable to claim preclusion that are the same for arbitral awards and judicial judgments are those relating to the requirement of identity of claims and parties. The source of law of these conditions and qualifications is the law of the forum in which preclusion is sought. See Comment *c* of this Section.

e. The "same" claim. When the identity between the claim in a judicial proceeding and in a prior arbitral award is clear, giving the award claim preclusive effect is straightforward. See MACTEC, Inc. v. Gorelick, 427 F.3d 821, 831 (10th Cir. 2005), cert. denied 547 U.S. 1040 (2006) (final domestic arbitral award affirming patent validity barred subsequent suit for declaratory judgment regarding validity of same patent). In some instances, however, questions may arise over whether the claims are indeed the same. Jurisdictions still differ among themselves in the criteria applicable to the identity of claims in the arbitration context. For example, jurisdictions differ in the extent to which they are willing to grant preclusive effect to claims that are substantially similar, though not identical, to the ones that were previously adjudicated, as well as to claims that could have been previously adjudicated in the first

proceeding, but were not. Compare Fink v. Golenbock, 680 A.2d 1243, 1252 (Ct. Sup. Ct. 1996) (applying preclusion because claim could have been arbitrated under the arbitration agreement) with Beals v. Commercial Union Ins. Co., 808 N.E.2d 824, 827 (Mass. App. Ct. 2004) (denying preclusion for bad faith insurance claim which could have been brought in earlier domestic arbitration because inclusion of claim was not statutorily required and based on finding that bad faith claims are often litigated separately). In a number of contexts, however, it is now accepted that a "claim" for the purposes of claim preclusion analysis includes not only the actual claim, but also a claim arising out of any part of the transactions or connected transactions (sometimes referred to as "common nucleus of operative facts") out of which the original claim arose. See Restatement (Second) of Judgments, § 24(1).

Legal systems also differ importantly in the scope of preclusion generally. While many foreign jurisdictions traditionally adopt a more restrictive approach to applying their domestic doctrines of res judicata, various proposals are being made to introduce or expand the use of issue preclusion in the international arbitration context, such as the Recommendations published by the International Law Association and proposals to amend arbitral rules so that they expressly provide that the parties are bound not only by the final award, but by its underlying reasoning. See Interim Report of the International Law Association (ILA) Committee on Res Judicata and Arbitration (Berlin Conference, 2004); Final Report of the ILA, Resolution 1/2006; V.V. Veeder, Issue Estoppel, Reasons for Awards and Transnational Arbitration, ICC Bulletin, Special Supplement, 2003, p. 78. Based on these developments, some scholars argue that "[t]here is a growing consensus [in the international arbitration context] towards curtailing the relitigation of issues that should have been pled the first time by parties in good faith." Radicati di Brozolo, supra, at 147, n.58.

f. The "same" parties. Res judicata standards generally require that there be an identity of parties between the original action and the one in which preclusion is sought. However, different jurisdictions have their own standards regarding what constitutes the "same" parties. See, e.g., Nannis Terpening & Assocs. v. Mark Smith Const. Co., 318 S.E.2d 89, 92-93 (Ga. Ct. App. 1984) (claim against persons who were not parties to earlier domestic arbitration proceeding was barred where claim was brought by same plaintiff and sought same damages as had been awarded in arbitration). Questions that arise concerning the identity of parties are governed by the law of the jurisdiction in which claim preclusion is sought, and the party invoking preclusion bears the burden of satisfying the relevant criteria. This issue might arise, for example, if claim preclusion based on a prior judgment is asserted against a putative third party that is an assignee, a principal, or a close corporate affiliate of one of the parties. See generally Restatement of the Law (Second) of Judgments §§ 43-61. In the arbitration context, a very similar analysis is conducted in determining whether an arbitral tribunal had jurisdiction over, and thus whether an award rendered by that tribunal is entitled to recognition with respect to, a putative party. As a general rule, a court may determine that an award is entitled to recognition despite a claim by a putative party that the tribunal did not have jurisdiction over it. In that instance, the objecting party is usually found to be subject to the award because it shares a legal identity with one of the parties, which means that it is also effectively deemed as a matter of law to have participated in the proceedings or to have had notice but declined to participate. In this regard, a finding that an award is recognizable against a putative party that is objecting to arbitral jurisdiction is effectively a determination that the objecting party is the "same party" that participated in the arbitration and therefore is subject to the claim preclusive effect of the resulting award. In exceptional circumstances, it is also possible that a third party that did not participate in the proceedings will be found under claim preclusion principles to share an identity with a party and therefore be subject to the preclusive effect of the award. See §§ 4-30(b) & 4-31(b), infra.

g. Applicable law. Most judicial authority concerning the claim preclusive effect of arbitral awards has been developed in the domestic context, where the term "recognition" is not generally used. Perhaps as a result of this definitional lacuna, courts have shown considerable confusion over the source of the requirement that awards rendered under FAA Chapter One be given claim preclusive effect. Some parties have argued, unsuccessfully, that arbitral awards are entitled to claim preclusive effect pursuant to the Full Faith and Credit Statute. See McDonald v. W. Branch, Mich., 466 U.S. 284, 287 (1984) (labor

arbitration) (rejecting argument that the federal full faith and credit statute required that preclusive effect be given the arbitration award). Most other courts have relied on the common law doctrine of res judicata, with some modification to account for the unique features of arbitration. See Restatement (Second) of Judgments, Comment *b* to § 84. Among the reasons for resort to the common law doctrine of res judicata is the fact that the notions of "claim preclusion" and "res judicata" were originally developed in the judicial context to prevent relitigation of claims adjudicated in prior judicial proceedings, whether in the same or in a different jurisdiction. Despite some apparent analogies, deciding whether to give preclusive effect to claims decided in a prior arbitral award raises unique questions that require application of the specialized law of arbitration. Assuming that the requirement of identity of parties and claims is met and that claim preclusion would be consistent with the parties' agreement and expectations, the only basis for denying claim preclusive effect to an arbitral award that is otherwise entitled to recognition are the grounds for non-recognition supplied by the relevant Convention and its implementing legislation (for Convention awards) or by FAA Section 10 (for non-Convention awards).

Granting preclusive effect based on a prior arbitral award presupposes that the claim and parties in the subsequent litigation are the same as those in the arbitration, or are closely related enough that the law regards them as the same. This issue is not addressed by either the Conventions or the FAA. Accordingly, the question of the law applicable to these issues remains open. In the context of claim preclusion based on prior judgments, most courts have applied the law of the jurisdiction in which the prior judgment was rendered. See Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984) ("a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."); Paramount Aviation Corp. v. Augusta, 178 F.3d 132, 139 (3d Cir. 1999) (stating that the preclusion law of the forum where the initial judgment was made governs later preclusion determinations); Siebert v. Phelan, 901 F. Supp. 183, 186 (D.N.J. 1995) (same).

The rationale for this approach is that a judgment should not be given greater preclusive effect in another jurisdiction than it enjoys under the law of the jurisdiction where it was rendered, and that the effect of a judgment should bear some relation to the integrity and reliability of the forum in which it was made. See Marrese v. Am. Acad. of Orthopaedic Surgeons, 470 U.S. 373, 384-85 (1985) (rejecting the idea that suits under 28 U.S.C. § 1783 allow courts to give greater preclusive effect to prior judicial decisions; courts instead follow regular rules which prohibit this practice); Migra, 465 U.S. at 81 (same): Gjellum v. Birmingham, 829 F.2d 1056, 1059 n.4 (11th Cir. 1987). These rationales have little relevance in the international arbitration context. Arbitral tribunals are not part of a court system and do not have established rules on claim preclusion, apart from the guidelines recently suggested in the ILA Recommendations. Just as the procedural rules and substantive law of the situs do not, absent party agreement, bind the arbitral tribunal, the claim preclusion standards of the situs do not attach to the resulting award. See Radicati, supra, at 133. ("No given law, including the *lex arbitri*, thus has a particularly strong claim to govern the matter [of res judicata]."). On the other hand, the court in which claim preclusion is asserted has a legitimate interest in conserving judicial resources and promoting judicial economy generally. For these reasons, the better view, and the view adopted by the Restatement, is that the law applicable to the claim preclusive effect of an international arbitral award is the law of the jurisdiction in which preclusion is sought, including provisions of any relevant convention.

There is one exception to application of the law of the jurisdiction where preclusion is sought. When the challenge to preclusion involves an issue of whether the subsequent action includes the "same parties" as the prior arbitration, that issue may sometimes be resolved under analysis of whether the award is entitled to recognition challenge under the grounds in Sections 4-12 (for Convention awards) or 4-22 (for non-Convention awards), infra. See Comment *c* of this Section. In such cases, there is no reason to separately analyze the "same parties" issue under the law of the jurisdiction in which preclusive effect is sought.

h. Burden of proof. The party seeking claim preclusive effect bears the burden of establishing (i) that the formal requirements for recognition, as set forth in Section 4-4, supra, are satisfied, and (ii) that the claim for which preclusion is sought is the same claim, and between the same parties, as the claim

that was adjudicated in the arbitration, and (iii) that the requested grant of claim preclusion comports with the parties' agreement and reasonable expectations. The party seeking preclusion does not have to prove the absence of a Convention or FAA ground for denying recognition. See Comment *b* of this Section. Rather, a party that opposes claim preclusion based on a prior arbitral award bears the burden of proving the existence of one or more grounds under Sections 4-12 through 4-22 for denying recognition to an award. This allocation is consistent with the presumptive binding effect of arbitral awards and ensures that the burden of proof required to ensure that awards are recognized and given preclusive effect is consistent with the burden of proof for enforcing the award. See § 4-6, supra.

With regard to the second and third factors, the party seeking preclusion bears the burden of demonstrating the elements of issue preclusion and that the grant of preclusive effect is consistent with the arbitration agreement and with the reasonable expectations of the parties. There is no clear precedent that determines who bears the burden on this final factor, and arguably it could be placed on the party resisting the grant of preclusion. Placing the burden on the party seeking preclusion is consistent, however, with the fact that claim preclusion relieves a party in subsequent litigation from having to relitigate a claim. Cf. Choi v. State, 549 N.E.2d 469, 471 (N.Y. 1989) (requiring party opposing issue preclusion to prove denial of full and fair opportunity); Parker v. MVBA Harvestore Sys., 491 N.W.2d 904, 906 (Minn. Ct. App. 1992) (party seeking issue preclusion bears burden of proof); Virsen v. Rosso, Beutel, Johnson, Rosso & Ebersold, 356 N.W.2d 333, 337 (Minn. Ct. App. 1984) (same).

i. Authority to decide claim preclusive effect of an award. A lawsuit that arguably seeks to relitigate the "same" claim that was resolved in an arbitral award between the "same" parties is, almost by definition, within the scope of the arbitration agreement underlying the original arbitration agreement. Accordingly, a request that a claim in an arbitral award be granted preclusive effect often raises the related question of whether a court has the authority to decide whether such preclusive effect should be granted, or whether the issue should be referred to a new arbitral tribunal. This issue is taken up in Chapter 2. See Sections 2-___ and 2-___,[12] supra.

[12] Cross-reference to Sections to be drafted regarding reference of claims to arbitration and doctrine of *functus officio.*

§ 4-10. Issue Preclusion

A court may preclude relitigation of a specific issue of fact or law made by an international arbitral award if:

a) the award is entitled to recognition under this Chapter;

b) the award satisfies the requirements for issue preclusion prescribed for an arbitral award by the law of the forum in which such recognition is sought, and

c) barring relitigation of the issue is consistent with the arbitration agreement and the reasonable expectations of the parties.

Comments:

a. Generally. Issue preclusion, or "collateral estoppel" as it is generally known in U.S. law, denotes the grant of preclusive effect to a finding of fact or law previously made by another adjudicatory body, typically a court. The effect of a grant of issue preclusion is that a court refrains from resolving a particular issue in an action properly before it based on its finding that another adjudicatory body has already decided that issue in an earlier adjudication between the same parties. The purpose of issue preclusion is to prevent a party from collaterally attacking an adjudicatory outcome of a proceeding in which it has participated, or is deemed to have participated, by raising in a later proceeding an issue that was decided in the prior adjudication. In this respect, issue preclusion, like claim preclusion, seeks to bring closure to disputes, encourage judicial economy, and avoid inconsistent judgments.

While claim and issue preclusion are similar in these respects, the nature of and requirements for issue preclusion differ from those applicable to claim preclusion.

b. The issue preclusive effect of Convention awards. Claim preclusion may readily be understood as a necessary consequence of the binding nature of arbitral awards and inherent in the obligation under the Conventions to recognize them. See Comment *a*, § 4-9, supra. The availability of issue preclusion based on a prior arbitral award is less straightforward, and the requirements for establishing that an issue in an arbitral award is entitled to preclusive effect are more complex. See Comment *b* of this Section. As an initial matter, it is uncertain whether the drafters of the Conventions contemplated issue preclusion as well as claim preclusion. Moreover, relatively little judicial precedent exists regarding the issue preclusive effect of international awards. In addition, in many foreign jurisdictions issue preclusion is not as well established or simply does not exist as an independent doctrine, either with respect to court judgments or arbitral awards. As a consequence, not all parties to international transactions necessarily have the same expectations about the issue preclusive effect of arbitral awards.

On the other hand, parties generally enter into arbitration agreements and participate in arbitral proceedings with the expectation that the resulting award will bring closure to issues decided in the award. Consistent with this expectation, precluding parties from collaterally attacking findings made in an arbitral award strengthens the binding effect and finality of arbitral awards. Moreover, by definition,

this Section only addresses the availability of issue preclusion with respect to actions that are pending in a U.S. court, meaning actions in which a U.S. court (a) has jurisdiction over the parties under U.S. law, and (b) is evaluating a request for issue preclusion in relation to an adjudication that is pending before it.

To the extent that issue preclusion gives arbitral awards wider effect than the Conventions require, it is nevertheless consistent with Article III of the New York Convention, which allows Contracting States to "recognize arbitral awards as binding . . . in accordance with the rules of procedure in the territory where the award is relied upon." Similarly, Article 4 of the Panama Convention provides that recognition of an award "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." Although this language is generally interpreted as pertaining only to the procedures for obtaining recognition, it expresses more generally an obligation to treat awards similar to local judgments, which reasonably implies affording them similar status and effect. Consistent with this interpretation, these Convention articles allow Contracting States to apply their own rules of preclusion in determining the effect of an arbitral award.

Moreover, while national differences remain regarding the extent and nature of preclusive effect, the notion that international arbitral awards should enjoy issue preclusive effect is gaining ground in other countries. For all these reasons, the

Restatement takes the position that issue preclusion is available in relation to international arbitral awards.

In order to grant issue preclusive effect to an arbitral award, a court must first find that the award is entitled to recognition under this Chapter. It must also find that the conditions for issue preclusion established by the law of the forum in which issue preclusion is sought are satisfied, and that the grant of issue preclusion would be consistent with the parties' agreement and reasonable expectations. This approach is consistent with the fact that, because issue preclusion is an equitable doctrine, courts evaluate requests for preclusive effect on a case-by-case basis, examining both the initial adjudication and the equities of granting preclusive effect to its resolution of issues.

c. The issue preclusive effect of non-Convention awards. FAA Chapter One, which governs non-Convention awards, differs from the Conventions in that it does not use the term "recognition" or expressly refer to arbitral awards as "binding." It is nevertheless well established that arbitral awards subject to Chapter One of the FAA are binding despite the absence of the term "binding" in the statute, and domestic arbitral awards have routinely been granted issue-preclusive effect. For these reasons, non-Convention awards are entitled to issue preclusive effect when they satisfy the applicable requirements. See Comment *d* of this Section.

d. Requirements for issue preclusion. For a finding on an issue in an international arbitral award to be granted issue preclusive effect in a subsequent litigation, several elements must be established.

(i). Entitlement of the award to recognition. Before inquiring into the issue preclusive effect of an arbitral award, a court generally determines whether the award is entitled to recognition under this Chapter. This same predicate is required for claim preclusion. See Comments *a*-*d*, § 4-9, supra.

(ii). The elements of issue preclusion. The availability of and standards for issue preclusion vary among jurisdictions within the United States and even more widely among other countries, which, as noted, in many instances do not have a formal doctrine of issue preclusion at all. Despite the variations, issue preclusion in U.S. courts can be said generally to entail four core requirements. First, the parties must have been given a full and fair opportunity to litigate the relevant issue. Second, the issue whose relitigation would be precluded must have been actually decided in the previous adjudication. Third, resolution of the issue must have been essential to the previous adjudication. And, fourth, the party against whom preclusion is sought must have been a party, or in privity with a party, to that adjudication. These core requirements, as defined, modified, or supplemented by forum law, must be satisfied in order for a finding in an award to have issue preclusive effect.

(iii). Parties' agreement and reasonable expectations. As noted above, see Comment *a* of this Section, courts enjoy substantial discretion in deciding whether to

grant issue preclusion based on a prior award and make that determination on a case-by-case basis. As compared to domestic arbitral awards, international arbitral awards raise important prudential considerations. Foremost among them is the risk that parties coming from legal systems in which issue preclusion is unknown or not well established as a discrete doctrine may not expect that an issue decided in an arbitral award could have preclusive effect in a later proceeding involving different claims. Accordingly, before giving an international arbitral award issue preclusive effect, a court should consider additional factors to ensure that such preclusion is consistent with the parties' agreement and reasonable expectations.

To assess the parties' expectations in relation to issue preclusion, a court properly considers: (a) the standards and practices regarding issue preclusion in the place where the parties are domiciled, have their principle place of business, or regularly conduct activities related to the dispute, (b) any relevant industry practices or terms in the parties' arbitration agreement that may indicate expectations regarding the effect of arbitral findings on subsequent claims, (c) any indications from the arbitral record concerning the parties' expectations regarding the issue preclusive effect of the award, insofar as the confidentiality of the arbitral proceedings allows, (d) the extent to which the law of the seat of arbitration has an established policy on issue preclusion and the parties may have considered that policy in selecting the arbitral seat, and (e) any other factor properly taken into account to avoid unfair surprise.

e. Applicable law. As is the case with claim preclusion, issue preclusion presupposes that the award on which preclusion is based is one that is entitled to recognition under the applicable law, namely the Conventions and their implementing legislation (for Convention awards) or FAA Chapter One (for non-Convention awards). In addition to satisfying the requirements for recognition, an award must also satisfy the requirements for issue preclusion prescribed by the law of the forum. See Comment *b(ii) &(iii)* of this Section.

The issue preclusive effect of a court judgment is ordinarily subject to the law of the place where the original judgment was rendered. The Restatement takes a different view regarding the preclusive effect of an international arbitral award. When a court gives issue preclusive effect to a finding in an arbitral award, it essentially adopts the tribunal's determination of the issue and incorporates it into its own adjudication of a case properly before it. But, unlike a national court, an arbitral tribunal does not have a preexisting framework for determining the preclusive effect of prior adjudications. The law of the arbitral seat governs arbitral procedure and awards in many respects, but in the absence of express party agreement, arbitral tribunals are not bound by the rules of the seat on civil procedure, conflict of laws, or substantive law. It would be anomalous, therefore, to hold that their awards are subject to the rules applicable to issue preclusion in the courts of the seat. Moreover, a court that is asked to grant issue preclusion is legitimately concerned with conservation of judicial resources and with judicial economy. All in all, the jurisdiction

where issue preclusion is sought has a greater interest in the matter than the courts of the place where the award was made.

For these reasons, the Restatement adopts the position that the standards governing issue preclusion are those of the jurisdiction in which preclusion is sought. The law of the arbitral seat may be relevant, however, in assessing the parties' expectations about the possibility of eventual issue preclusion and therefore the potential for unfair surprise. See Comment *b(iii)* of this Section.

f. Burden of proof. A party seeking issue preclusion, like a party seeking claim preclusion, bears the burden of establishing the formal requirements for recognition under Section 4-4, supra. Again, as with claim preclusion, the party resisting issue preclusion bears the burden of establishing a ground for denying recognition of the award under the standards set forth in Sections 4-12 through 4-18, and Sections 4-19 through 4-22, for Convention and non-Convention awards, respectively. Once it is established that the award is entitled to recognition, the party seeking preclusion bears the further burden of demonstrating that the specific requirements for issue preclusion under the law of the forum in which preclusion is sought are satisfied, and that the grant of preclusive effect will not be inconsistent with the parties' agreement or disrupt the reasonable expectations of the parties.

REPORTERS' NOTES

a. Generally. Issue preclusion, or collateral estoppel, essentially bars relitigation of an issue that was fully litigated and finally determined in a prior adjudicatory proceeding. The issue preclusive effect of international arbitral awards is a complex matter, and has historically been less certain than the claim preclusive effect of such awards. There is little to suggest that the drafters of the New York and Panama

Conventions specifically contemplated issue preclusion, and the FAA chapters implementing those Conventions do not address the matter. Moreover, issue preclusion is less common and generally less formally developed in many foreign jurisdictions, particularly those jurisdictions belonging to the civil law tradition. The uneven treatment of issue preclusion across national legal systems raises questions about whether parties to international arbitrations expect or could reasonably anticipate that international awards are capable of having issue preclusive effect.

In the United States, courts are in general agreement that issue preclusion may be granted with respect to findings in domestic arbitral awards. See Restatement (Second) of Judgments § 84; Norris v. Grosvenor Mktg. Ltd., 803 F.2d 1281, 1286 (2d Cir. 1986); B-S Steel of Kan., Inc. v. Tex. Indus., Inc., 439 F.3d 653, 666 (10th Cir. 2006) (litigants should not be given a second chance to litigate the same issue previously decided in arbitration); Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654, 677 (S.D.N.Y. 2005) (interest in finality dictates that those given a chance to fully argue their claim not be given a second chance to argue similar issues); Maidman v. O'Brien, 473 F. Supp. 25, 29 (S.D.N.Y. 1979) (collateral estoppel effect of arbitrators' decision barred federal securities law claim against broker, where controlling issues in suit were identical to those decided by arbitrators and where investor had fair opportunity to present her claims). Issue preclusion has also been extended to international awards. See Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1137 (5th Cir. 1991) (finding that arbitral award precluded relitigation in subsequent indemnity suit of issues of causation, liability, and damages, even though suit involved party that was "vouched in" but refused to participate in arbitration).

While some foreign jurisdictions do not have a separate doctrine that deals with issue preclusion per se, many of those same jurisdictions reach very similar outcomes in certain cases under their doctrine of res judicata. For example, in explaining the limits of res judicata, Bernard Hanotiau explains that under French and Belgian law, res judicata applies not only to the first tribunal's conclusions, but also a tribunal's reasoning essential to reaching that conclusion. See Bernard Hanotiau, The Res Judicata Effect of Arbitral Awards, in Complex Arbitrations 49 (2003) ICC Bull. Special Supplement, (finding "res judicata" applied under French and Belgian law not only to conclusion, but also to "the secondary issues that have necessarily been resolved by the court in the process of reaching its decision and which would deprive the decision of its logical basis if they were to be denied."); Final Report on Res Judicata and Arbitration as well as the Report on LisPendens and Arbitration by the Committee on International Commercial Arbitration (finding that courts in France, Belgium, and The Netherlands, and to a lesser degree Germany and Switzerland, give effect not only to the final *dispositif* of a judgment, but also reasoning that was essential to reach that final disposition); Gary B. Born, International Commercial Arbitration 2886 (2009) (the notion that civil law jurisdictions have "no doctrine of collateral estoppel" has "surface appeal, but appears to ignore the way in which principles of res judicata in civil law jurisdictions give preclusive effect to aspects of a judgment's (or award's) reasoning"); Stavros L. Brekoulakis, Third Parties in International Commercial Arbitration 252 (2011) (distinguishing between res judicata and the "third-party effect," which allows "a limited number of *issues* determined in the first award" to have an "adverse" or "prejudicial" effect on third parties who did not participate in the proceedings) (emphasis in original).

Under this approach, for example, a second tribunal will not reconsider the issue of force majeure raised in a subsequent proceeding between the same parties. See Hanotiau, supra at 49. Similarly, a French court would not reconsider in a subsequent litigation an arbitral finding that a franchising agreement between two parties had been extended to a third party, even if that third party had not participated in the original proceeding; it would instead apply the finding of the earlier arbitral tribunal. See Brekoulakas, supra at 253 (citing Cour de Cassation, 23 January 2007, Prodim v. Distribution Casino France (2007)); Kristof Cox, Get More than You Expected: The Effects of an Arbitration Award on Third Parties, 24 Int'l Lit. Q. 1, 5 (2007) (interpreting the *Prodim* case as deciding that an arbitral award's preclusive effect is "not limited to the dispositive part of the decision, but that it also extends to the reasons" and that "neither a lack of identity between the claims and causes of action, nor a lack of identity between the parties" is required and that the judge cannot "mak[e] findings that are inconsistent with the findings of the award"); but see Pierre Mayer, Note □ 23 January 2007 □ Cour

de Cassation (Ch. Com.), Revue de l'Arbitrage, (Comité Français de l'Arbitrage 2007 Volume 2007 Issue 4) pp. 771 -774 (criticizing the opinion of the Cour de Cassation). Meanwhile, a U.S. court would likely reach the same results as these cases, but under the doctrine of issue preclusion. See, e.g., Nauru Phosphate Royalties Inc. v. DragoDaic Interests, Inc., 138 F.3d 160 (5th Cir. 1998) (non-party creditor on promissory note bound by finding in arbitral award that landowner was not liable on promissory note where its interests were in privity of the landowner); Cecil's, Inc. v. Morris Mech. Enters., Inc., 735 F.2d 437 (1984) (award in favor of owner against contractor binding in subsequent action by contractor against subcontractor and subcontractor's surety). Cf. Carte Blanche (Singapore) Pte., v. Diners Club Int'l, Inc., 2 F.3d 24, 29 (2d Cir. 1993) (franchisee could enforce award against franchisor and collect from franchisor's parent corporation under corporate veil-piercing theory).

Although important differences among legal systems on issue preclusion remain, an increasing number of international arbitration commentators have concluded that issue preclusion is available for international arbitral awards and should be governed by "transnational rules applicable to international commercial arbitration." Final Report of the ILA, Resolution 1/2006, Recommendation 2. Those international standards generally acknowledge application not only of claim preclusion, but also issue preclusion to international arbitral awards. See Interim Report of the International Law Association (ILA) Committee on Res Judicata and Arbitration (Berlin Conference, 2004); Final Report of the ILA, Resolution 1/2006, Recommendation 2 (recommending that an arbitral award have "preclusive effects in the further arbitral proceedings as to a claim, cause of action *or issue of fact or law*, which could have been raised, but was not, in the proceedings resulting in that award, provided that the raising of any such new claim, cause of action or new issue of fact or law amounts to procedural unfairness or abuse") (emphasis added); see also Luca Radicati di Brozolo, Res Judicata and International Arbitral Awards Post Award Issues, ASA Special Series No. 38, at 145 (Pierre Tercier, ed., 2011)(noting that the ILA Recommendations represent a "bottom-up harmonization" of standards for preclusion and, as such, reduce the potential for unfair surprise on the parties).

To the extent that there remain special concerns about issue preclusion in the context of international arbitral awards, these concerns are best addressed as courts assess the appropriateness of issue preclusion on a case-by-case basis. Traditionally, even in matters involving domestic awards, this assessment entails an examination of the initial adjudication and the equities of granting preclusive effect to issues resolved in it. Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1137 (5th Cir. 1991) (endorsing a case-by-case analysis to apply collateral estoppel to an international award); see also In re Celotex Corp., 196 B.R. 602, 608 (Bankr. M.D. Fla. 1996) (endorsing case-by-case approach). For these reasons, issue preclusion is in principle available for international arbitral awards that are entitled to recognition under this Chapter, provided that the requirements established by the law of the forum in which preclusion is sought are satisfied and subject to the safeguards established by this Section.

b. The issue preclusive effect of Convention awards. Unlike claim preclusion, issue preclusion based on a prior arbitral award is not regarded as necessarily available under the conventions, and the requirements for establishing issue preclusion in the context of international arbitral awards is more complex. See Comment *c* of this Section. In addition, national jurisdictions vary considerably regarding the availability of issue preclusion. As a consequence, not all parties to international transactions necessarily have the same expectations about the issue preclusive effect of arbitral awards.

There remain national differences regarding the extent and nature to which issue preclusion is available for judgments. On the other hand, issue preclusion affects an ongoing attempt to relitigate in U.S. courts an issue that was already decided in an international arbitral award. In addition, international arbitral awards are increasingly being recognized as entitled to issue preclusive effect in international commentary. See Comment *d* of this Section. For all these reasons, the Restatement takes the position that issue preclusion is available in relation to international arbitral awards.

c. The issue preclusive effect of non-Convention awards. Although FAA Chapter One does not use the term "recognition" or expressly refer to arbitral awards as "binding," courts have routinely held that awards subject to Chapter One of the FAA are binding and domestic arbitral awards have routinely been

granted issue-preclusive effect. For these reasons, non-Convention awards are entitled to issue-preclusive effect when they satisfy the applicable requirements. See Comment *d* of this Section.

d. Requirements for issue preclusion. Issue preclusion based on a prior arbitral award is subject to several requirements.

(i). Entitlement of the award to recognition. An award that is not entitled to recognition cannot be granted issue preclusive effect. Thus, as an initial matter, issue preclusion is only possible in relation to an award that satisfies the requirements for recognition under this Chapter. See Comments *a*-*d*, § 4-9, supra.

(ii). The elements of issue preclusion. Although jurisdictions that embrace issue preclusion vary in their articulation of the governing standards, those jurisdictions that allow it commonly require that four central requirements be satisfied: (1) the parties must have been given a full and fair opportunity to litigate the relevant issue; (2) the issue on which preclusion is sought must actually have been decided in the previous adjudication; (3) resolution of the issue must be necessary to the previous adjudication; and (4) the party against whom preclusion is sought must be a party or in privity with a party to the previous adjudication. See, e.g., Wolf v. Gruntal& Co., Inc., 45 F.3d 524, 528 (1st Cir. 1995); Witkowski v. Welch, 173 F.3d 192, 198–205 (3d Cir. 1999); Sanders v. Washington Metro. Area Transit Auth., 819 F.2d 1151, 1157 (D.C. Cir. 1987); Mandich v. Watters, 970 F.2d 462, 465–67 (8th Cir. 1992); Cities Serv. Co. v. Gulf Oil Corp., 980 P.2d 116, 123–30 (Okla.), cert. dismissed sub nom. Chevron U.S.A., Inc. v. Oxy USA Inc., 528 U.S. 1014 (1999) ; Konieczny v. Micciche, 702 A.2d 831, 836–37 (N.J. Super. Ct. App. Div. 1997); Western Indus. v. Kaldveer Associates, 887 P.2d 1048, 1050–52 (Idaho 1994); Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650–54 (Minn. 1990); Clemens v. Apple, 102 A.D.2d 236 (N.Y. App. Div. 1984), aff'd, 481 N.E.2d 560, 561 (N.Y. App. Div. 1985).

The requirement that parties receive a full and fair opportunity to litigate varies slightly among jurisdictions, and has changed over time. In a classic articulation by a New York court, the factors to be considered include: the nature of the original forum, the importance of the issue in the prior litigation, the incentive and initiative to litigate in the original adjudication, the extent of the original adjudication (i.e., whether the issue was resolved at a preliminary stage in the proceedings), the competence and expertise of counsel, the availability of new evidence, the differences in the applicable law, and the foreseeability of future litigation. See Gilberg v. Barbieri 423 N.E.2d 807, 809 (N.Y. 1981); see also Trepanier v. Getting Organized, Inc., 583 A.2d 583, 587 (Vt. 1990).

The full-and-fair-opportunity factor was originally conceived not simply as requiring that the first adjudication satisfied some minimal due process threshold, but also that that the original proceeding afforded procedural opportunities comparable to those required by the jurisdiction in which preclusion is invoked. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 325 (1979) (justifying grant of issue preclusion because there were "no procedural opportunities available to the petitioners that were unavailable in the first action of a kind that might be likely to cause a different result"); see also Allen D. Vestal, Preclusion/Res Judicata Variables: Adjudicating Bodies, 54 Geo. L.J. 857, 862-74 (1966) (examining the procedural adequacy of courts of different jurisdictions in order to determine whether issue preclusion is generally appropriate in specific instances). In many circumstances, this requirement has prevented issue preclusion from being applied to findings by administrative agencies or arbitral tribunals. Jay C. Carlisle, Getting a Fully Bite of the Apple: When Should the Doctrine of Issue Preclusion Make an Administrative or Arbitral Determination Binding in a Court of Law? 55 Fordham L. Rev. 63, 68 (1986).

Courts have since rejected this restrictive view of the full-and-fair-opportunity requirement. More recently, courts have found that a party had a full and fair opportunity in the prior adjudication as long as the party "explicitly solicited resolution of the issue in the prior administrative proceeding and fully participated in such proceeding with the expectation that it would be bound by the result." Allied Chem. v. Niagara Mohawk Power Corp., 528 N.E.2d 153, 155 (N.Y. 1988). Under this newer standard, courts generally allow issue preclusion to apply to administrative law and arbitral decisions that otherwise meet the applicable requirements. See U.S. v. Utah Constr. & Mining Co., 384 U.S. 394, 422

(1966); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 463-66, 481-85 (1982) (affirming grant of issue preclusion to finding of an administrative law tribunal); Ryan v. New York Tel. Co., 467 N.E.2d 487, 489-90 (N.Y. 1984) (same); Buckhalter v. Pepsi-Cola Gen. Bottlers, Inc., 820 F.2d 892, 893 (7th Cir. 1987) (same); U. S. v. Karlen, 645 F.2d 635, 639-40 (8th Cir. 1981) (same); Witkowski v. Welch, 173 F.3d 192, 198-206 (3d Cir. 1999) (affirming availability of issue preclusion for findings in arbitral awards); Mandich v. Watters, 970 F.2d 462, 465 (8th Cir. 1992) (same); Cities Serv. Co. v. Gulf Oil Corp., 980 P.2d 116, 124-25 (Okla. 1999) (same); Konieczny, 702 A.2d at 833-34; W. Indus. & Envtl. Servs., Inc. v. Kaldveer Assocs., 887 P.2d 1048, 1051 (Idaho 1994) (same); Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 649 (Minn. 1990) (same); see also Restatement (Second) of Judgments, § 83 (administrative law tribunals) and § 84 (arbitral tribunals).

The second and third requirements, namely that the issues on which preclusion is sought have been actually and necessarily decided, have raised special concerns in the domestic arbitration context. Arbitrators are not generally required, under U.S. law or the law of many other jurisdictions, to render an award with detailed reasoning setting forth the basis for the award. Carris v. John R. Thomas & Assoc., P.C., 896 P.2d 522, 528 (Okla. 1995) (denying preclusive effect of award because it did not specify which issues were actually decided); see also Richard W. Hulbert, Arbitral Procedure and the Preclusive Effect of Awards in International Commercial Arbitration, 7 Int'l Tax & Bus. Law. 156, 197 (1989) (arguing absence of written findings may make preclusion impossible unless they can be necessarily implied from the nature of the claim and award). This concern is less problematic in international arbitration because reasoned awards are standard industry practice in international arbitration. In fact, there has been a notable increase in the length and detail of international arbitral awards. Donald P. Arnavas & Rt. Hon. Lord David Hacking, Using ADR to Resolve International Contract Disputes, 04-11 Briefing Papers 1 (2004) ("Reasoned awards have always been the norm in international arbitration, but with the shift to more formalized and rule-based decisionmaking, awards have necessarily become longer and more detailed.").

The test for issue preclusion is also sometimes said to include a requirement that the first adjudication be "final." U.S. courts have differed over when an arbitral award is final, and thus capable of having issue preclusive effect. Some courts treat domestic awards as final only if judicially confirmed. See Ufheil Constr. Co. v. New Windsor, 478 F. Supp. 766, 768 (S.D.N.Y. 1979), aff'd, 636 F.2d 1204 (2d Cir. 1980); Gruntal & Co., Inc. v. Steinberg, 854 F. Supp. 324, 337 (D.N.J. 1994), aff'd, 46 F.3d 1116 (3d Cir. 1994). This understanding of finality misreads the FAA, and mistakes the nature of arbitral awards and the effect of confirmation on those awards. By definition, an arbitral award is a final and binding adjudication. See § 1-1(a), supra. When a court confirms an award, it reduces the award to a judgment. See § 1-1(g). Following confirmation, the award no longer needs to be given preclusive effect, since the judgment confirming the award is itself entitled to preclusive effect.

Courts in different U.S. jurisdictions have also taken different positions on the fourth requirement--namely, an identity of parties or at least privity between them. Courts commonly speak of "mutuality" in requiring that the party asserting issue preclusion was also a party, or in privity with a party, to the prior action and would also have been bound by that judgment. Courts seldom any longer require mutuality when issue preclusion is sought to be based on a prior court judgment. See Parklane, 439 U.S. at 337; Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350 (1971). There is less consensus about the requirement of mutuality in issue preclusion based on a prior arbitral award.

Courts generally agree on the relatively obvious point that non-parties to the original arbitration cannot be precluded by findings of the tribunal, since they presumably did not consent to arbitral jurisdiction in the first place. See Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1293 (3d Cir.), cert. denied, 117 S. Ct. 583 (1996); Brownko Int'l, Inc. v. Ogden Steel Co., 585 F. Supp. 1432, 1434 (S.D.N.Y. 1983). But see Universal Am. Barge Corp. v. J-Chem, Inc., 946 F.2d 1131, 1137 (5th Cir. 1991) (approving of application of preclusion against party that was "vouched in" but did not participate in arbitration). There is disagreement among courts, however, over whether so-called "non-mutual offensive collateral estoppel" is available on the basis of arbitral awards. Under "non-mutual offensive collateral estoppel," an award can be invoked by a non-party against a party to the prior proceeding to

prevent the original party from relitigating an issue decided in that proceeding. Compare Vandenberg v. Super. Ct., 982 P.2d 229, 237-40 (Cal. 1999) (refusing to extend issue preclusive effect to non-parties in the original arbitration) and Buckner v. Kennard, 99 P.3d 842, 849 (Utah 2004) (same) with Riverdale Dev. Co. v. Ruffin Bldg. Sys. Inc., 146 S.W.3d 852, 859 (Ark. 2004) (allowing non-mutual collateral estoppel for arbitral awards); Konieczny v. Micciche, 702 A.2d 831, 836 (N.J. Super. Ct. App. Div. 1997) (same); W. Indus. & Env'tl Serv., Inc. v. Kaldveer Assoc., 887 P.2d 1048, 1052 (Idaho 1994) (same); Auferhar v. Data Dispatch, Inc., 452 N.W.2d 648, 652 (Minn. 1990) (same); Clemens v. Apple, 102 A.D.2d 236 (N.Y. App. Div. 1984), aff'd, 481 N.E.2d 560 (N.Y. 1985) (same); Cities Serv. Co. v. Gulf Oil Corp., 980 P2d 116, 130 (Okla. 1999) (same); and Overseas Motors, Inc. v. Import Motors Ltd., 375 F. Supp. 499, 511-12 (E.D. Mich. 1974), aff'd, 519 F.2d 119 (6th Cir.), cert. denied, 96 S. Ct. 395 (1975) (same).

Although the Restatement leaves the standards for granting issue preclusion to the forum in which preclusion is sought, non-mutual offensive use of issue preclusion in international arbitrations is generally not appropriate. It is axiomatic that arbitral jurisdiction is based on, and limited by, the consent of the parties. A party that consented to arbitrate and be bound by a domestic arbitral award may plausibly be said to have contemplated being barred from relitigating issues decided in the resulting award. Even that stretches the concept of consent, since the new party did not consent (and could not be deemed to have consented) to the original arbitration. See Vandenberg v. Super. Ct., 982 P.2d 229, 237-40 (Cal. 1999); Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1293 (3d Cir.), cert. denied, 117 S. Ct. 583 (1996). The leap is that much greater in connection with international awards, which may involve parties that are unaware of the possibility of issue preclusion as a general matter, and could not conceivably be deemed to have consented to its invocation by a non-party in a future litigation on entirely different claims. For these reasons, it will rarely be appropriate for non-mutual offensive issue preclusion to be granted with respect to awards that are subject to this Chapter, even if it is otherwise available for domestic awards.

Notwithstanding this general rule, there is room for some narrow exceptions. For example, non-mutual collateral estoppel may be justified, under the facts of a particular case, when the award at issue involves only U.S. parties and is seated in the United States. In that situation, parties would most likely anticipate application of standards that generally apply to domestic arbitral awards. In addition, non-mutual collateral estoppel may be justified when the party resisting preclusion is found to have been subject to the arbitration agreement under Sections 4-12 or 4-22, infra.

In addition to differing in their interpretation and application of the four traditional factors for issue preclusion, courts also differ over whether an award that deals with issues that are non-arbitrable can nevertheless be granted issue preclusive effect in regard to other issues. Under existing caselaw, four different positions have emerged: (1) that findings by arbitrators may be granted issue preclusive effect in litigation involving non-arbitrable claims; (2) that findings by arbitrators may be granted issue preclusive effect, but only as to issues that do not go to the core of the non-arbitrable claim; (3) that findings by arbitrators may be granted issue preclusive effect with regard to all issues so long as the arbitral procedures were "adequate" to protect the legislative interest in the non-arbitrable claim; or (4) that issue preclusion may not be granted at all in cases involving non-arbitrable claims due to the importance of the statutory interest in non-arbitrability. G. Richard Shell, Res Judicata and Collateral Estoppel Effects of Commercial Arbitration, 35 U.C.L.A. L. Rev. 623, 656 (1988) (outlining four approaches).

While the resolution of certain claims or issues may be subject to the exclusive jurisdiction of the courts, factual determinations related to those claims are not subject to the same jurisdictional exclusivity and may therefore be granted issue preclusive effect in subsequent litigation. See Coffey v. Dean Witter Reynolds, Inc., 961 F.2d 922, 925 (10th Cir. 1992); Greenblatt v. Drexel Burnham Lambert, Inc., 763 F.2d 1352, 1361 (11th Cir. 1985); Maidman v. O'Brien, 473 F. Supp. 25, 30 (S.D.N.Y. 1979); see also Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985) (reasoning that rules governing issue preclusion will allow courts to grant preclusive effect with regard to factual determinations while protecting the federal interest in judicial resolution of non-arbitrable claims); Schattner v. Girard 668 F.2d 1366, 1369 (D.C. Cir. 1981) (applying issue preclusion effect to generally non-arbitrable claim of

unfair competition because the facts decided in the arbitration were identical to those to be decided in the subsequent litigation). Non-arbitrability is a narrow doctrine that applies only to a specific claim that Congress has expressly and unambiguously reserved to the exclusive jurisdiction of courts. A non-arbitrable claim, however, is often only one among several other claims in dispute that parties agreed to arbitrate. Allowing a party to relitigate facts that were properly before the arbitral tribunal and fully decided would effectively extend Congress' non-arbitrability determination and allow parties to escape the binding effect of awards with regard to issues that the tribunal finally and validly resolved. Should a specific case arise in which this general approach is not appropriate, a court can use its considerable discretion in evaluating a request for issue preclusion to deny its application.

(iii). Parties' agreement and reasonable expectations. As noted above, courts enjoy substantial discretion in deciding whether to grant issue preclusion based on a prior award, and determine the availability of issue preclusion on a case-by-case basis. See Comment *a* of this Section. International arbitral awards raise particular concerns in this regard, notably the potential risk that the parties resisting preclusion may come from legal systems in which issue preclusion is not an established doctrine. See Born, supra, at 2881-2882 (noting that there is a wide variance among jurisdictions regarding the availability of and standards for issue preclusion). As discussed above in Reporters' Note *a* of this Section, several recent cases suggest that even jurisdictions that do not have an established doctrine of issue preclusion may nevertheless apply res judicata to reach similar results in certain situations. See Born, supra at 2886 (arguing that it is overly simplistic to conclude that civil law jurisdictions do not permit issue preclusion because application of claim preclusion under foreign law reaches similar results in certain cases). Moreover, separate from the judgments context, within the international arbitration context, there are increasing calls for application of issue preclusion to international arbitral awards. See International Law Association (ILA), Committee on International Commercial Arbitration, Final Report of the ILA, Resolution 1/2006, Recommendation 5; see also Brekoulakis, supra, at 242-43; Radicati di Brozolo, supra, at 145; V.V. Veeder, Issue Estoppel, Reasons for Awards and Transnational Arbitration, ICC Bulletin, Special Supplement, 2003, p. 78. Before giving an international arbitral award issue preclusive effect, a court should therefore consider additional factors with a view to ensuring that issue preclusion is consistent with the arbitration agreement and the parties' reasonable expectations. To that end, a court may properly consider: (a) the standards and practices regarding issue preclusion in the place where the parties are domiciled, have their principal place of business, or regularly conduct activities related to the dispute; (b) any relevant industry practices or terms in the parties' arbitration agreement that may indicate expectations regarding the effect of arbitral findings on subsequent claims; (c) any indications from the arbitral record concerning the parties' expectations regarding the issue preclusive effect of the award, insofar as the confidentiality of the arbitral proceedings allows; (d) the extent to which the law of the seat of arbitration has an established policy on issue preclusion and the parties may have considered that policy in selecting the arbitral seat, and (e) any other factor properly taken into account to avoid unfair surprise. Cf. B-S Steel of Kan., Inc. v. Tex. Indus., Inc., 439 F.3d 653, 666 (10th Cir. 2006) (finding, with respect to a domestic award, that when the parties have invested considerable time and resources arbitrating an issue identical to that before a court, and the arbitration panel clearly articulates its findings on that issue, the court may consider this evidence that the parties intended the arbitration to have preclusive effect); see Brekoulakis, supra, at 255-257 (explaining the relevant factors in determining whether to give effect to a "specific point" or issue in an prior award).

e. Applicable law. To enjoy issue preclusive effect, an international arbitral award must be entitled to recognition, a matter governed by the applicable law of arbitration: the relevant Convention and its implementing legislation (for Convention awards) and FAA Chapter One (for non-Convention awards), and state law to the extent not preempted by federal arbitration law. In addition to satisfying the basic requirements for recognition, an award must also satisfy the requirements applicable to issue preclusion. In the judgments context, the law governing issue preclusion is ordinarily the law of the jurisdiction where the original judgment was made. This rule makes much more sense for judgments than it does for arbitral awards. As noted in Comment *g* to Section 4-9, supra, arbitral awards are not bound by the seat's rules of civil procedure, conflict of laws, or substantive law. For these reasons, the

Restatement adopts the position that the standards that govern issue preclusion are those of the legal system of the forum in which preclusion is sought. The law of the arbitral seat remains relevant when the court assesses the reasonable expectations of the parties regarding the issue preclusive effect of the award. See Comment *b(iii)* of this Section. Meanwhile, the forum has a significant interest in whether an award is granted issue preclusive effect. In granting preclusive effect, the court of the forum is effectively adopting the findings of an arbitral tribunal and incorporating those findings into its own disposition of a claim.

f. Burden of proof. As with claim preclusion, a party invoking issue preclusion bears the burden of establishing the formal requirements for recognition under the standards set forth in Section 4-4, supra, and the party resisting issue preclusion bears the burden of establishing a ground for denying recognition of the award under the standards set forth in Sections 4-12 through 4-18, and Sections 4-19 through 4-22, for Convention and non-Convention awards, respectively. In addition, the party invoking issue preclusion must also establish the specific requirements for issue preclusion under the law of the forum in which preclusion is sought, and further that the grant of preclusive effect is consistent with the arbitration agreement and with the reasonable expectations of the parties. Cf. B-S Steel of Kan., Inc. v. Tex. Indus., Inc., 439 F.3d 653, 666 (10th Cir. 2006) ("Where the parties have invested considerable time and resources arbitrating an issue identical to that before a court, and the arbitration panel clearly articulates its findings on that issue, the court may consider this evidence that the parties intended the arbitration to have preclusive effect.").

There is little or no clear precedent that determines who bears the burden for this final factor, and arguably it could be placed on the party resisting the grant of preclusion. Placing the burden on the party seeking preclusion is consistent, however, with the fact that issue preclusion relieves a party in subsequent litigation from having to prove the relevant factual or legal issue. See Parker v. MVBA Harvestore Sys., 491 N.W.2d 904, 906 (Minn. Ct. App. 1992) (party seeking issue preclusion bears burden of proof); Virsen v. Rosso, Beutel, Johnson, Rosso & Ebersold, 356 N.W.2d 333, 337 (Minn. Ct. App. 1984) (same). But see Choi v. State, 549 N.E.2d 469, 471 (N.Y. 1989) (requiring party opposing issue preclusion to prove denial of full and fair opportunity).

TOPIC 2.

GROUNDS FOR POST-AWARD RELIEF

§ 4-11. Grounds for Post-Award Relief—Generally

(a) A court may vacate or deny confirmation, recognition, or enforcement of a Convention award only on the grounds set forth in Sections 4-12 through 4-18.

(b) A court may deny recognition or enforcement of a non-Convention award only on the grounds set forth in Sections 4-19 through 4-22.

(c) A court may, in exceptional circumstances:

(1) confirm or decline to vacate a U.S. Convention award notwithstanding the existence of a ground for vacatur; or

(2) recognize or enforce a foreign award notwithstanding the existence of a ground for denying recognition or enforcement.

Comments:

a. Grounds for vacating or denying confirmation, recognition, or enforcement of Convention awards. The grounds for denying recognition or enforcement of a foreign Convention award are set out in Article V of the New York Convention and Article 5 of the Panama Convention. Although the courts of appeals currently are divided on the grounds for vacating U.S. Convention awards, the Restatement takes the position that

under FAA Section 207, the exclusive vacatur grounds are those set out in Article V. The text of Section 207 is consistent with such an interpretation, which harmonizes the grounds for vacating U.S. Convention awards with both the grounds for denying confirmation of those awards and the grounds for denying recognition or enforcement of foreign Convention awards.

b. Grounds for denying recognition or enforcement of non-Convention awards. By definition, non-Convention awards are not governed by either the New York or the Panama Convention. Accordingly, the grounds for denying recognition and enforcement of arbitral awards set out in those Conventions do not apply to non-Convention awards. Instead, as stated in Section 4-3(b), supra, Chapter One of the FAA governs the recognition and enforcement of non-Convention awards. Accordingly, the grounds for denying recognition and enforcement of a non-Convention award, when sought under FAA Chapter One, are those set out in Section 10 of the FAA.

c. Exclusive grounds for post-award relief. In the interest of uniformity and certainty, and consistent with U.S. obligations under the Conventions, a court may not vacate or deny confirmation, recognition, or enforcement of a Convention award on a ground other than those specified in the New York or Panama Convention. See § 4-3, supra. Likewise, a court may not deny recognition or enforcement of a non-Convention award on a ground other than those specified in FAA Section 10. In particular, under the Conventions and the Federal Arbitration Act, courts do not review the merits of an arbitral award. Neither mistake of law nor mistake of fact, even if egregious, is a

ground for vacating or denying confirmation, recognition, or enforcement of an international arbitral award. See § 4-22, Comment *g*, infra.

d. Discretionary confirmation, recognition, or enforcement. The Restatement recognizes that there may be exceptional circumstances in which an international arbitral award warrants confirmation, recognition, or enforcement, notwithstanding proof of the existence of a ground that would permit denial of such relief. See, e.g., § 4-16, infra. Nevertheless, a court should do so only in exceptional circumstances.

REPORTERS' NOTES

a. Grounds for vacating or denying confirmation, recognition, or enforcement of Convention awards. Article V of the New York Convention and Article 5 of the Panama Convention set out the grounds for denying recognition or enforcement of foreign Convention awards. Determining the grounds for vacating or denying confirmation of U.S. Convention awards, however, is less straightforward. Two possible sets of grounds are available. First, the grounds for vacating U.S. Convention awards might be those set out in Section 10 of the FAA, described in Sections 4-19 through 4-22, infra. Second, the grounds for vacating U.S. Convention awards might be those set out in Article V of the New York Convention (and Article 5 of the Panama Convention), described in Sections 4-12 through 4-18, infra. The Restatement takes the position that Article V alone provides the grounds on which U.S. Convention awards can be vacated.

An initial question is whether the choice among the two sets of grounds even matters. Certainly the verbal formulation of the grounds for denying recognition or enforcement under the New York and Panama Conventions differs from the verbal formulation of the grounds for vacating awards under the FAA. But courts and commentators have tended to construe the grounds similarly. See, e.g., Mgmt. & Tech. Consultants S.A. v. Parsons-Jurden Int'l Corp., 820 F.2d 1531, 1534 (9th Cir. 1987) ("In interpreting the grounds specified [for challenging awards], it is generally recognized that the Convention tracks the Federal Arbitration Act."); Alan Scott Rau, The New York Convention in American Courts, 7 Am. Rev. Int'l Arb. 213, 236 (1996) ("[A]s a general matter I think it is reasonably safe to assume that in operation the standards of the Convention and the FAA will be identical."). But see Polimaster Ltd. v. RAE Sys., 623 F.3d 832, 836 (9th Cir. 2010) ("The grounds for refusing confirmation of an award under the Federal Arbitration Act . . . generally track those under the New York Convention, although they are not coextensive.").

The most commonly identified difference between the two sets of grounds—at least prior to the Supreme Court's decision in Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008)—is manifest disregard of the law. Prior to *Hall Street*, courts generally held that manifest disregard of the law was available as a non-statutory ground for vacating arbitration awards under the FAA, but not available under Article V of the New York Convention. E.g., Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998). But in *Hall Street*, in holding that parties could not expand the grounds for vacating awards by contract, the Supreme Court cast serious doubt on the continued availability of manifest disregard as a non-statutory ground for vacatur. 552 U.S.

at 584-85. As explained in the Reporters' Note to Comment *g*, Section 4-22, infra, the Restatement takes the position that this difference between the FAA grounds and the Convention grounds no longer exists.

If the grounds for vacating awards under FAA Chapter One are in substance the same as the Convention grounds for denying recognition or enforcement, then the choice among the sets of grounds presumably does not have any importance as a matter of substance.

(i). Textual arguments. The relevant provision of the FAA is Section 207, which provides as follows:

> 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.

9 U.S.C. § 207; id. § 308 (applying Section 207 to Panama Convention awards). A Convention award made in the United States is "an arbitral award falling under the Convention." Accordingly, Section 207 provides that a court "shall confirm the award" unless the party opposing enforcement establishes one of the grounds for denying recognition or enforcement set out in Article V of the New York Convention.

Given that it mentions confirmation, but is silent on vacatur, Section 207 might be interpreted as eliminating any opportunity of U.S. courts to vacate Convention awards made in the United States. As discussed in detail in the Reporters' Note to Comment *c*, Section 4-3, supra, the better view, and the one adhered to by the Restatement, is that FAA Chapters Two and Three authorize vacatur as well as confirmation of U.S. Convention awards. This is consistent with FAA Sections 208 and 307, which provide for application of FAA Chapter One to Convention awards to the extent not in conflict with Chapters Two and Three. As a result, the question here is not whether vacatur of U.S. Convention awards is available, but what grounds for vacatur of those awards are available.

Section 207 does not address expressly the grounds for vacating Convention awards made in the United States. Denial of recognition and enforcement is not the same as vacatur. See, e.g., Gary B. Born, International Commercial Arbitration 2671 (2009). A court judgment denying recognition or enforcement is not binding on courts in other jurisdictions when they decide whether to recognize or enforce an award. Stated otherwise, even though a court in one jurisdiction has denied recognition or enforcement, a party may nonetheless seek and possibly obtain recognition or enforcement in another jurisdiction. By contrast, when a court vacates an award, it annuls the award, and that annulment is likely (though not necessarily) to be given effect in other jurisdictions. Indeed, Article V(1)(e) of the New York Convention provides that a court may refuse to recognize or enforce an award that "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." New York Convention, art. V(1)(e); see also § 4-16, infra.

A first possible reading of Section 207 is that it permits vacatur only on the grounds set out in Section 10 of the FAA. Because FAA Chapter Two is silent on vacating Convention awards made in the U.S., Chapter One would continue to apply under Section 208 of the FAA, which states that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208. Under this interpretation, both a court's authority to vacate an award and also the grounds on which it may do so would be incorporated from Chapter One. This approach is consistent with Section 207, the argument goes, because that section provides that an award shall be confirmed unless one of the grounds in the New York Convention is met, and one of those grounds is that the award has not been set aside under the national arbitration law, here FAA Chapter One. See New York Convention, art. V(1)(e).

A second possibility is that Section 207 permits vacatur, but only on the grounds for denying recognition and enforcement set out in the New York and Panama Conventions. Like the previous interpretation, this interpretation draws the right to vacate awards from Chapter One, but it does not incorporate Chapter One's vacatur grounds as such. Under this reading, allowing U.S. courts to vacate

U.S. Convention awards is consistent with FAA Chapters Two and Three, but allowing use of the grounds set out in FAA Chapter One is not, since it is inconsistent with Section 207's requirement that Convention awards be "confirmed" unless a New York Convention ground is established. Indeed, both Section 207 and Section 9 use the term "confirmed" to describe the court's entry of judgment on an award, suggesting that the sections should be construed consistently with each other. Moreover, Section 9 makes confirmation and vacatur of awards two sides of the same coin by requiring an award to be confirmed unless it is vacated. The only way to achieve the same symmetry under Section 207, assuming that confirmation has the same meaning in the two sections, is to apply the Convention grounds to the vacatur as well as the confirmation of U.S. Convention awards. See Richard W. Hulbert, The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act, 22 Am. Rev. Int'l Arb. 45, 67 (2011).

While both interpretations of Section 207 are plausible, the Restatement adopts the latter interpretation as more consistent with FAA Chapter 2 as a whole.

(ii). Legislative history. The legislative history of FAA Chapter 2 does not address the grounds for vacating U.S. Convention awards. The Senate and House Reports both state that Chapter 2 "deal[s] exclusively with the recognition and enforcement of awards pursuant to the provisions of the convention," which might be construed as indicating that Chapter 2 does not address the grounds for vacating (rather than recognizing and enforcing) awards. S. Rep. No. 91-702, at 1 (1970); H.R. Rep. No. 91-1181 (1970) (same), reprinted in 1970 U.S.C.C.A.N. 3601, 3601; see also H.G. Torbert, Jr., Acting Ass't Sec'y for Congressional Relations, Dep't of State, Letter to Hon. John W. McCormack, Speaker, House of Representatives (Dec. 3, 1969) (hereinafter "Torbert Letter") (stating that to implement the New York Convention, the Secretary of State's Advisory Committee on Private International Law recommended "enact[ing] a new chapter dealing exclusively with recognition and enforcement of awards falling under the Convention"), reprinted in 1970 U.S.C.C.A.N. at 3603. But the statements in the Senate and House Reports do not support such an interpretation. Chapter 2 does not "deal exclusively with the recognition and enforcement of awards"; it also deals with the enforcement of arbitration agreements, for example. 9 U.S.C. § 206.

The section-by-section analysis in the House and Senate Reports provides no more guidance. In both cases, the Reports merely paraphrase the text of Section 207 without adding any additional explanation as to what the section does. S. Rep. No. 91-702, supra, at 2 ("Section 207 provides that within 3 years after an arbitral award is made, any party to the arbitration may apply to any court having jurisdiction for an order confirming the award against any party to the arbitration."); H. Rep. No. 91-1181,reprinted in 1970 U.S.C.C.A.N. at 3602 (same); see also Torbert Letter, supra, reprinted in 1970 U.S.C.C.A.N. at 3604 ("Section 207 deals with confirmation of an award made under the Convention. A similar provision is included in section 9 of the Federal Arbitration Act.").

At the Senate hearing on the bill, Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, described Section 207 as follows:

> Section 207 deals with two problems relating to the enforcement of foreign arbitral awards. The Uniform Arbitration Act has a time period of 1 year within which an application made be made for an order confirming an award. The Arbitration Convention does not contain any specific provision on this point. However, all of the experts on arbitration who worked with us considered that a 1-year period for the enforcement of foreign arbitral awards was much too short. In many cases enforcement would normally be sought outside the United States as a first step. An action would be filed here only after efforts to obtain enforcement in a foreign country had failed. It was, therefore, essential to allow time for these initial enforcement efforts outside the United States and the consensus was that 3 years is a reasonable period in these circumstances. The second problem was that the grounds for refusal or deferral of the recognition or enforcement of an arbitral award are somewhat different under the Uniform Arbitration Act than under the Convention. For example the Convention

> has a specific reference to the incapacity and thus leaves this to be dealt with under the general law of contracts. To avoid any possible conflict section 207 provides that the refusal and deferral clauses of the Convention are controlling.

Hearing Before the S. Comm. on Foreign Relations (Feb. 9, 1970) (statement of Richard D. Kearney), reprinted in S. Rep. No. 91-702, at 8, reprinted in 1970 U.S.C.C.A.N. 3601. Although the discussion is more detailed than the conclusory descriptions in the Committee Reports, it again does not address the standards for vacating U.S. Convention awards.

(iii). Case law. The courts of appeals currently are split on whether the FAA Section 10 grounds or the Convention grounds apply to actions to vacate Convention awards made in the United States. The Supreme Court has not addressed the issue directly. The closest it has come is its decision in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010), which involved an action to vacate a U.S. Convention award. The Court relied on FAA Section 10(a)(4), rather than the comparable ground under the New York Convention, in concluding that the award should be vacated. Id. at 1762. But in relying on FAA Chapter One, the Court did not address the issue considered here. Instead, presumably because the case arose out of the Second Circuit (which had previously held that the FAA Chapter One vacatur grounds apply to Convention awards made in the United States), the parties and the lower courts all relied on FAA Chapter One. Because the Supreme Court did not expressly decide what vacatur grounds apply to U.S. Convention awards, the Court would not have to overrule *Stolt-Nielsen* if it were to decide in the future that the Article V grounds instead were applicable.

The majority of the circuits that have addressed the issue have used the FAA Section 10 grounds. The leading case is Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998), in which the Second Circuit stated:

> In sum, we conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. See Convention art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.

Id. at 23. The Third and Sixth Circuits likewise have held that the grounds for vacating Convention awards made in the United States are those set out in FAA Section 10. See Ario v. Underwriting Members at Lloyds, 618 F.3d 277, 292 (3d Cir. 2010) ("When both the arbitration and the enforcement of an award falling under the Convention occur in the United States, there is no conflict between the Convention and the domestic FAA because Article V(1)(e) of the Convention incorporates the domestic FAA and allows awards to be 'set aside or suspended by a competent authority of the country in which . . . that award was made.' Here, because the arbitration took place in Philadelphia, and the enforcement action was also brought in Philadelphia, we may apply United States law, including the domestic FAA and its vacatur standards."); Jacada (Eur.), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 709 (6th Cir.) ("The Convention provides that an award may not be enforced when '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.' Convention, art. V(1)(e), 21 U.S.T. at 2520. Because this award was made in the United States, we can apply domestic law, found in the FAA [Chapter One], to vacate the award."), cert. denied, 546 U.S. 1301 (2005).

By comparison, the Eleventh Circuit is the lone circuit to have held that the Convention grounds apply in actions to vacate U.S. Convention awards. In Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434 (11th Cir. 1998), cert. denied, 525 U.S. 1068 (1999), the court of appeals analyzed the issue as follows:

> The Tampa panel's arbitral award must be confirmed unless appellants can successfully assert one of the seven defenses against enforcement of the award enumerated in Article V of the New York Convention. See Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 335-36 (5th Cir. 1976); see also National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 813 (D. Del. 1990). The appellants bear the burden of proving that any of these seven defenses is applicable.

Id. at 1441-42. It should be noted that both of the cases cited by the Eleventh Circuit as authority appear to have involved foreign Convention awards, not Convention awards made in the United States.

(iv). Policy considerations. The FAA Section 10 vacatur grounds apply to actions to vacate domestic U.S. awards (i.e., awards between U.S. parties with no international nexus that are made in the United States), while the Convention grounds apply to actions to enforce foreign Convention awards (i.e., awards subject to the New York or Panama Convention made outside the United States). The awards at issue here—awards subject to the New York or Panama Convention but made in the United States—are an intermediate class of awards that share characteristics of both classes of awards: they are Convention awards, and thus are like foreign Convention awards, but are made in the United States, and thus are like domestic U.S. awards.

Using the Convention grounds for vacatur of U.S. Convention awards would unify the grounds for vacatur with the grounds for denying confirmation of these awards, thus maintaining the correlation between confirmation and vacatur grounds that Congress established in enacting FAA Chapter One. Relatedly, using the Convention grounds for this purpose results in subjecting all Convention awards, whether foreign or made in the United States, to the same standards, whether vacatur, confirmation, recognition, or enforcement of such awards is sought. Such uniformity would benefit foreign parties arbitrating in the United States, who would be facing a regime for review of arbitral awards with which they are familiar and which is simpler, thus enhancing the attractiveness of the U.S. as an arbitral forum. More generally, it seems anomalous for the U.S. to have by legislation accepted the Conventions' invitation to Contracting States to treat awards made on its territory as Convention awards, and then withhold from them application of the grounds for denial of recognition and enforcement that represent the Conventions' centerpiece. Arguably, the U.S. committed itself internationally to do precisely the contrary.

On the other hand, it is well established that the New York and Panama Conventions themselves do not regulate the grounds for vacating Convention awards under national arbitration law. See Gary B. Born, International Commercial Arbitration 2554 (2009) ("Most national courts and commentators have therefore concluded that the New York Convention imposes no limits on the grounds which may be relied upon to annul an award in the arbitral seat."); see, e.g., Albert Jan van den Berg, The New York Arbitration Convention of 1958, at 22 (1981) ("[I]n the country of origin a losing party may obtain a setting aside on a ground not mentioned in Article V of the Convention."); W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 Tex. Int'l L.J. 1, 11 (1995) ("What the Convention did not do . . . was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration."); Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1070 (1961) ("Significantly, [Article V(1)(e)] fails to specify the grounds upon which the rendering State may set aside or suspend the award. While it would have provided greater reliability to the enforcement of awards under the Convention had the available grounds been defined in some way, such action would have constituted meddling with national procedure for handling domestic awards, a subject beyond the competence of the Conference."). Cf. Born, supra, at 2558 (arguing for an implied limit on vacatur grounds, based on obligation in Conventions to enforce arbitration agreements; but concluding that limiting the grounds for vacating awards to the Article V grounds "is implausible: it affords unjustifiably broad scope to the Article V exceptions, given the Convention's drafters' deliberate decision to make them applicable to recognition actions, but not annulment actions, and given the fairly widespread,

unchallenged availability of non-Article V grounds for annulment actions in a number of leading jurisdictions."). Thus, applying the FAA Section 10 grounds to vacatur of Convention awards made in the United States would be fully consistent with the New York Convention and the Panama Convention.

The issue here, however, is not how to construe the New York and Panama Conventions but instead how to construe Section 207. Congress certainly was free to go beyond the Conventions and to revise the grounds for vacating Convention awards made in the United States when implementing the Conventions, even if the Conventions themselves did not require it to do so. For the reasons stated above, the Restatement takes the position that, under Section 207, the grounds for vacating U.S. Convention awards are the Convention grounds rather than the FAA Section 10 grounds.

b. Grounds for denying recognition or enforcement of non-Convention awards. The grounds for denying recognition or enforcement of non-Convention awards are governed by Chapter One of the FAA. See Reporters' Note to Comment *c*, § 4-3, supra. As discussed in that Note, the vacatur grounds set out in Section 10 of the FAA should be construed as grounds for denying recognition and enforcement of non-Convention awards. For a description of those grounds, see Sections 4-19 through 4-22, infra.

c. Exclusive grounds for post-award relief. The grounds stated in the New York and Panama Conventions for vacating or denying confirmation, recognition, or enforcement of an award are exclusive; courts may not rely on grounds not stated in the applicable Convention as a basis for denying recognition or enforcement. Thus, Section 207 of the FAA states: "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." 9 U.S.C. § 207; id. § 302; see Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 288 (5th Cir.) ("[C]ourts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V."), cert. denied, 543 U.S. 917 (2004); China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 283 (3d Cir. 2003) ("Consistently with the policy favoring enforcement of foreign arbitral awards, courts strictly have limited defenses to enforcement to the defenses set forth in Article V of the Convention . . . ."); Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997) ("There is now considerable caselaw holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award."); Gary B. Born, International Commercial Arbitration 2721 (2009) ("It is clear that the exceptions enumerated in Article V of the New York Convention are the exclusive grounds for denying recognition of a foreign award under the Convention."); Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 265 (1981) ("[T]he grounds mentioned in Article V are exhaustive[.]"); see also § 4-23, infra (providing that grounds for denying recognition and enforcement of international arbitral awards may not be supplemented by agreement of the parties).

In particular, courts cannot review the merits of an arbitral award when deciding whether to grant post-award relief. As stated by Gary Born: "Neither the New York Convention nor the Inter-American Convention contains any exception permitting non-enforcement of an arbitral award simply because the arbitrators got their decision wrong, or even badly wrong." Born, supra, at 2865; see also Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) (holding that review of awards on arbitrary and capricious standard is not available after *Hall Street*); Karaha Bodas, 364 F.3d at 306 ("Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention."); Toys "R" Us, 126 F.3d at 20 ("We join these courts in declining to read into the Convention the FAA's implied defenses to confirmation of an arbitral award.") (holding that manifest disregard of the law is not available as a ground for denying recognition or enforcement under the New York Convention); M & C Corp. v. Erwin Behr GmbH, 87 F.3d 844, 851 (6th Cir. 1996) ("[T]he Convention lists the exclusive grounds justifying refusal to recognize an arbitral award. Those grounds . . . do not include miscalculations of fact or manifest disregard of the law."); Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech., 763 F. Supp. 2d 12, 31 (D.D.C. 2011) (holding that manifest disregard of the law is not a basis for denying recognition or enforcement of a Convention award, either under Article V(1)(c) or as an independent ground).

d. Discretionary confirmation, recognition, or enforcement. The Conventions do not mandate denying recognition or enforcement of Convention awards in every case in which a ground is established. Rather, use of the term "may" in the Conventions indicates that denial of recognition or enforcement is permitted, but not absolutely required. See New York Convention, art. V; Panama Convention, art. 5. Compare 9 U.S.C. § 207 ("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 10 of the FAA similarly provides that "[i]n 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." 9 U.S.C. § 10 (emphasis added). Accordingly, in exceptional circumstances, confirmation, recognition, or enforcement may be appropriate, despite the existence of a ground for denying such post-award relief. One such circumstance is when a court in the place of arbitration has set aside an award, but the court of another jurisdiction chooses nevertheless to recognize or enforce the award. See § 4-16, infra. By comparison, in most cases it will not be appropriate for a court to exercise discretion to recognize or enforce an award that is subject to a ground for denying recognition or enforcement. For example, if a party has established that it did not agree to arbitrate, see § 4-12, infra, recognizing or enforcing the award against that party would be inappropriate.

SUB-TOPIC (A).

CONVENTION AWARDS

§ 4-12. Arbitration Agreement Does not Exist or Is Invalid

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that no arbitration agreement exists or the arbitration agreement is invalid.

(b) Whether the arbitration agreement referred to in paragraph (a) does not exist, or whether a party lacked capacity to enter into the arbitration agreement, is determined by the law applicable to that issue under the choice-of-law rules of the forum where post-award relief is sought.

(c) Whether the arbitration agreement referred to in paragraph (a) is invalid is determined by the law to which the parties have subjected the arbitration agreement or, if no such law has been selected, by the law identified in the general choice-of-law clause in the contract or, in the absence of such a clause, by the law of the seat of arbitration.

(d) Under this Section, a court does not review the arbitral tribunal's determination of the validity of a contract that includes the arbitration agreement. However, a court determines de novo: (1) the existence of the arbitration agreement; (2) the validity of the arbitration agreement, unless the parties clearly and unmistakably submitted the

validity issue to arbitration; and (3) the existence of the contract that includes the arbitration agreement.

Comments:

a. *Generally.* Just as parties cannot be required to arbitrate if they have not entered into an arbitration agreement, so too an arbitral award is not enforceable if it is based upon an arbitration agreement that never existed or is invalid. Thus, Article V(1)(a) of the New York Convention and Article 5(1)(a) of the Panama Convention permit a court to deny recognition or enforcement of an award if no arbitration agreement exists, if the arbitration agreement is invalid, or if one of the parties lacked the capacity to agree to arbitrate. Likewise, under FAA Section 207, the same ground is available for vacating or denying confirmation of a U.S. Convention award.

b. *Non-existence or invalidity of arbitration agreement.* Whether an arbitration agreement exists raises basic questions of contract formation—that is, whether the parties have assented to arbitration, either by agreeing to a freestanding arbitration agreement or by agreeing to an arbitration clause in a contract. Whether an arbitration agreement is valid depends on whether the agreement is rendered unenforceable by standard defenses to contract enforcement, such as duress, mistake, fraud and fraudulent inducement, illegality, and unconscionability. (The extent to which courts may review arbitral findings on these defenses is discussed in Comment *d*, of this Section). Identical issues arise when courts decide whether to enforce an arbitration

agreement (see § 2-___,[13] supra), although a different law may apply in that context. A contention that the arbitration agreement is unenforceable because arbitration of the dispute is not permitted by law is addressed under Section 4-17, infra, rather than under this Section.

c. *Applicable law.* The law applicable to the existence or validity of an arbitration agreement depends on the nature of the alleged defect in the agreement, and is dictated by the terms of the Conventions. Under Article V(1)(a) of the New York Convention and Article 5(1)(a) of the Panama Convention, if the challenge is based on a party's alleged lack of capacity, the applicable law is determined by the conflict-of-laws rules of the forum in which post-award relief is sought. Under the plain language of those same provisions, if the challenge is to the validity of the arbitration agreement, the applicable law is the law, if any, the parties selected to govern the arbitration agreement. See Comment *b* to § 4-14, infra. If the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly), a general choice-of-law clause in the contract determines the law governing the validity of the arbitration agreement. If the parties have neither selected any law to govern the arbitration agreement nor included in the contract a general choice-of-law clause, the law of the seat of arbitration, without resort to its choice-of-law rules, governs the issue. If the challenge is to the existence of the arbitration agreement, the applicable

[13] Cross-reference to Section to be drafted on enforcing arbitration agreements.

law is determined by the choice-of-law rules of the forum in which post-award relief is sought.

d. *Review of arbitral tribunal's rulings on existence or validity of arbitration agreement.* A court reviews de novo an arbitral tribunal's determination of whether an arbitration agreement exists. When the existence of the arbitration agreement is at issue, the parties cannot avoid court review by clearly and unmistakably submitting the question to arbitration in their original arbitration agreement, but instead may only submit the issue to the tribunal by a separate and subsequent agreement (including a post-dispute agreement). A court also reviews de novo an arbitral tribunal's determination of the validity of an arbitration agreement, unless the parties clearly and unmistakably agree that validity is an issue for the arbitral tribunal to decide in a final and binding manner. See Comment *e* to § 4-14, infra.

e. *Review of arbitral tribunal's rulings on existence or validity of main contract.* Courts review de novo whether a contract that includes an arbitration clause exists, even though the challenge is to the existence of the contract as a whole. Such challenges necessarily implicate a party's assent to arbitration, and hence a court has the final say. However, courts do not review the arbitral tribunal's rulings on challenges to the validity of the contract as a whole, such as a claim that a contract including an arbitration clause was fraudulently induced or is illegal. Similar questions of the allocation of decisionmaking authority between courts and the arbitral tribunal

arise in connection with actions to enforce arbitration agreements. See § 2-___,[14] supra. As discussed more fully in that Section, questions of the existence of the main contract ordinarily will directly implicate the assent to arbitration, while questions of the validity of the main contract—in light of the separability doctrine—do not. This Section should be construed consistently with that Section.

Illustrations:

1. The buyer, a corporation from country *B*, files a request for arbitration asserting a claim for breach of contract against the seller, a corporation from country *S*, for failure to deliver goods. Before the arbitral tribunal, the seller repeatedly objects to the tribunal's jurisdiction, arguing that no arbitration agreement exists because it never entered into a sales contract with the buyer and that its signature on the alleged contract was forged. The arbitral tribunal enters an award in favor of the buyer, finding that the seller had assented to the contract and rejecting the forgery allegation. The buyer then seeks to confirm or enforce the award. In the confirmation or enforcement action, the court makes a de novo determination of whether the seller assented to the contract and whether the contract was forged.

[14] Cross-reference to Section to be drafted on separability doctrine and enforcing arbitration agreements.

2. Same facts as *Illustration 1*, except that instead of arguing that its signature on the alleged contract was forged, the seller argues that the main contract is invalid because the buyer fraudulently induced it to enter into the contract by misrepresenting material facts concerning the transaction. The arbitral tribunal enters an award in favor of the buyer, finding that it did not make any misrepresentations. The buyer then seeks to confirm or enforce the award. In the confirmation or enforcement action, the court does not review the tribunal's finding that no misrepresentations were made.

f. Waiver and determination sua sponte. A party's ability to waive a challenge based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

g. Partial grant of post-award relief. In appropriate circumstances, as outlined in Section 4-1(d) & (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest.

REPORTERS' NOTES

a. Generally. The Supreme Court regularly reaffirms the axiom that arbitration is a matter of contract and that parties are not bound to arbitrate unless they have agreed to do so. See, e.g., First Options, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 649 (1986). Arbitrators making an award against a party that has not agreed to arbitrate the dispute are "officious intermeddlers who . . . would be no more arbitrators than any of the thousands of men and women who pass through New York's Grand Central Station each morning." William W. Park, Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators, 8 Am. Rev. Int'l Arb. 133, 134 (1997). Accordingly, both the New York and Panama Conventions make the non-existence or invalidity of the arbitration agreement a ground for denying recognition and enforcement of a Convention award (and, hence, also a ground for vacating or denying confirmation of a U.S. Convention award under FAA Section 207). See New York Convention, art. V(1)(a) (1958) (permitting a court to

refuse recognition or enforcement if "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"); Panama Convention, art. 5(1)(a) (permitting a court to refuse enforcement or recognition if "the parties to the agreement were subject to some incapacity under the applicable law or . . . the agreement is not valid under the law to which the parties have subjected it or, if such law is not specified, under the law of the State in which the decision is made").

b. Non-existence or invalidity of arbitration agreement. The invalidity of the arbitration agreement is a ground for post-award relief under the plain language of both the New York and Panama Conventions. Questions of validity presume existence, so that the question of the existence of the arbitration agreement likewise falls under this ground. Although lack of capacity of the parties is listed separately in each of the Conventions, it also represents a circumstance in which the arbitration agreement does not exist or is invalid. Lack of capacity is listed separately because the Conventions prescribe a different choice-of-law rule, as discussed in Comment *c* of this Section.

Grounds for challenging the validity of the arbitration agreement include fraud, duress, impossibility, and unconscionability. See, e.g., Encyclopaedia Universalis, S.A. v. Encyclopaedia Britannica, Inc., 2003 U.S. Dist. LEXIS 21850, at *22-24 (S.D.N.Y. Dec. 4, 2003) (rejecting claim that performance of arbitration agreement was discharged on grounds of impossibility), aff'd in part, rev'd in part, vacated in part on other grounds, 403 F.3d 85 (2d Cir. 2005). Presumably, arbitration agreements, if governed by U.S. law, also must be supported by consideration, but in practice that rarely will be a problem.

Few American cases address claims of lack of capacity as a ground for denying recognition or enforcement of an international arbitral award. See, e.g., Buques Centroamericanos, S.A. v. Refinadora Costarricense de Petroleos, S.A., 1989 U.S. Dist. LEXIS 5429, at *2-3 (S.D.N.Y. May 18, 1989) (claim of incapacity due to lack of Costa Rican legislative approval held waived). Cases from other countries raising capacity issues typically involve either claims of sovereign immunity or lack of authority of the person signing the contract. Julian D.M. Lew et al., Comparative International Commercial Arbitration 708 (2003). Although both the New York and Panama Conventions refer to the incapacity of the "parties," the lack of capacity of one party is sufficient for the court to vacate or deny confirmation, recognition, or enforcement of an award made against that party.

Authorities agree that the non-existence of an arbitration agreement also falls under this ground. See China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 286 (3d Cir. 2003) (holding that forgery of the contract including the arbitration clause is a ground for denying enforcement under the New York Convention, and explaining that "[r]ead as a whole, therefore, the Convention contemplates that a court should enforce only valid agreements to arbitrate and only awards based on those agreements"); id. at 292 (Alito, J., concurring) (relying instead on Article IV(1)(b)'s requirement that the party seeking enforcement "supply . . . the original agreement referred to in Article II or a duly certified copy thereof"); see also Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 287 (1981) ("One of the matters of invalidity of the arbitration agreement under the law applicable to it could be the *lack of consent*, misrepresentation, duress, fraud, or undue influence.") (emphasis added); IV Ian R. Macneil, Federal Arbitration Law § 44.40.2.2, at 44:283 (1995) ("The question is whether the phrase 'is not valid' in Article V(1)(a) may be read to include situations in which an award has been made on the basis of an apparent agreement to arbitrate that was 'null and void' or 'inoperative' because the parties did not in fact consent or their consent was somehow legally ineffective. This seems a reasonable interpretation and one consistent with the other provision in Article V(1)(a) dealing with incapacity."). But see Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc., 2005 U.S. Dist. LEXIS 8810, at *22 (D. Kan. May 10, 2005) ("This argument [that a party did not enter into any contract with the other party] does not fit neatly within any of the enumerated grounds listed in article V of the Convention.").

Some courts address challenges to the existence or validity of the arbitration agreement under other grounds for denying recognition or enforcement, most commonly under the public policy ground in Article V(2)(b) of the New York Convention. See, e.g., Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 315 (2d Cir. 1998) (rejecting applicability of public policy defense to claim that contract that was subject of dispute was forged); Haardt v. Wahib S. Binzagr & Bros., 1986 U.S. Dist. LEXIS 30966, at *8 (S.D. Tex. Dec. 19, 1986) ("Plaintiff's argument must be that if Plaintiff proved he signed the 1982 agreement under duress it would be against public policy to enforce the agreement."); Transmarine Seaways Corp. v. Marc Rich & Co., 480 F. Supp. 352, 358 (S.D.N.Y.) ("Agreements exacted by duress contravene the public policy of the nation . . . ."), aff'd mem., 614 F.2d 1291 (2d Cir. 1979).

In Sarhank Group v. Oracle Corp., 404 F.3d 657 (2d Cir. 2005), the Second Circuit held that American contract law applied in determining whether a non-signatory is bound to arbitrate. Id. at 662 ("An American nonsignatory cannot be bound to arbitrate in the absence of a full showing of facts supporting an articulable theory based on American contract law or American agency law."). The court of appeals evaluated the award under Article V(2)(a) rather than under Article V(1)(a), thus enabling it to avoid the choice-of-law rules of Article V(1)(a), which might have resulted in application of Egyptian law. Id. at 661. Commentators and at least one foreign court have criticized the decision. Barry H. Garfinkel & David Herlihy, Looking for Law in All the Wrong Places: The Second Circuit's Decision in Sarhank Group v. Oracle Corporation, 20-6 Mealey's Int'l Arb. Rep. 12 (June 2005) (criticizing decision for "mistakenly" applying Article V(2)(a) to question whether "arbitration agreement existed as between Sarhank and Oracle"); Aloe Vera of Am., Inc. v. Asianic Food(s) Pte, 3 Sing. L. Rep. 174, para. 38 (Sing. High Ct. 2006) ("The approach taken by the appellate court was antithetical to that enshrined in the Convention. It demonstrated an insular attitude to the decisions of foreign tribunals involving American nationals without regard to the fact that the American parties had chosen to do business in a foreign jurisdiction and to make their agreements subject to foreign law and foreign arbitration.").

The defenses asserted in these cases—duress and lack of assent—are more properly addressed under Article V(1)(a). As such, the applicable law would be determined under the choice-of-law rules specified in Article V(1)(a), as discussed in Comment *c*, supra. Applying Article V(2) instead improperly circumvents the choice-of-law rules of Article V(1)(a). That said, given that the issue in the *Sarhank* case itself was whether an arbitration agreement could be enforced against a non-signatory—i.e., whether an arbitration agreement existed to which the non-signatory was bound—the applicable law under Article V(1)(a) would be determined by the choice-of-law rules of the forum. See the last paragraph of Comment *c* of this Section; see also Alan Scott Rau, Understanding (and Misunderstanding) "Primary Jurisdiction," 21 Am. Rev. Int'l Arb. 47, 161-63 & n.295 (2010).

A final possible challenge to the validity of the arbitration agreement is illegality, raised by a party relying on a national law that makes pre-dispute agreements between certain parties or to arbitrate certain claims unenforceable. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 U.S.C. § 26(n) & 18 U.S.C. § 1514A(e) (making pre-dispute arbitration agreements unenforceable as to certain whistle-blower claims); Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (making pre-dispute arbitration agreements unenforceable in franchise agreements between car dealers and manufacturers). But such a challenge ordinarily should be treated under Article V(2)(a) ("subject matter . . . not capable of settlement by arbitration") and its choice-of-law rule instead of under Article V(1)(a). See Gary B. Born, International Commercial Arbitration 761 (2009) ("In most cases, national laws that are directed to the legality of the arbitration agreement itself should be considered as applications of the New York Convention's non-arbitrability exception to the obligation to enforce arbitration agreements . . . rather than as rules of contractual invalidity. That is because such legislative provisions generally have the effect of singling out and forbidding arbitration of specified categories of disputes regardless of the terms of the parties' arbitration agreement (i.e., rendering those categories of disputes 'not capable of settlement by arbitration'), rather than invalidating particular agreements to arbitrate pursuant to generally-applicable rules of contract law.").

c. Applicable law. For most challenges to the validity of the arbitration agreement, the New York and Panama Conventions specify the applicable law. By the terms of the Conventions, if the parties agree to a body of law to govern the validity of the arbitration agreement, that law governs. If the parties do not agree on the law to govern the arbitration agreement, the law of the place selected as the seat of arbitration, without resort to its choice-of-law analysis, governs. As Gary Born explains: "In practice, relatively few national court decisions have considered challenges to the existence, validity, or legality of arbitration agreements under Article V(1)(a). In those cases that have arisen, national courts have generally applied the choice-of-law rules set forth in Article V(1)(a)." Gary B. Born, International Commercial Arbitration 2784 (1999).

Several district courts have followed the basic choice-of-law rule of Article V(1)(a), but then seemed to rely on American law, albeit only on an alternative basis. See Overseas Cosmos, Inc. v. NR Vessel Corp., 1997 U.S. Dist. LEXIS 19390, at *8-10 (S.D.N.Y. Dec. 8, 1997) (holding that "respondent has not established that 'the . . . agreement is not valid under the law to which the parties have subjected it,'" and, alternatively, that the "arbitration agreement contained in the MOA is clearly enforceable under U.S. law"); Verolme Botlek B.V. v. Lee C. Moore Corp., XXI Y.B. Comm. Arb. 824, 827-828 n.3 (N.D. Okla. 1995) (addressing whether contract existed under both Dutch law (the law applicable to the arbitration agreement) and federal common law, and concluding that a contract was formed under both sets of laws).

Other courts have applied the law specified in a general choice-of-law clause in the contract that includes the arbitration clause to the question of the existence or validity of the arbitration agreement. See, e.g., Encyclopaedia Universalis, S.A. v. Encyclopaedia Britannica, Inc., 2003 U.S. Dist. LEXIS 21850, at *22-24 (S.D.N.Y. Dec. 4, 2003) (applying New York law as specified in general choice-of-law clause to claim of impossibility of performance of British arbitration). Commentators are divided on this approach. Compare, e.g., Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 293 (1981) ("[I]f a contract contains a general choice of law clause and provides in the arbitral clause that arbitration is to be held in a country with a different law, the latter indication must be deemed to prevail over the former."); with Alan Redfern & Martin Hunter, Law & Practice of International Commercial Arbitration ¶ 2-86 (4th ed. 2004) ("Since the arbitration clause is only one of many clauses in a contract, it would seem reasonable to assume that the law chosen by the parties to govern the contract will also govern the arbitration clause."). See generally Born, supra, at 443-51 ("There has been substantial controversy about the applicability of this sort of general choice-of-law clause in an underlying contract to the associated arbitration agreement.").

The Restatement follows the view that if the parties have not agreed to a law to govern their arbitration agreement (either expressly or impliedly), the law specified in a general choice-of-law clause generally determines the law applicable to the arbitration agreement. This approach facilitates a consistent interpretive framework for the entire contract, and best reflects the parties' intent. It is fully consistent with the Conventions, which describe the applicable law as "the law to which the parties have subjected" the arbitration agreement. See New York Convention, art. V(1)(a); see also Panama Convention, art. 5(1)(a) ("the law to which the parties have submitted it").

Note that this approach does not permit a court to circumvent the Federal Arbitration Act by interpreting a general choice-of-law clause as incorporating state law into the contract that otherwise would be preempted by the FAA. See Volt Info. Scis., Inc. v. Stanford Univ., 489 U.S. 468, 476 (1989). In several recent cases, the Supreme Court has interpreted choice-of-law clauses in domestic contracts that choose the law of an American state to "encompass prescriptions governing the substantive rights and obligations of the parties" but not the arbitration laws of the specified jurisdiction. See Preston v. Ferrer, 552 U.S. 346, 363 (2008); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63-64 (1995) ("[T]he best way to harmonize the choice-of-law provision with the arbitration provision is to read 'the laws of the State of New York' to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators."). But see Volt, 489 U.S. at 476 (upholding California court's interpretation of choice-of-law clause against FAA preemption challenge). An important element of the Court's decisions in those cases is the recognition that choice of the law of

an American state should not be interpreted as an agreement to the "State's allocation of power between courts and arbitrators, *notwithstanding otherwise-applicable federal law*." Mastrobuono, 514 U.S. at 60 (emphasis added). Instead, by contracting for the law of an American state, the parties are presumed to be contracting for state law as modified by applicable federal law, in this case the FAA. The treatment of general choice-of-law clauses in this Section reflects this understanding and should be understood consistently with it.

The Conventions specify a different choice-of-law rule in cases in which a party alleges it lacked capacity to agree to arbitrate. The governing law in such a case—the "law applicable to them"—is determined by the choice-of-law rules of the enforcing jurisdiction. Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1067 (1961); see also van den Berg, supra, at 276; Restatement (Second) Conflict of Laws §§ 187, 188, & 198.

The choice-of-law rule applicable to issues of lack of capacity also applies to questions of the existence of the arbitration agreement: the choice-of-law rule of the forum where post-award relief is sought. In cases in which a party's assent to the main contract is challenged, using the law specified in a choice-of-law clause in the contract or the law of the arbitral seat would be "bootstrapping"—giving effect to a contract provision when a party's assent to that contract provision is at issue. See Reporters' Note to Comment *d* of this Section.

d. Review of arbitrators' rulings on existence or validity of arbitration agreement. In applying the FAA to domestic awards, a court reviews de novo whether a party assented to a contract that includes an arbitration clause rather than deferring to the arbitrators' decision on that issue. First Options, Inc. v. Kaplan, 514 U.S. 938, 943-44 (1995) (in action to vacate award under FAA Section 10, court decides whether non-signatory was bound to contract that included an arbitration clause). For a discussion of this issue in connection with actions to enforce arbitration agreements, see Section 2-___,[15] supra.

In *China Minmetals*, the United States Court of Appeals for the Third Circuit held that the reasoning of *First Options* applies under the New York Convention as well. China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 289 (3d Cir. 2003). It explained as follows: "Although *First Options* arose under the FAA, the Court's reasoning in the case is based on the principle that 'arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.' This rationale is not specific to the FAA." Id. (citation omitted). Thus, even though the arbitrators had already explicitly rejected the contention that the contract was forged—an allegation directed at the main contract, not just the arbitration agreement—the court of appeals remanded the case to the district court to make an independent determination of that issue. See Guang Dong Light Headgear Factory, Inc., v. ACI Int'l, Inc., 2005 U.S. Dist. LEXIS 8810, at *29 (D. Kan. May 10, 2005) (following *China Minmetals* and holding "that this Court should make an independent determination of the Sales Contracts' validity, and therefore the arbitrability of this dispute."). But see Europcar Italia, S.p.A. v Maiellano Tours, Inc., 156 F.3d 310, 315 (2d Cir. 1998) ("[T]he issue of whether the underlying contract that is the subject of the arbitrated dispute was forged . . . [is] a matter to be determined exclusively by the arbitrators.").

Even if the parties' original arbitration agreement assigns to the arbitral tribunal the exclusive authority to decide whether the arbitration agreement exists, courts may review that issue de novo. See First Options, 514 U.S. at 944. As stated by William W. Park:

> The suggestion that arbitrators can determine their own jurisdiction with respect to the identity of the parties, without a separate agreement submitting that question to arbitration, brings to mind the picture of Baron Münchhausen pulling himself up by his own pigtail. In many cases, such a principle will assume the very proposition

[15] Cross-reference to Section to be drafted on enforcing arbitration agreements.

> (arbitral jurisdiction) that remains to be proven. In the absence of an arbitration agreement accepted by the person alleged to be bound with respect to the dispute in question, the person rendering the award would seem better characterized as a vigilante, intermeddler or imposter.

William W. Park, The Arbitrator's Jurisdiction to Determine Jurisdiction, in International Arbitration 2006: Back to Basics? 55, 130 (Albert Jan van den Berg ed., 2006); see also Alan Scott Rau, Everything You Really Need to Know about "Separability" in Seventeen Simple Propositions, 14 Am. Rev. Int'l Arb. 1, 119 n.323 (2003) ("Finally, is it still necessary to remind ourselves that even the most elegant and expert drafting is irrelevant when there has never been an agreement to arbitrate in the first place? . . . [I]t is simply inconceivable that an American court—faced with an allegation of either forgery or fraud in the factum—would see a purported ruling by the ICC Court as posing any obstacle whatever to an application for a stay of the arbitration."). Instead, only by a separate and subsequent agreement can the parties submit the issue of the existence of the arbitration agreement to the arbitral tribunal for it to decide exclusively. Park, supra, at 130-31. For further discussion, see Section 2-___,[16] supra.

In Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772 (2010), the Supreme Court held that the issue of whether an arbitration agreement was unconscionable was for the arbitrator, rather than a court, to decide when the parties had clearly and unmistakably delegated the issue to the arbitrator. The arbitration agreement in *Rent-A-Center* included a "delegation provision," which specified that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." Id. at 2775. The Court reasoned that the delegation provision itself was an agreement to arbitrate, which was separable from the agreement to arbitrate in which it was included. Because the unconscionability challenge was directed at the arbitration agreement as a whole, and not the delegation provision, a court "must treat [the delegation provision] as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the [arbitration] Agreement as a whole for the arbitrator." Id. at 2779. Although *Rent-A-Center* dealt with the enforcement of an arbitration agreement, the Court's reasoning would apply as well to the enforcement of an arbitral award. For discussion of whether institutional arbitration rules constitute a clear and unmistakable agreement under *Rent-A-Center*, see the Reporters' Note to Comment *e*, Section 4-14, infra.

e. Review of arbitral tribunal's rulings on existence or validity of main contract. "It is . . . well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2855-56 (2010). Consistent with Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), and Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006), however, courts do not review the tribunal's rulings on challenges to the validity (as distinct from the existence) of the contract as a whole. Some commentators have criticized the "metaphysical" lengths to which the distinction between validity and existence has been taken in "Continental legal learning." Alan Scott Rau, "Separability" in the United States Supreme Court, 2006 Stockholm Int'l Arb. Rev. 1, 18-19 (describing "the whole notion of 'nonexistence'" as "not only sterile and purely verbal—but what is worse, . . . completely unnecessary."). The terminology is reflected in dicta in the Supreme Court's decision in *Buckeye*, however, 546 U.S. at 444 n.1 (distinguishing between the question of the "contract's validity" and the question "whether any agreement . . . was ever concluded"), and here serves the purpose of identifying at a practical level those issues subject to de novo review by the courts. For a more detailed discussion of this issue, see Section 2-___,[17] supra. In the unusual case that a challenge to the existence of the main contract does not implicate the parties' assent to arbitration, the court does not review a tribunal's ruling on the issue. See, e.g., Rau, supra, at 19-22

[16] Cross-reference to Section to be drafted on separability doctrine and enforcing arbitration agreements.

[17] Cross-reference to Section to be drafted on separability doctrine and enforcing arbitration agreements.

(listing possible examples). In such a case, the parties have agreed to arbitrate the existence of the main contract, making that issue one for the tribunal, and not the courts, to decide.

Uncertainty remains, however, as to whether challenges to the main contract on grounds such as duress and lack of capacity affect the existence of the main contract or only its validity. See Buckeye Check Cashing, 546 U.S. at 444 n.1 (leaving question open). Compare Amirmotazedi v. Viacom, Inc., 2011 U.S. Dist. LEXIS 23667, at *19-20 (D.D.C. Mar. 9, 2011) ("In this case, Plaintiff challenges the making of the Arbitration Agreement on the grounds of intoxication . . . . Because this mental capacity defense goes to the formation, or the 'making' of the Arbitration Agreement, under § 4 of the FAA it must be decided by this Court."); In re Morgan Stanley & Co., 293 S.W.3d 182, 189 (Tex. 2009) (defense of lack of capacity is issue for court to decide); and Transmarine Seaways Corp. v. Marc Rich & Co., 480 F. Supp. 352, 358 (S.D.N.Y.) ("There is, of course, no substance to Transmarine's argument that the question is foreclosed from judicial review by the conclusion of a majority of the arbitrators that duress was not present, so that the contract was enforceable."), aff'd mem., 614 F.2d 1291 (2d Cir. 1979); with Sommers v. Cuddy, 2009 U.S. Dist. LEXIS 30126, at *9 (D. Nev. Mar. 30, 2009) (court not permitted to consider defense of lack of mental capacity because "[i]t is clear from Plaintiffs' argument that Plaintiffs are challenging the enforcement of the contract as a whole and not just the arbitration provision."); Nat'l Union Fire Ins. Co. v. Las Vegas Prof'l Football L.P., 2010 U.S. Dist. LEXIS 5829, at *6-7 (S.D.N.Y. Jan. 15, 2010) ("LVG argues that the Payment Agreement was the product of duress and therefore is void or voidable. It has not specifically challenged the validity of the arbitration provisions, or argued that those provisions were the product of fraud, duress or some other impropriety. Therefore, the issue of the contract's validity is an issue for the arbitrators to decide."). See the more extensive discussion in Section 2-___,[18] supra.

Illustration 1 is based on China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274 (3d Cir. 2003).

Illustration 2 is based on Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).

f. Waiver and determination sua sponte. Issues of waiver and sua sponte determination by the court are addressed in Section 4-25, infra. No special rule on either waiver or sua sponte determination applies under this Section.

g. Partial grant of post-award relief. For discussion of the authority of courts to grant post-award relief as to part but not all of an award, see Comment *c* to Section 4-1(d) & (e), supra.

[18] Cross-reference to Section to be drafted on separability doctrine and enforcing arbitration agreements.

§ 4-13. Denial of Notice or Opportunity to Present Case

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that the party opposing such grant of relief did not receive adequate notice of the appointment of the arbitral tribunal or of other important phases of the arbitration proceedings.

(b) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that a serious procedural defect in the arbitral process resulted in a material denial of the party's opportunity to present its case or to rebut its opponent's case.

(c) A party is denied an opportunity to present its case or rebut its opponent's case under this Section to the extent that the court finds evident partiality by an arbitrator. Evident partiality exists when there is proof that would cause an objective, disinterested observer who is fully informed of the relevant facts related to the arbitrator's conduct or alleged conflicts to develop a serious doubt regarding the fundamental fairness of the arbitral proceedings.

(d) The adequacy of notice and of a party's opportunity to present its case under this Section is determined by reference to federal law and, to the extent not in conflict with federal law, state law.

Comments:

a. Generally. Fundamental procedural fairness is essential to the legitimacy of the arbitral process and the resulting award. Both Article V(1)(b) of the New York Convention and Article 5(1)(b) of the Panama Convention permit a court to deny recognition or enforcement of an arbitral award against a party that did not receive adequate notice of important stages of arbitral proceedings, or that otherwise was denied fundamental procedural fairness. This Section is interpreted against the background of the general presumption in favor of giving effect to arbitral awards (see § , supra), and the broad discretion that arbitrators enjoy in managing arbitral proceedings. Consequently, this exception is interpreted narrowly and protects only against serious procedural defects that have a material effect on arbitral proceedings, rendering them fundamentally unfair.

b. Source of standards of procedural fairness. The New York and Panama Conventions do not elaborate upon the precise standards of procedural fairness applicable to the recognition and enforcement of arbitral awards. These standards are determined by reference to the law of the forum where the award is sought to be confirmed (for U.S. Convention awards) or recognized or enforced (for foreign Convention awards). In the United States, the relevant principles are generally referred to as "due process" standards, but use of this term does not imply that domestic constitutional due process protections directly apply in arbitration. The procedural protections that assure fundamental fairness in a consensual arbitral

process, particularly ones involving parties from different legal cultures and procedural traditions, are distinct from those that would be required in judicial proceedings in which the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution apply.

c. Content of procedural fairness standards. In the United States, procedural fairness requires that each party have a fair opportunity to present its case to the tribunal and to rebut its opponent's case at a meaningful time and in a meaningful manner. What constitutes "adequate" notice and a "meaningful" opportunity depends on the facts and circumstances of the particular case. These standards generally require that each party be afforded a reasonable amount of time in which to prepare and present evidence and argument to the tribunal. An absence of notice is not a basis for vacating or denying recognition or enforcement to an award unless it resulted in serious procedural disadvantage that had a material effect on arbitral proceedings, rendering them fundamentally unfair to the party who was denied notice.

Procedural fairness also requires that a party be informed of and permitted to respond to evidence and argument of the opposing party or parties. This requirement means that all parties should be afforded broadly comparable opportunities to be heard. Precise equivalence in procedural opportunities is not required, and courts generally defer to arbitral tribunals' rulings regarding case management, unless such rulings create serious procedural inequalities that had a material effect on the fundamental fairness of the arbitral proceedings.

Illustrations:

1. An arbitral tribunal refuses to reschedule a hearing based on the alleged unavailability of *B*'s expert, but admits over *A*'s objection the expert's witness statement. *A* later challenges enforcement of an award in favor of *B*, arguing that it was denied a fair opportunity to rebut *B*'s case because it was unable to cross-examine *B*'s expert. The court enforces the award.

2. An arbitral tribunal affords *A* seven days to present its case, but rules that, because certain of B's intended witnesses would offer duplicative and marginally relevant testimony, *B* is limited to five days to respond. *B* later seeks to vacate an award in favor of *A* on the ground that it was not accorded equal time to present its arguments. The court confirms the award.

3. Over the objection of *B*, an arbitral tribunal decides on the strength of *A*'s written submissions alone to issue an award in favor of *A* without permitting counter submissions by *B*. *B* opposes enforcement of the resulting award on the ground that it did not have an opportunity to present its case. A court may refuse to enforce the award.

4. The parties provided in their arbitration agreement for a "documents only" arbitration, but one party later objects claiming that it

must be able to submit witness testimony in order to prove its case. The court enforces the award.

d. Lack of notice. If a party does not receive adequate notice of an essential event in the arbitral process, the resulting award may be challenged. The test is whether the lack of notice constitutes a serious procedural defect that materially affects the fundamental fairness of arbitral proceedings. Notice is essential to enable a party to participate effectively in arbitral proceedings and effectively present its case. Notice must be given of the commencement or existence of the proceedings and generally of other important events, such as the constitution of the tribunal, the scheduling of hearings, and the setting of deadlines for submissions. The absence of such notice may be regarded as a serious procedural defect. When notice is insufficient with respect to only a limited aspect or portion of the proceedings, but does not affect the fundamental fairness of the entire proceedings, the award will ordinarily still be entitled to confirmation, recognition or enforcement under this Section.

The requirement of notice within the meaning of this Section can be satisfied when effective notice has been provided to a party, when the party otherwise had actual knowledge of the proceedings or the relevant event or, in appropriate circumstances and if consistent with the interests of justice, when the party has received constructive notice.

e. Limitation on the opportunity to present case generally. A party may challenge a Convention award on the ground that the tribunal rendered the proceedings

fundamentally unfair by so severely limiting the party's ability to present proof or arguments that the party was effectively unable to present its case or rebut its opponent's case. Such an argument will only be successful if the limitation constitutes a serious procedural defect that results in fundamental unfairness by limiting a party's ability to be heard and have its factual submissions and legal arguments considered by the tribunal. Parties often unsuccessfully challenge an award on the basis of alleged procedural defects such as refusal to permit discovery, to allow witness testimony or cross-examination, or to accommodate attorney or witness schedules. These types of challenges are rarely successful because they do not generally constitute serious procedural defects that had a material effect on the proceedings, and because the procedural decision made by the arbitral tribunal is determined to be within the tribunal's discretion in managing the proceedings.

f. Opportunity to present case and impartiality of the arbitral tribunal. Ordinarily the requirement that a party have an opportunity to present its case also implies an impartial tribunal that is willing to consider each party's presentation of its case and make a determination based on the parties' factual submissions and legal arguments. Consequently, a finding that an arbitrator had an unfair predisposition toward a particular outcome or an improper bias in favor of one party may be a basis for denying post-award relief. Parties may agree to certain procedures, particularly with respect to the procedures and conditions for the appointment of party-appointed arbitrators, which affect application of the impartiality standards. An agreement by both parties regarding the appointment of an arbitrator after proper disclosure will

generally preclude later objection. Although arbitrator misconduct and bias that affect the fundamental fairness of arbitral proceedings may be raised under this Section, such allegations may also be the basis for challenging an award on the ground that the constitution of the tribunal or arbitral procedure did not comport with the parties' agreement under Section 4-15, infra, or, as parties often argue, that the award violates public policy under Section 4-18, infra.

(i). "Evident partiality." Under U.S. law, the standard for determining when an arbitrator is improperly biased in a manner that precludes a party from having a meaningful opportunity to present its case is when an arbitrator is determined to be subject to "evident partiality." The Supreme Court has not provided any clear or recent guidance on the meaning of this statutory term. In the absence of such guidance, lower federal courts have diverged significantly in defining "evident partiality" as that term is used in the FAA.

Although numerous tests have been articulated, they fall into three general categories. First, some courts have required for application of this ground that an arbitrator have a connection to one of the parties or the dispute that creates the appearance of partiality or impropriety. This standard is often described as akin to the conflict-of-interest standard imposed on judges. Second, a few courts have required for satisfaction of this ground that an arbitrator have some personal interest, including but not limited to a pecuniary interest, in the outcome of the dispute, as when the arbitrator has an ongoing contractual relationship with one of the parties. This view is

often characterized as requiring proof of actual bias. The third category of cases might be considered an intermediate view. Under this view, to establish evident partiality, a party must present evidence that would cause an objective, disinterested observer who is fully informed of the relevant facts related to the arbitrator's conduct or conflicts to develop a significant doubt about the fundamental fairness of the proceeding in that case.

Each of the first two approaches generate significant conceptual and pragmatic concerns, albeit at opposite ends of the spectrum. Accordingly, the Restatement adopts the third approach, namely that in order to establish evident partiality sufficient to justify vacating, or refusing to confirm, recognize, or enforce an award, a party must present evidence that would cause an objective, disinterested observer to entertain a serious doubts about the fundamental fairness of the proceedings. This position strikes an appropriate balance. On the one hand, it serves to preserve the integrity of the arbitral process and acknowledges the difficulty of proving actual bias. On the other hand, it recognizes that parties who consent to arbitration generally contemplate arbitrators who have specialized knowledge that is a consequence of their remaining engaged in professional relationships and maintaining professional affiliations.

In determining whether this standard is satisfied, a court considers the specific facts of the individual case. In evaluating these facts, courts generally consider: 1) the extent and character of the relevant personal interest, pecuniary or otherwise, or relationship of the arbitrator; 2) the directness of the relationship between the

arbitrator and the party that it was alleged to favor; 3) the connection between the arbitrator's interest or relationship and the arbitration; 4) the proximity in time between the interest or relationship and the arbitral proceeding; 5) any relevant industry practices that may affect the parties' expectations regarding relationships between the arbitrator, and the parties and their dispute; and 6) the extent to which the arbitrator undertook a reasonable investigation to discover potential conflicts and actually knew, or should have known, of the information that was not disclosed. A court may also consider whether the arbitrator undertook a reasonable investigation to discover potential conflicts and whether the arbitrator knew or should have known of the information that was not disclosed.

(ii). Disclosure, disqualification and challenge to awards. This Section addresses the grounds for vacating, or denying confirmation, recognition, or enforcement of an award. One reason for the confusion that surrounds arbitrators' impartiality obligations is that an arbitrator's potential conflicts of interest are relevant at several junctures in the lifecycle of an arbitration—disclosures during the appointment process, challenges to disqualify arbitrators, and challenges to awards under this Section. At each juncture, an arbitrator's impartiality obligations may be reviewed by a different entity, often under different standards, and for a different purpose. While these various inquiries are not completely unrelated, they are distinct and the findings in the latter categories (disclosure and disqualification) only indirectly affect a court's analysis of the ground under this Section.

Most arbitral rules, industry practice guidelines, and caselaw, impose on arbitrators obligations to disclose certain categories of information that may potentially raise questions about their independence or impartiality. These disclosures are initially required during the appointment process, but arbitrators have a continuing obligation to disclose any new information that comes to light later in the proceedings. In this context, disclosure promotes transparency and serves a prophylactic purpose, alerting the parties to circumstances that may bear upon an arbitrator's impartiality and independence and providing them an opportunity to raise a timely challenge to the nominee's appointment.

Based on such disclosures, a party may seek to disqualify the arbitrator. Disclosure of a potential conflict, however, does not necessarily establish a basis for disqualifying an arbitrator. Most institutional rules and practice guidelines urge arbitrators to err on the side of disclosure. For more detailed discussion of the standards for disqualifying arbitrators, see Section __, supra.[19]

Finally, under this Section, alleged arbitrator conflicts may be raised in seeking vacatur, or opposing confirmation, recognition, or enforcement of an arbitral award. A party that duly objected to a disclosure that did not result in disqualification, and did not subsequently waive that objection, may reassert under this Section the same objection to oppose a grant of post-award relief. More commonly, a party disappointed in an arbitral award discovers information that an arbitrator arguably should have

[19] Cross-reference to forthcoming section on arbitrator disqualification.

disclosed, but did not. As noted above, failure to disclose information that is either relevant or was required to be disclosed is not in itself grounds for vacatur or refusal to confirm, recognize, or enforce an award. Instead, the undisclosed information must be such that it could be the basis for a finding of evident partiality under this Section.

(iii). Relationship between arbitral and judicial impartiality. Another factor contributing to confusion and lack of clarity in regard to arbitrators' impartiality obligations is the frequent analogy of arbitrators to judges. Despite apparent similarities, the nature of arbitral decisionmaking and the selection process for arbitrators requires a conception of impartiality that is markedly different from that ascribed to judges.

Arbitrators are usually designated, directly or indirectly by the parties, typically on account of their specific expertise regarding issues in dispute. Arbitrators are commonly assumed to maintain a variety of other professional positions and affiliations, and are compensated by the parties. Most of these features of an arbitrator would be unacceptable for a publicly appointed judicial officer. They are generally acceptable for arbitrators, however, because the specific terms of the parties' agreement usually contemplate arbitral decisionmakers who have certain relationships and connections either to the parties or the dispute. For these reasons, while the terms "partiality" and "impartiality" are often used both in discussing arbitrators and judges, they have distinctly different meanings in the two contexts.

(iv). Distinctions between party-appointed arbitrators and arbitral chairs. Courts and commentators often suggest that different standards of independence and impartiality apply to party-appointed arbitrators and arbitral chairpersons. That view reflects an assumption that chairs may be called upon to act as umpires or tie-breakers between the two party–appointed arbitrators. However, the language of the FAA provides no basis for differentiating among arbitrators. Moreover, a strong consensus has developed in the international arbitration community to the effect that, absent party agreement to the contrary, chairs and party-appointed arbitrators are subject to comparable standards of independence and impartiality.

While the standards are defined similarly in the abstract, they can differ in practice. For example, in a typical tripartite tribunal, a party-appointed arbitrator is typically selected by the appointing party, usually because of specific traits, such as nationality, that the party-appointed arbitrator shares with the party. Moreover, the appointing process often includes an interview with potential candidates. The same shared traits and ex parte pre-appointment interviews that are standard practice for party-appointed arbitrators would not generally be acceptable for chairs. Because selection based on shared nationality and ex parte pre-appointment interviews may be considered standard practice with regard to party-appointed arbitrators, they will not in themselves ordinarily furnish a basis for finding evident partiality on the part of the arbitrator.

g. Waiver and determination sua sponte. Parties can waive most standard procedures and various types of procedural defects. Waiver may be explicit, either in the parties' written arbitration agreement or during the hearings. Often, waiver is implied by a party's failure to object on a timely basis. If a party does not object to a particular procedure during the arbitration, it ordinarily may not later challenge the award on that procedural ground. Relatedly, if a party defaults in an arbitration, it is generally precluded from objecting to arbitral procedures. Parties may also waive certain objections to the appointment or qualifications of arbitrators if they do not, in an institutional arbitration, raise a timely challenge before the institution. However, a party ordinarily does not waive an objection merely by virtue of having failed to seek to have the award set aside by a competent court. See § 4-25, infra. Some types of egregiously unfair procedures that also constitute violations of public policy under Section 4-18, infra, may not be subject to waiver. To date, however, such potential violations remain hypothetical.

h. Burden of proof. As with other grounds for denying post-award relief for Convention awards, the burden is on the party opposing the grant of relief to prove either the absence of notice or the existence of a material procedural defect. Generally, the party asserting lack of notice is required to demonstrate the absence of *actual* notice. In appropriate circumstances and when consistent with the interests of justice, however, an award may be enforced despite such proof, if that party had constructive notice, such as if the notice was delivered to the party's attorney of record. A mere denial of knowledge is not sufficient for the party opposing an application for post-

award relief, particularly when there is evidence that the relevant information was duly sent. Similarly, failure to comply with formal procedures for providing notice is not sufficient to establish an absence of notice under this Section.

The burden of establishing evident partiality is not satisfied by mere suspicion or unsubstantiated claims. The relevant evidence must be direct, definite, and capable of demonstration. Courts also often require that a party seeking vacatur or opposing confirmation, recognition, or enforcement make an affirmative showing that essential facts underlying the challenge were not, and could not have been, discovered by the exercise of due diligence prior to or during the arbitral proceedings.

With regard to other procedural defects, it is generally not sufficient for a party to establish only the existence of the defect, without demonstrating its effect on the fundamental fairness of the proceedings. It is not necessary, however, that the party opposing an application for post-award relief prove that the defect actually affected the substantive outcome of the case.

i. Partial grant of post-award relief. In appropriate circumstances, as outlined in Comment *b* to Section 4-1(d), supra, a court may decide to confirm a portion a U.S. Convention award, or recognize, or enforce a portion of a foreign Convention award, while denying relief to the rest. Although partial grant of post-award relief is theoretically possible under this Section, as a practical matter, it will rarely be appropriate. It is generally difficult to attribute particular substantive outcomes to specific procedural failings or to specific events for which notice was lacking. Courts

should not parse and scrutinize each phase or aspect of arbitral procedure to determine whether post-award relief is appropriate. As a result, a partial grant of post-award relief will be most feasible in cases that have been expressly bifurcated, for example, as between liability and quantum of damages. It is especially difficult to justify partial, as opposed to full, post-award relief if the award is challenged on the basis of arbitrator bias.

REPORTERS' NOTES

a. Generally. The procedural protections guaranteed by the New York and Panama Conventions are limited to those that are fundamental to a fair adjudication. Consorcio-Rive S.A. v. Briggs of Cancun, Inc., 82 Fed. Appx. 359, 364 (5th Cir. 2003) ("[T]he strong federal policy in support of encouraging arbitration and enforcing arbitration awards dictates that we narrowly construe the defense that a party was 'unable to present its case.'"); Generica Ltd. v. Pharm. Basics, Inc., 1996 U.S. Dist. LEXIS 13716, at *9-10 (N.D. Ill. Sept. 16, 1996) ("'[T]he exception arising from an inability to present one's case 'should be narrowly construed' in light of the Convention's goal of encouraging the timely and efficient enforcement of awards."); see also Generica Ltd. v. Pharm. Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997). Accordingly, under this Section, a request for post-award relief will only be denied for serious procedural defects that affect the fundamental fairness of the proceedings.

b. Source of standards of procedural fairness. Since the New York and Panama Conventions do not specify the law applicable to the interpretation and application of this ground, several approaches have developed. Most nations have arbitration laws that require that arbitrations conducted on their territory comport with basic notions of procedural fairness, which are predicated on national procedural traditions applicable in judicial contexts. National arbitration laws and national procedural standards may apply directly when a party seeks to have an award set aside in the seat. They also indirectly inform judicial analysis when parties challenge recognition and enforcement. Thus, Article V(1)(b) of the New York Convention has been interpreted as "essentially sanction[ing] the application of the forum state's standards of due process." Karaha Bodas Co., L.L.C., v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 298-299 (5th Cir. 2004); see also First State Ins. Co. v. Banco de Seguros Del Estado, 254 F.3d 354, 357 (1st Cir. 2001); Generica, 125 F.3d at 1129-30; Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 975-76 (2d Cir. 1974); Telenore Mobile Commc'ns AS v. Storm, L.L.C., 524 F. Supp. 2d 332, 368 (S.D.N.Y. 2007); Biotronik Mess- und Therapiegeraete GmbH v. Medford Med. Instrument Co., 415 F. Supp. 133, 140 (D.N.J. 1976).

When national procedural standards are applied, however, courts commonly emphasize the international character of the arbitral process, and do not directly apply purely domestic procedural standards. Generica, 125 F.3d at 1129-30. In this vein, some commentators have argued that denial of recognition and enforcement should be based only on internationally recognized standards of procedural fairness, not "idiosyncratic" national standards. See Gary B. Born, International Commercial Arbitration 1266 (2009); cf. Rhone Mediterranee Compagnia Francese Di Assicurazioni e Riassicurazoni v. Achille Lauro, 712 F.2d 50, 54 (3d Cir. 1983) (stating that violations of "parochial" procedural rules should not lead to denial of recognition of awards under Article V(1)(d) in light of Contracting States' commitments under the New York Convention). While courts have not adopted a purely international

standard, they have demonstrated a willingness to tailor their analysis to international procedures and practices.

c. Content of procedural fairness standards. As a matter of terminology, the phrase "due process" is used in both a technical and a more generic sense. In the United States, notions of procedural fairness derive conceptually from the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution. All U.S. courts that have considered the issue, however, have concluded that, due to the absence of state action, constitutional due process standards do not apply directly in an arbitral proceeding to which parties have agreed. See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999); F.D.I.C. v. Air Fla. Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987); Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986). While these cases involve domestic arbitration, their reasoning extends to international arbitration and judicial review of foreign arbitral awards. Despite these precedents, many courts and commentators both in the United States and in foreign nations refer to guarantees of procedural fairness as guarantees of "due process." Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145-46 (2d Cir. 1992); Parsons & Whittemore, 508 F.2d at 975; Biotronik, 415 F. Supp. at 140.

Adding to this confusion, some arbitration cases cite to domestic constitutional due process precedents in their discussions. See, e.g., Iran Aircraft Indus., 980 F.2d at 146 (citing Mathews v. Eldridge, 424 U.S. 319, 333 (1976)). It is clear from cases that have expressly considered the state action issue, however, that references to "due process" are illustrative and do not denote direct application of constitutional protections in international commercial arbitration. Instead, they refer to more generic conceptions of procedural fairness applicable to any adjudicatory process.

Apart from the state action issue, constitutional due process protections that are ensured in U.S. judicial contexts would be inapposite in international commercial arbitration. In agreeing to submit their claims to arbitration, parties have agreed to substitute arbitral procedures for those that would otherwise apply in a judicial proceeding. See Haardt v. Wahib S. Binzagr & Bros., 1986 U.S. Dist. LEXIS 30966, at *8 (S.D. Tex. Dec. 19, 1986). As a result, the guarantees of procedural fairness in the international arbitration setting are more flexible than the due process guarantees that apply in U.S. courts. This increased flexibility is consistent with the fact that parties have consented to arbitrate their dispute. Accordingly, parties have either agreed, directly or indirectly, to have specific arbitral procedures apply or to allow the arbitral tribunal to determine what procedures are appropriate. Julian D.M. Lew, Loukas A. Mistelis & Stefan Kröll, Comparative Intenational Commerical Arbitration (2003) (analyzing the role of party autonomy in determining procedural and substantive factors of an international arbitration). In the international context, party autonomy in the choice of arbitral procedures is even more important since those procedures must accommodate parties from different legal systems with differing procedural traditions.

When parties agree to arbitrate a dispute, they agree to substitute arbitral procedures for the procedures that would otherwise apply in judicial proceedings. Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 299 (S.D. Tex. 1997), judgment aff'd on other grounds, 161 F.3d 314 (5th Cir. 1998); Parsons & Whittemore, 508 F.2d at 975-76. In agreeing to arbitrate, parties also confer on an arbitral tribunal (and in some instances an arbitral institution) the power, generally subject to party agreement, to manage the arbitral proceedings. Accordingly, many grounds that might be available for challenging judicial proceedings as procedurally defective are not grounds for challenging the procedural fairness of arbitral proceedings. The significant latitude parties enjoy in determining the applicable procedures is necessary in order for arbitral proceedings to accommodate the preferences of parties from different legal traditions. Moreover, in agreeing to arbitrate, the parties vest the arbitrators with broad authority to determine the procedural features necessary or useful for effective management of the arbitration. As the court explained in Hoteles Condado Beach, La Concha & Convention Ctr. v. Union De Tranquistas Local 901:

> An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence; the

> arbitrator's role is to resolve disputes, based on his consideration of all relevant evidence, once the parties to the dispute have had a full opportunity to present their cases.

763 F.2d 34, 38 (1st Cir. 1985). While *Hoteles Codado Beach* involved domestic arbitration, the court's characterization of an arbitral tribunal's procedural authority applies with equal, if not greater, force in international arbitration. Accordingly, as long as procedures either agreed to by the parties or prescribed by an arbitral tribunal do not violate fundamental notions of procedural fairness, they will not later provide a basis for vacating or denying confirmation, recognition, or enforcement of an award under this Section.

In evaluating claims under this Section, a court affords significant deference to the evidentiary rulings by an arbitral tribunal and other decisions regarding the management of proceedings. See Trans Chem. Ltd., 978 F. Supp. 266 (enforcing award despite claim that tribunal had issued an "irrational" scheduling order, erred in ruling on requests for interim measures, and failed to issue a reasoned award). Moreover, courts do not reevaluate an arbitral tribunal's assessment of the evidence or of a witness's credibility. See Asociacion De Empleados Del Estado Libre Asociado De P.R. v. Union Internacional De Trabajadores De La Industria De Automoviles, Aeroespacio e Implementos Agricolas, 2008 U.S. Dist. LEXIS 50373, at *8-9 (D.P.R. June 23, 2008). Courts must, however, consider the specific allegations underlying the claims of procedural defect, and this evaluation sometimes requires an examination of how the alleged defect relates to the substantive claims or defenses that a party contends it was unable to present. See Karaha Bodas Co., 364 F.3d at 300-301 (noting that "exclusion of relevant evidence [that] deprives a party of a fair hearing" can be the basis for denying recognition of an award, but specifically evaluating rebuttal submitted by the party seeking enforcement to find that it did not raise new claims and thus the party opposing enforcement was not unfairly denied opportunity to confront claims); Iran Aircraft Indus., 980 F.2d at 146 (tribunal misled claimant concerning the form of evidence needed to substantiate claim).

Contrary to the approach of U.S. courts, which have repeatedly held that the procedural guarantees applicable to arbitration are not the same as those that apply in state or federal court proceedings, some foreign systems purport to determine the content of the Convention standards by direct reference to their domestic court procedures, or to their own versions of international arbitration law, or international law more broadly. For example, courts in Europe apply the procedural protections ensured by Article 6 of the European Convention on Human Rights in international arbitration. Meanwhile, Article 190(2)(d) of the Swiss Law on Private International Law permits arbitral awards to be set aside where the principle of equal treatment of the parties or their right to be heard in an adversarial procedure has not been observed. See Born, supra, at 2575-78.

d. Lack of notice. A failure to serve legal documents in a manner consistent with national procedural rules is not a ground for challenge to an award. The parties' arbitration agreement displaces national rules for service, and therefore those rules cannot be invoked as evidence of a procedural defect. If there is an ambiguity regarding the notice procedures agreed upon in an arbitration agreement, as with other issues of contractual interpretation, the arbitrators' interpretation of notice requirements is entitled to deference. See Choice Hotels Int'l, Inc. v. SM Prop. Mgmt., LLC, 519 F.3d 200, 208-09 (2008) (deferring to arbitrator's decision that service at last-known address was sufficient under AAA rules and that agreement did not require service on representative designated in agreement for notice of other contractual events).

In exceptional instances, a court may recognize and enforce an award, even if a party did not have actual notice of the proceedings, if that party either had constructive notice of the proceedings or bears some responsibility for the failure of notice. See Bernstein Seawell & Kove v. Bosarge, 813 F.2d 726, 732 (5th Cir. 1987) (holding that even in the absence of actual notice, information provided to party's attorney about arbitration was sufficient to constitute constructive notice); First State Ins. Co. v. Banco de Seguros Del Estado, 254 F.3d 354, 357-58 (1st Cir. 2001) (lack of notice attributed to negligence of party's designated agent).

e. Limitations on the opportunity to present case generally. Generally, denial of a party's request to have even a single oral hearing may be grounds for denying post-award relief. There are, however, exceptions. For example, if the parties have agreed in their arbitral agreement to a "documents only" or an online arbitration, denial of a subsequently requested oral hearing is not adequate grounds for challenge. Relatedly, if a party requests an additional hearing or hearings, or other procedural opportunities, an arbitral tribunal's ruling on the request is afforded deference and denial of such a request will not generally be sufficient ground for refusing recognition or enforcement of an arbitral award.

Other challenges to awards based on limitations on a party's ability to present evidence rarely suffice to justify vacatur or a refusal of confirmation, recognition or enforcement, unless the limitations are applied to the parties in a grossly unequal manner or they materially prevent a party from being able to assert a critical claim or defense. This standard acknowledges that arbitrators have broad discretion to limit the number of hearing days or the number of witnesses who may be called to testify, to limit the availability or extent of discovery, and to limit or exclude formal evidentiary objections and cross-examination. A refusal to reschedule hearings to accommodate witnesses or attorneys is also generally not a sufficient basis for vacating or defeating confirmation, recognition or enforcement of an award.

In appropriate circumstances, an award may be denied recognition or enforcement if the tribunal's decision is based on facts or legal issues that were not presented or argued by the parties. If a party is denied an opportunity to address or rebut factual or legal issues, it may effectively be denied an opportunity to present its case, at least when the issues are material to the final disposition. An arbitral tribunal is not precluded from raising factual or legal issues sua sponte during the proceedings. However, the tribunal must then afford the parties an opportunity to address and respond to those issues.

f. Opportunity to present case and impartiality of the tribunal. Arbitrator impartiality is fundamental to the arbitration process. "The problem of arbitrator partiality is a difficult one because consensual arbitration involves a tension between abstract concepts of impartial justice and the notion that parties are entitled to a decision maker of their own choosing, including an expert with the biases and prejudices inherent in particular worldly experiences." Rev. Unif. Arb. Act § 12, cmt. 1, 7 U.L.A. 43 (2005). Challenges based on allegations of an arbitrator's lack of impartiality or failure to make a required disclosure regarding an issue that may affect the arbitrator's impartiality may be brought under this Section or Section 4-15, infra. They are often asserted as alleged violations of public policy under Section 4-18, infra. See, e.g., Andros Compania Maritima, SA v. Marc Rich & Co., 579 F.2d 691, 699 n.11 (2d Cir. 1978); Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 819 n.2 (D. Del. 1990); Fertilizer Corp. of India v. IDI Mgmt. Inc., 517 F. Supp. 948, 954 (S.D. Ohio 1981). Because this Section directly addresses procedural fairness, however, such challenges are more appropriately brought under it.

(i). "Evident partiality." Although "evident partiality" is a term that derives from Section 10(a)(2) of the FAA, it is applicable to Convention awards by virtue of the fact that the Conventions direct reviewing courts to apply local procedural standards. Accordingly, under this ground, a non-Convention award may be denied recognition, or enforcement "where there was evident partiality . . . in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). The obligation to be free from "evident partiality" continues to apply throughout the course of arbitral proceedings, including after the initial appointment of the tribunal.

Like obscenity, evident partiality "is an elusive concept: one knows it when one sees it, but it is awfully difficult to define in exact terms." Int'l Bhd. of Elec. Workers v. Coral Elec. Corp., 104 F.R.D. 88, 89 (S.D. Fla. 1985).

The first and last time the Supreme Court has offered any guidance on the meaning of "evident partiality" was in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968). The decision, however, does not provide clear guidance. Justice Black, writing the opinion of the Court, reasoned that "any tribunal permitted by law to try cases and controversies not only must be unbiased

but also must avoid even the appearance of bias." Id. at 150 (emphasis added). Justice White ostensibly concurred with Justice Black's opinion, but appeared to offer a contrary definition of evident partiality. Specifically, Justice White's concurrence reasoned that "arbitrators are not "automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." Id. Because Justice White's reasoning seems to differ so markedly from Justice Black's opinion, courts do not agree about whether Justice Black's opinion in *Commonwealth Coatings* was a plurality or a majority opinion, meaning whether Justice White concurred in Justice Black's reasoning, joined the opinion to make it a majority, or joined only in the outcome, leaving Justice Black's opinion as a plurality opinion. Compare Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) ("Commonwealth Coatings is not a plurality opinion."); Beebe Med. Ctr., Inc. v. InSight Health Serv. Corp., 751 A.2d 426, 434 (Del. Ch. 1999) ("Federal courts have struggled over the meaning and application of Commonwealth Coatings, principally because of the unusual nature of Justice White's concurrence in which he purported to join the majority opinion while delimiting its application."); with Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82 (2d. Cir. 1984) ("Four justices . . . [who joined Justice Black's opinion] do not constitute a majority of the Supreme Court.").

In light of the confusion over Supreme Court precedent, and in the absence of more recent guidance, lower federal courts have diverged significantly in attempting to define "evident impartiality." See Burlington N. R. R. Co. v. Tuco, Inc., 960 S.W.2d 629, 633-35 (Tex. 1997) (reviewing various splits in both state and federal cases). Judicial definitions of "evident partiality" fall into three general categories. Some courts, consistent with Black's majority opinion, require only proof of a reasonable impression or appearance of bias. See New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1106 (9th Cir. 2007); Montez v. Prudential Sec., Inc., 260 F.3d 980, 983 (8th Cir. 2001); Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 160 (8th Cir. 1995); Schmitz, 20 F.3d at 1045. A few other courts have adopted the view that only proof of actual bias can qualify as evident partiality. See Positive Software Solutions v. New Century Mortgage Corp., 476 F.3d 278, 281 (5th Cir. 2007) (en banc); Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 621-23 (7th Cir. 2002); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992); Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 1150 (10th Cir. 1982).

The definition of evident partiality adopted by a majority of courts, and by the Restatement, requires an objective, disinterested observer who is fully informed of the facts relevant to the arbitrator's conduct or alleged conflicts to develop a serious doubt regarding the fundamental fairness of the arbitral proceedings. See Dauphin Precision Tool v. United Steelworkers of Am., 338 Fed. Appx. 219, 223 (3d Cir. 2009) (unpublished opinion); Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007); Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 644 (6th Cir. 2005); JCI Commc'ns, Inc. v. Int'l Broth. of Elec. Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003); ANR Coal Co., Inc. v. Cogentrix of N. Carolina, Inc., 173 F.3d 493, 500-01 (4th Cir. 1999); Gianelli Money Purchase Plan & Trust v. ADM Inv. Servs., Inc., 146 F.3d 1309, 1312-13 (11th Cir. 1998); Al-Harbi v. Citibank, N.A., 85 F.3d 680, 683 (D.C. Cir. 1996); Morelite Const. Corp. (Div. of Morelite Elec. Serv., Inc.) v. New York City Dist. Council Carpenters Ben. Funds, 748 F.2d 79, 84 (2d Cir. 1984); Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), cert. denied, 464 U.S. 1009, modified, 728 F.2d 943 (7th Cir. 1984); see also DeBaker v. Shah, 194 Wis. 2d 104, 118 (Wis. 1995). This definition strikes an appropriate balance. Actual bias can be extremely difficult to prove, even when it exists. See Morelite Const. Corp., 748 F.2d at 84 (referring to actual bias as an "insurmountable standard"). On other hand, allowing awards to be vacated, or denied confirmation, recognition or enforcement simply because of an impression of bias would encourage parties to bring potentially frivolous challenges and jeopardize the finality of arbitral awards. The intermediate position adopted by the Restatement avoids the risks of these two extremes.

In evaluating alleged conflicts under this Section, courts weigh a range of factors, including: 1) the extent and character of the relevant personal interest, pecuniary or otherwise, or relationship of the arbitrator; 2) the directness of the relationship between the arbitrator and the party that it was alleged

to favor; 3) the connection between the arbitrator's interest or the relationship and the arbitration; 4) the proximity in time between the interest or relationship and the arbitral proceeding; 5) any relevant industry practices that may affect the parties' expectations regarding relationships between the arbitrator, and the parties and their dispute; and 6) the extent to which the arbitrator undertook a reasonable investigation to discover potential conflicts and actually knew of, or should have known of, the information that was not disclosed. The first four of these factors are based on those originally articulated in ANR Coal Co. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500 (4th Cir. 1999), and followed by other courts. See Canadian Aviation Simulator Servs., Inc. v. Thales Training, Ltd., 2006 WL 1975932, at *4 (S.D.N.Y. July 13, 2006); RZS Holdings AVV v. PDVSA Petroleos S.A., 598 F. Supp. 2d 762, 773 (E.D. Va. 2009).

Factor 5 is designed to address trade practices within specific industries or geographic regions that can affect parties' expectations regarding the conduct and relationships of an arbitrator. See Carina Int'l Shipping Corp. v. Adam Mar. Corp. 961 F Supp 559, 568-69 (S.D.N.Y. 1997); see also IBA Guidelines on Conflicts of Interest in International Arbitration, n.6 ("It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice.").

Factor 6 relates both to an arbitrator's duty to investigate and to actual knowledge of potential conflicts. The prevailing view in international practice is that arbitrators have a duty to conduct a reasonable investigation into potential conflicts. See Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 138 (2d Cir. 2007) (arbitrators have duty to investigate non-trivial conflicts); see also General Standard 6(c) of the IBA Guidelines ("An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned."). This obligation is also acknowledged in rules that govern domestic arbitration. See § 12 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (1973); RUAA § 12(a) (requiring "a reasonable inquiry" before making pre-appointment disclosure). The duty to investigate requires a reasonable investigation, which may vary depending on the facts and circumstances of an individual case. Failure to investigate, like failure to disclose generally, is not itself a basis for establishing evident partiality under this standard, but instead functions as a factor relevant to the court's overall assessment of the facts.

There is some disagreement among courts about whether an arbitrator's lack of knowledge of a conflict precludes a finding of evident partiality. Some courts have taken the view that an absence of knowledge about a conflict per se precludes a finding of evident partiality. See Gianelli Money Purchase Plan & Trust v. ADM Inv. Servs., Inc., 146 F.3d 1309, 1313 (11th Cir. 1998); see also Rev. Unif. Arb. Act § 12(e), 7 U.L.A. 43 (2005) ("An arbitrator appointed as a neutral arbitrator who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under Section 23(a)(2)."). This approach—categorically excluding from consideration all conflicts regarding which an arbitrator has no actual knowledge—arguably discourages arbitrators from fulfilling their duty to investigate. It also imposes on the aggrieved party the unreasonable burden of having to prove actual knowledge about a conflict on the part of an arbitrator. The better view, and the one represented in the final factor of the test stated above, is that absence of knowledge is relevant to a court's analysis of the facts of a case, particularly as relates to the investigation undertaken by the arbitrator. See New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1107-08 (9th Cir. 2007). If the arbitrator has taken reasonable measures to investigate potential conflicts, a lack of knowledge about a particular conflict will generally weigh significantly against a finding of evident partiality.

(ii). Disclosure, disqualification, and challenges to awards. Arbitrator impartiality is subject to review at several junctures in the lifecycle of an arbitration, including the appointment process, proceedings to disqualify an arbitrator, and proceedings challenging an award under this Section. Catherine A. Rogers, The Ethics of International Arbitrators, in The Leading Arbitrators' Guide to

International Arbitration (2008). Each of these junctures may involve review of an arbitrator's alleged conflicts by a different entity, often under different standards, and for a different purpose. This Section addresses only the latter situation, namely when evident partiality is established for the purposes of seeking vacatur, or opposing confirmation, recognition, or enforcement of an award.

Under most arbitral rules and consistent with industry practice guidelines, arbitrators are generally understood as having an obligation to disclose certain categories of information that may potentially raise questions about their independence or impartiality. Most rules urge arbitrators to make broad disclosures in order to promote transparency and confidence in the fairness of the arbitral process. Such disclosures may be reviewed by the appointing authority, such as an arbitral institution, or by a court in the seat of arbitration. In light of these purposes, and the expectation that all doubts regarding potential conflicts should be resolved in favor of disclosure, the category of information disclosed is much broader than the category of information that can lead to disqualification or, later, to a finding of evident partiality under this Section.

(iii). Relationship between arbitral and judicial impartiality. Because the same term "impartial" is used to describe the obligations of both judges and arbitrators, some courts have attempted to define the standard for evaluating arbitrator conduct in terms used to evaluate judicial conduct. Ultimately, this analogy is more misleading than illuminating. The analogy is invoked because judges and arbitrators perform a similar function in adjudicating a dispute. Despite this basic similarity, the nature of arbitral decisionmaking and the selection process for arbitrators entails a conception of impartiality that is markedly different from that ascribed to judges.

Judges are generally assigned to cases at random, while arbitrators are usually designated by the parties, typically on account of their specific expertise regarding issues in dispute. It is commonly assumed that arbitrators will maintain a variety of other professional positions and affiliations, even while acting as arbitrators. Arbitrators are also compensated by the parties. These features are often pointed to as reasons why arbitrators should be held to less exacting standards than judges. On the other hand, these same features, combined with the absence of a judicial review mechanism for correcting factual or legal errors on the part of arbitrators, are sometimes cited as requiring that arbitrators be held to more exacting standards than judges.

The element missing in these comparisons is the role of party consent and control over the process. Parties voluntarily agree to submit their disputes to arbitration, and specifically agree upon procedures and standards for selecting and appointing arbitrators. In doing so, and depending on the specific terms of their agreement, the parties effectively consent to arbitral decisionmakers who will have certain relationships and connections either to the parties or the dispute that could be disqualifying for judges adjudicating the same dispute. For these reasons, while the terms "partiality" and "impartiality" are often used both in discussing arbitrators and judges, they have distinctly different meanings in the two contexts.

(iv). Distinctions between party-appointed arbitrators and arbitral chairpersons. Historically, U.S. domestic arbitration practice has diverged from conventional international practice regarding the level of partiality tolerated by members of the arbitral tribunal. See Alan Scott Rau, On Integrity in Private Judging, 38 S. Tex. L. Rev. 485 (1998); Catherine A. Rogers, Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct, 41 Stan. J. Int'l L. 53 (2005). Up until the 1990s, the default rule in U.S. domestic arbitration was that party-appointed arbitrators were not required to be neutral, meaning that they could effectively operate as a party's advocate on the tribunal.

This U.S. practice was greeted with hostility in the international arbitral community, but was permitted by the 1977 version of the ABA/AAA Code of Ethics for Arbitrators in Commercial Disputes. More recently, U.S. domestic practices have changed, and party-appointed arbitrators are increasingly expected to be independent of the parties. The ABA/AAA Code of Ethics was modified in 2004 to reflect this shift in U.S. practice, but it still permits parties to contractually agree to the historical model of non-neutral party-appointed arbitrators. See www.abanet.org/dispute/commercial_disputes.pdf (last visited Mar. 19, 2010) (creating a "presumption of neutrality for all arbitrators"). Although the United

States permits non-neutral party-appointed arbitrators, this approach is somewhat unusual in the international context. See IBA Guidelines on Conflicts of Interest in International Arbitration ("IBA Guidelines"), Explanation of Standard 1 ("[T]he fundamental principle in international arbitration is that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceedings."); see also William S. Dodge, National Courts and International Arbitration: Exhaustion of Remedies and Res Judicata Under Chapter Eleven of NAFTA, 23 Hastings Int'l & Comp. L. Rev. 357, 369-70 (2000) (arguing that domestic tribunals may not be sufficiently impartial for the purposes of international arbitration). For a defense of this position in the domestic context based on party autonomy, see Rau, supra, at 501 ("Any 'conflict' between non-neutral party-appointed arbitrators and 'societal goals of unbiased, impartial decisionmaking' can only be problematical for us to the extent we are willing to overlook justifications rooted in private choice.").

Even if they are nominally subject to the same evident partiality standard as arbitral chairs, in practice many types of conflicts for a party-appointed arbitrator that will not raise concerns about the fundamental fairness of proceedings. Party-appointed arbitrators are often intentionally selected for their perceived ability to ensure that an appointing party's views are fully reflected in and considered by a tribunal. See Andreas Lowenfeld, The Party-Appointed Arbitrator in International Controversies: Some Reflections, 30 Tex. Int'l L.J. 59, 65-68 (1995) (in international arbitrations a party-appointed arbitrator can help in the "translation of legal culture . . . when matters that are self-evident to lawyers from one country are puzzling to lawyers from another."). For this reason, in applying the factors for determining whether an alleged conflict constitutes evident partiality with respect to a party-appointed arbitrator, under this Section, many types of relationships and experience are considered acceptable with respect to party-appointed arbitrators even if they might otherwise raise concerns with respect to a chair.

Related to the issue of non-neutral party-appointed arbitrators is the issue of whether, or to what extent, an arbitral award may be enforced despite the lack of independence or impartiality of a sole arbitrator or an arbitral chair when the parties have expressly agreed to such an arbitrator. Under international standards and those of most foreign countries, an arbitral award made by an arbitral chair or sole arbitrator who was not independent of the parties would not be enforceable regardless of the parties' agreement on the issue. See IBA Guidelines, at Standard 1.2 (treating as non-waivable "Red List" item if "[t]he arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties."). However, courts in some domestic arbitration cases in the United States have enforced awards produced by arbitral tribunals that were not independent. See Hottle v. BDO Seidman, LLP, 846 A.2d 862, 865 (Conn. 2004) (enforcing an award when arbitral tribunal "consist[ed] solely of directors and partners of one of the parties"); Sphere Drake Ins., Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 620 (7th Cir. 2002) (enforcing an award even though reinsurer's appointed arbitrator represented reinsurer in prior unrelated international insurance arbitration); Whitaker v. Citizens Ins. Co. of Am., 476 N.W.2d 161, 162-163 (Mich. Ct. App. 1991) (trial court erred in disqualifying arbitrator on the ground that he "actively represented defendant in other insurance cases"); Westinghouse Elec. Corp. v. New York City Transit Auth., 623 N.E.2d 531, 532 (N.Y. 1993) (enforcing an award when arbitration agreement required that "all questions of any nature whatsoever" arising out of contract were to be decided by Chief Electrical Officer, an employee of one of the parties); see also Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994) (suggesting that "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.").

Commentators in the international arena generally doubt that arbitrators who are not independent could act as a sole arbitrator or chairperson in an international context. See, e.g., William W. Park, Arbitrator Integrity: The Transient and the Permanent, 46 San Diego L. Rev. 629, 638-639 (2009) (reasoning that when an arbitrator is a director in a corporation, a party "becomes a judge in its own cause" and "the decisionmaking process may no longer bear the attributes permitting its

enforcement as an 'award' under relevant statutes or treaties"). This is one area where domestic arbitration may tolerate procedures that are outside the norms of international arbitration.

g. Waiver and determination sua sponte. The rules of many arbitral institutions expressly provide that failure to object to a procedural ruling or act constitutes a waiver of a party's right to later object to it. See UNCITRAL Rules, art. 30; ICC Rules, art. 33; ICDR Rules, art. 25. As a result, parties will generally be deemed to have agreed in advance to either raise procedural objections during the arbitral proceedings or to forego such objections. The purpose of this temporal limitation is two-fold: both to prevent parties from relying on unspecified procedural objections as the basis for later attack on an award in the event they do not prevail on the merits and to give the arbitral tribunal an opportunity to correct the alleged procedural defect.

As the court in Cook Industries, Inc. v. C. Itoh & Co., explained: "[A party] cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first." 449 F.2d 106, 107-108 (2d Cir. 1971); see also Lucent Techs., Inc. v. Tatung Co., 379 F.3d 24, 31 (2d Cir. 2004) (finding waiver based on party's failure to inquire from AAA regarding arbitrator's prior relationship with other party, and object during arbitration); Goff v. Dakota, Minn. & E. R.R. Corp., 276 F.3d 992, 998 (8th Cir. 2002) (finding waiver of procedural objection due to failure to raise objection during arbitration). Even in the absence of an express agreement regarding the timing of objections, courts often treat objections to procedures as waived unless raised during the arbitral proceedings. See A/S Ganger Rolf v. Zeeland Transp. Ltd., 191 F. Supp. 359, 363 (S.D.N.Y. 1961) (noting that a party who does not appear in an arbitration "may not complain that it has not been heard on the merits before the arbitrators since it waived the right to do so granted to it by the arbitration agreement by which it bound itself."); AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., 139 F.3d 980, 982 (2d Cir. 1998) ("The settled law of this circuit precludes attacks on the qualifications of arbitrators on grounds previously known but not raised until after an award has been rendered."); Ilios Shipping & Trading Corp. v. Am. Anthracite & Bituminous Coal Corp., 148 F. Supp. 698, 700 (S.D.N.Y.), aff'd, 245 F.2d 873 (2d Cir. 1957) (per curiam) ("Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection."). While objections must be made in a timely fashion, there are no strict form requirements for how the objection must be made.

While party autonomy is paramount in the arbitration process, as in every contractual context, there are limits, particularly with regard to procedure. See Amalgamated Ass'n of St. Elec. Ry. & Motor Coach Emp. of Am. A.F.L. v. The Conn. Co., 112 A.2d 501, 503 (Conn. 1955) ("If [an arbitration agreement] specifies methods of procedure for the arbitration, the arbitrators will be bound to that procedure unless it is in violation of law or public policy.").

h. Burden of proof. To satisfy its burden of proof of lack of notice, the losing party must furnish evidence that it did not have knowledge of the relevant event or information, and that such lack of knowledge materially interfered with the fairness of the proceedings. See Parsons & Whittemore, 508 F.2d at 975; First State Ins. Co., 254 F.3d at 357. This burden may be particularly difficult, and in many instances impossible, to satisfy in circumstances where the party seeking to confirm or enforce the award has demonstrated that the party opposing confirmation or enforcement had constructive notice of the relevant matter.

As with all Convention grounds, the burden of proving the absence of notice is on the party seeking to vacate an award or defeat its confirmation, recognition or enforcement. This allocation of the burden of proof creates a peculiar situation with respect to notice. In other contexts in which notice is required, such as notice of receipt of a summons in civil litigation, generally the burden of proving the existence of such notice is on the party whose obligation it was to provide the notice. In this context, however, the burden of proof rests with the party who contends that notice was not received. Technically, therefore, the party resisting recognition or enforcement of an award has the burden of proving a negative, specifically of demonstrating that it did not have actual notice. This burden cannot

generally be satisfied by a mere denial of knowledge by a party or its counsel, or a general denial of receipt of notice, particularly if the party had actual knowledge of the proceedings or relevant event. Instead, it requires the introduction of affirmative evidence that the party in fact did not have actual knowledge of the relevant events. Such evidence may include, for example, proof that notice was sent to an incorrect address.

As with notice, the burden of proving that a party was denied an opportunity to present its case lies with the party challenging the award. See Telenor Mobile Commc'ns, 524 F. Supp. 2d at 368 ("The burden of [proof under Article V(1)(b) is that a party] was denied a full and fair opportunity to be heard."). The placement of this burden is consistent with the Convention's presumption in favor of enforcement. Although sometimes described as a question of fact, the Article V(1)(b) ground is more accurately understood as presenting a mixed question of law and fact. Judicial analysis of what constitutes a violation is often conclusory. Generally, however, courts find the exception to be met only when the violation that is alleged and proven constitutes a serious procedural defect that resulted in a material denial of a party's opportunity to present its arguments to the tribunal.

Some courts have suggested that it is also necessary for an objecting party to demonstrate that the alleged procedural unfairness resulted in some form of actual prejudice. See Generica Ltd. v. Pharm. Basics, Inc., 125 F.3d 1123, 1129-31 (7th Cir. 1997) (award enforceable even though the arbitrator curtailed cross-examination because arbitrator did not regard testimony as central to liability and arbitrator did allow development of the record on that issue by other sources). This approach is problematic for a number of reasons. First, the record in an arbitration is often only partial and less formal than a record of a trial court proceeding. Accordingly, parties may not have the resources to prove a link between the procedural defect and the substantive outcome. Second, this Section is designed to protect the fundamental fairness of the process, not the correctness of the outcome. Finally, and more importantly, requiring proof that a particular defect affected the substantive outcome risks putting courts in the business of reviewing the substance of arbitral awards to determine whether the objection has merit.

Under this Section, a decision not to attend or participate in an arbitration is not the same as, or sufficient proof of, lack of notice. In certain circumstances, an arbitral tribunal may render an award even if a party opposing the claims does not appear. Consequently, failure to appear in and of itself is not generally a basis for a successful challenge. Geotech Lizenz AG v. Evergreen Sys., Inc., 697 F. Supp. 1248, 1254 (E.D.N.Y. 1988) (rejecting a challenge where challenging party decided not to appear at the arbitration while it pursued a separate court action). Challenges to awards based on the fact that they were rendered in default proceedings have virtually always been rejected as long as the defaulting party had actual or, in exceptional circumstances and in the interest of justice, constructive notice. See Born, supra, at 1865. Such claims have been rejected even in cases where the inability to appear was based on fear of criminal prosecution, on the ground that the party could find means to participate other than personal appearance. See Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., 134 F. Supp. 2d 789, 797 (E.D. La. 2001), aff'd on other grounds, 82 Fed. Appx. 359, 364-65 (5th Cir. 2003); Nat'l Dev. Co. v. Khashoggi, 781 F. Supp. 959, 962 (S.D.N.Y. 1992). In certain circumstances, a tribunal may deliberate or render an award in the absence of or without the participation, either actual or effective, of one of the arbitrators. Although a so-called "truncated tribunal" is generally considered "pathological" and may give rise to an objection under Section 4-15, infra, as a violation of the parties' agreement, in some instances a tribunal may continue and render an enforceable award. For example, the wrongful refusal by one arbitrator to participate does not necessarily deprive a party of an opportunity to present its case, and therefore is not in itself grounds for denying recognition or enforcement under this Section. See Born, supra, at 1587-1590. Moreover, some institutional rules expressly permit tribunals to render awards if the absence of an arbitrator or an arbitrator's active participation is justified. See id. at 1590-1592.

An award that is predicated on material facts that were not presented by the parties, and which the parties did not have an opportunity to comment on or respond to, may be vacated or denied confirmation, recognition or enforcement under this Section. Similarly, an award based on material legal

issues that were not presented by or commented on by the parties may be a basis for such post-award relief. The treatment of such objections in arbitration differs from their treatment in judicial settings, where judges are presumed to have an independent familiarity with the law and parties can address on appeal erroneous legal analysis or wholly unsupported factual claims. The absence of substantive appellate review of arbitral awards requires that parties be afforded an opportunity to address all material arguments in the first instance and denial of such an opportunity may be regarded as a significant procedural defect. Cf. St. George's Inv. Co. v. Gemini Consulting Ltd., [2004] EWHC 2353 (Ch.) ("[A]n arbitrator is entitled to use his expert knowledge to arrive at his award, provided it is of the kind and in the range of knowledge that one would reasonably expect the arbitrator to have and providing that he uses it to evaluate the evidence called and not to introduce new and different evidence.").

i. Partial grant of post-award relief. In appropriate circumstances, as outlined in Comment *f* to Section 4-1, supra, a court may decide to confirm, recognize. or enforce a portion of the award, while denying confirmation, recognition or enforcement to the rest. Although giving only partial effect to an award is theoretically possible under this Section, it will rarely be appropriate. As a practical matter, those instances in which a court can attribute particular substantive outcomes to a specific procedural failing will most likely involve cases that have been expressly bifurcated or otherwise divided into separate procedural phases with separate orders or awards being produced in the different phases. Courts should not parse and scrutinize each phase or aspect of arbitral procedure to determine whether partial confirmation, recognition, or enforcement is appropriate. With regard to challenges based on alleged bias of an arbitrator, it will be even more unusual for a portion of an award to be given effect despite a legitimate challenge under this Section.

§ 4-14. Award on Matters Beyond the Terms of the Submission to Arbitration

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that it deals with matters that were not submitted to arbitration.

(b) Whether a Convention award deals with matters that were not submitted to arbitration is determined by the law to which the parties have subjected the arbitration agreement or, if no such law has been selected, by the law identified in the general choice-of-law clause in the contract or, in the absence of such a clause, by the law of the seat of arbitration.

(c) A court determines de novo whether a Convention award deals with matters that were not submitted to arbitration, unless the parties clearly and unmistakably submitted that issue to arbitration.

Comments:

a. Generally. Like Section 4-12, supra, this Section derives from the consensual nature of arbitration. Just as parties cannot be compelled to arbitrate when they have not agreed to do so, neither, even when they have agreed to arbitrate, can they be compelled to arbitrate matters not embraced by their agreement to arbitrate. Under this Section, a court may vacate an award, or deny confirmation, recognition, or enforcement of an award, if the award deals with matters the parties have not agreed

to arbitrate. Article V(1)(c) of the New York Convention permits a court to deny recognition or enforcement if "[t]he 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." Article 5(1)(c) of the Panama Convention is broadly similar, permitting a court to deny recognition or enforcement if "the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration."

b. Applicable law. Neither Article V(1)(c) of the New York Convention nor Article 5(1)(c) of the Panama Convention specifies the law applicable to the question whether the award deals with matters beyond the terms of the submission to arbitrate. As in Section 4-12(b), supra, the applicable law is the law, if any, the parties selected to govern the arbitration agreement. If the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly), a general choice-of-law clause in the contract determines the applicable law. If the parties have not selected any law to govern the arbitration agreement or to govern the contract generally, the law of the seat of arbitration, without resort to its choice-of-law rules, governs the scope of the agreement to arbitrate. See § 4-12, Comment *c*, supra.

c. Beyond the arbitral submission. A party challenging an award as beyond the submission to arbitration faces a strong presumption that the arbitral tribunal acted within its jurisdiction. Awards challenged as beyond the submission to arbitration commonly fall into two categories: awards that extend beyond an expressly delineated

definition of the scope of the arbitration agreement (including a submission agreement), and awards based on an exercise of authority by the arbitral tribunal that the parties' agreement expressly denied to the tribunal. An example of the first category would be an award that resolves a claim that is expressly excluded from arbitration under the scope provision of the arbitration agreement.

Illustration:

1. The parties' contract provides that "all disputes as to quality or condition of rubber or other disputes arising under these contract regulations shall be settled by arbitration." The buyer fails to open letters of credit as required by the contract (but not required by the contract regulations), and the seller seeks damages for breach of contract. The arbitral tribunal awards damages for breach of contract due to the buyer's failure to open the required letters of credit. Because the dispute was over the failure to open letters of credit rather than the quality or condition of rubber, and because the requirement to open letters of credit did not arise under the referenced contract regulations, the court denies confirmation or enforcement of the award.

An example of the second category would be an award in which the arbitral tribunal exercises a power that the arbitration agreement expressly denies to the tribunal. For example, the parties may limit the authority of the tribunal to grant certain remedies or forms of relief. If the tribunal does not abide by the limitation, and

if the parties intended the limitation as a restriction on the tribunal's authority rather than as a limitation on the remedies available to the parties, the court may vacate or deny confirmation, recognition, or enforcement of the award on the ground that the tribunal exceeded its authority. On the other hand, courts reject attempts by parties to characterize a merits issue as a scope issue in an attempt to obtain court review of the merits of an award. Thus, if the parties intended to preclude or limit the recovery of certain remedies, a broad arbitration clause would give the tribunal the authority to rule on the enforceability of the remedy limitation, and a court will not review the tribunal's decision.

Consistent with the presumption that a tribunal acts within the scope of its authority, the Restatement presumes that such a provision is a contractual limitation on remedies but not a specific restriction on the tribunal's authority. This presumption can be rebutted, however. Whether the presumption is rebutted depends on various factors bearing on the parties' intent in formulating the provision. The factors include whether the provision clearly refers to the tribunal's authority (rather than contractual remedies), the negotiating history of the provision, whether the provision is located in the arbitration clause, the presence in the law of the arbitral seat of relevant limits on a tribunal's remedial powers, and the tribunal's own reasoned assessment (or lack thereof) concerning the parties' intent, including its characterization of the limitation in question.

Illustrations:

2. The parties' contract provides that "neither party shall have any liability for consequential damages." Ruling that the consequential damages limitation is unenforceable, the arbitral tribunal awards $185,000 in consequential damages. The contract provision presumptively is a remedy limitation rather than a restriction on the tribunal's authority. In the absence of any additional evidence on the matter, the presumption is not overcome, and the court does not second guess the arbitral tribunal's ruling that the limitation on remedies is invalid and confirms or enforces the award.

3. An arbitration is held in a trade in which arbitration is the dominant means of deciding disputes but in which arbitral awards of punitive damages has long been controversial. The parties' contract states that "the arbitrators have no authority to award punitive damages" and its arbitration clause designates the seat of arbitration. The Claimant seeks punitive damages, alleging fraud on the Respondent's part. Before the tribunal, the Respondent maintains that the tribunal lacks power to render punitive damages. It relies on the above contract language and demonstrates also a firm rule in the law of the seat that precludes arbitrators from awarding punitive damages. The tribunal awards punitive damages, reasoning that it has "jurisdiction

to determine its own jurisdiction" and that the arbitration rules chosen by the parties are silent concerning punitive damages. In light of the language restricting the authority of the arbitrators, the context in which the contract was negotiated, restrictions in the law of the seat chosen by the parties, and the tribunal's characterization of the question as jurisdictional, the presumption is overcome. The court will refuse to enforce the punitive damages portion of the award.

A party may not rely on this Section to challenge an award on the ground that it fails to resolve all claims in dispute. Instead, a party objecting to the incompleteness of an award may pursue an appropriate remedy at the seat of arbitration (see § 4-36, infra).

d. Submission to arbitration. The extent of an arbitral tribunal's jurisdiction is determined by the scope provision in the arbitration agreement and by the terms of reference to the arbitral tribunal, if any, agreed to by the parties. It may also be determined by a joint submission to the tribunal to that effect by all the parties in the course of the proceeding. If the terms of reference narrow the tribunal's jurisdiction, the court may vacate or refuse to confirm, recognize, or enforce an award to the extent that it exceeds them. Conversely, the terms of reference may expand the tribunal's jurisdiction if the parties thereby include additional matters to be arbitrated.

e. De novo review of tribunal's scope rulings. Courts generally review de novo the scope of the arbitration agreement. See § 4-7, supra. However, if the parties

specify in their arbitration agreement that scope is an issue that the tribunal has the final and unreviewable authority to decide, a court will not review the tribunal's decision on that issue. Many institutional arbitration rules give the arbitral tribunal the authority to rule on issues of scope, but do not expressly provide that the tribunal's decision on scope is to be considered final and unreviewable. If the parties assent to arbitration under such institutional rules, the court nonetheless reviews de novo the arbitral tribunal's determination of the scope of the arbitration agreement.

f. *Waiver and determination sua sponte.* A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

g. *Partial grant of post-award relief.* In appropriate circumstances, as outlined in Section 4-1(d) & (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest.

REPORTERS' NOTES

a. Generally. This Section differs from Section 4-12, supra ("Arbitration Agreement Does Not Exist or Is Invalid") because this Section "concerns the case where the arbitration agreement may be valid as such, but the arbitrator has given decisions which are not contemplated by or not falling within the scope of the arbitration agreement and the questions submitted to him by the parties." Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 312 (1981). The underlying policy of the two Sections is the same, however: that "[d]ecisions on matters never submitted to arbitration deserve no more deference than the opinions of a random commuter passing through the Paris Metro or New York's Grand Central Station." William W. Park, Determining an Arbitrator's Jurisdiction: Timing and Finality in American Law, 8 Nev. L.J. 135, 155 (2007).

b. Applicable law. Article V(1)(c) of the New York Convention and Article 5(1)(c) of the Panama Convention are silent on the applicable law. Some commentators suggest that this silence is unimportant because scope issues tend to be fact-based. See Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 312 (1981) ("the question of applicable law will normally not arise, as the excess of authority is largely a question of fact"). Others argue that the approach of Article V(1)(a) should be used, with the applicable law being the law that is chosen by the

parties to govern their arbitration agreement or the contract as a whole, or, if none, the law of the arbitral seat. Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1068 n.82 (1961). But using the law of the arbitral seat, which is the approach of Article V(1)(a), arguably is inconsistent with the structure of the New York Convention, which could have used the same language in this Article as it did in Article V(1)(a), but did not do so.

The district court in Aasma v. American Steamship Owners Mutual Protection & Indemnity, 238 F. Supp. 2d 918 (N.D. Ohio 2003), aff'd, 2004 U.S. App. LEXIS 10105 (6th Cir. May 19, 2004), used the law chosen by the parties to govern their arbitration agreement, which it determined to be English law. Because English law permitted the award of costs, the court held that the award was within the scope of the parties' submission to arbitration. Id. at 921-22. The Restatement follows the approach of *Aasma* in cases in which the parties have agreed on a law to govern their arbitration agreement. In cases in which the parties have not done so, this Section follows the same approach to applicable law as Section 4-12(c), supra. Accordingly, if the parties have not agreed upon a body of law to govern the arbitration agreement (either expressly or impliedly), a general choice-of-law clause in the contract determines the law governing the scope of the arbitration agreement, provided that such an interpretation does not circumvent federal preemption of state arbitration law. If the parties have neither selected a law to govern the arbitration agreement nor included in the contract a general choice-of-law clause, the law of the seat of arbitration, without resort to its conflicts-of-law analysis, governs the issue. For a detailed discussion of the rationale for this approach, see Comment *c* to Section 4-12, supra.

c. Beyond the arbitral submission. Courts rarely decline to enforce awards as beyond the submission to arbitration. Albert Jan van den Berg, New York Convention of 1958: Refusals of Enforcement, 18(2) ICC Int'l Ct. Arb. Bull. 15, 24 (2007) (finding only two reported cases, neither of which was from the United States).

The leading American case on Article V(1)(c) is Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974). In *Parsons & Whittemore*, the Second Circuit recited several general principles that govern application of this Section. First, the reviewing court applies "a powerful presumption that the arbitral body acted within its powers." Id. at 976. Second, because the New York Convention is designed to facilitate the enforcement of arbitration awards, Article V(1)(c) is construed narrowly. Id. Third, the court will not use Article V(1)(c) to review the merits of the award because the Convention "does not sanction second-guessing the arbitrator's construction of the parties' agreement." Id. at 977.

The cases analyzing Article V(1)(c) involve two main types of fact patterns. In the first type, a party asserts that the award resolves a claim that is beyond the scope of the arbitration agreement (either an arbitration clause or a submission agreement). For example, in Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764 (9th Cir. 1992), the Ninth Circuit rejected the contention that an award of the Iran-United States Claims Tribunal was beyond the scope of the "submission to arbitration"—in that case, the Claims Settlement Declaration between Iran and the United States establishing the Tribunal. According to the court:

> The "subject matter of the national's claim" here is obvious: the 1975 and 1978 contracts between Hoffman and Iran. It is equally evident that Iran's counterclaims "arise[] out of"' these contracts. Because the award resolves the claims and counterclaims connected with the two contracts, it clearly falls within Article II of the Claims Settlement Declaration, and hence does not exceed the scope of the submission to arbitration.

Id. at 771; see also Dandong Shuguang Axel Corp. v. Brilliance Mach. Corp., 2001 U.S. Dist. LEXIS 7493, at *14-16 (N.D. Cal. June 1, 2001) (finding that "June agreements" were not a "new legal relationship" but instead were within the scope of JVA's arbitration clause).

In the second type of case, a party asserts that the award conflicts with an express limitation on the arbitrators' powers in the parties' contract. Although the issue arises most commonly in disputes over the availability of remedies such as punitive or consequential damages, it is by no means limited to that context, and the principles set out here would apply in those contexts as well. See, e.g., Reliastar Life Ins. Co. v. EMC Nat'l Life Co., 564 F.3d 81, 84 (2d Cir. 2009) (contract provision requiring each party to bear its own costs; court rejects interpretation of provision as restricting authority of arbitrators to award attorneys' fees as sanction for bad faith conduct); see also § 4-15, infra (analyzing case in which tribunal decides ex aequo et bono contrary to an agreement precluding decision on that basis). For discussion of cases in which this issue has arisen under FAA Section 10, see Reporters' Note to Comment *c*, Section 4-22, infra.

In the leading cases, the contract provision at issue was not specifically framed as a limitation on the arbitrators' powers. Instead, the contract provision restricted the remedies available under the contract, and the courts concluded that the party seeking to avoid recognition or enforcement in effect was seeking review of the merits of the tribunal's decision. Thus, while the provision was found to constitute a limitation on remedy, its violation was not found to constitute an excess of arbitral authority.

For example, in *Parsons & Whittemore*, the parties' contract provided that "neither party shall have any liability for loss of production." 508 F.2d at 976. Despite this provision, the arbitrators awarded $185,000 for loss of production. The party opposing enforcement contended that the award was outside the scope of the submission to arbitration. The court of appeals rejected the argument, reasoning that "[t]he tribunal cannot properly be charged, however, with simply ignoring this alleged limitation on the subject matter over which its decisionmaking powers extended. Rather, the arbitration court interpreted the provision not to preclude jurisdiction on this matter." Id. Because "the arbitrator premised the award on a construction of the contract" and it was "'not apparent' . . . that the scope of the submission to arbitration has been exceeded," the court enforced the award. Id. (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960)).

The district court's decision in Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948 (S.D. Ohio 1981), is to the same effect. As the court described the facts: "It is beyond dispute that the contract between these parties clearly excluded consequential damages. It is also undisputed that the arbitrators rendered a large award, based almost exclusively on consequential damages, in FCI's favor." Id. at 958. The arbitrators had ruled that under British contract law, a "fundamental" breach of contract invalidated the damages limitation in the contract. The court determined that "the award is within the submission to the arbitrators, there were numerous hearings, and we are impressed with the thoroughness and scholarship of the arbitrators' decision." Id. at 960. Finding "at least colorable justification" for the decision, the court enforced the award. Id.

As indicated in Comment *c*, the Restatement adopts a presumption that while such a contract provision is a remedy limitation, it is not also a restriction on the tribunal's authority. Both *Parsons & Whittemore* and *Fertilizer Corp.* are consistent with such a presumption, although the opinions in those cases did not discuss the issue in those terms. Such a presumption also is consistent with the more general presumption that arbitral tribunals act within the scope of their authority. As such, unless the presumption is overcome, the validity and effect of such a provision is a matter for the tribunal to resolve. The presumption is a rebuttable one, however. Comment *c* sets out factors courts should consider in deciding whether the presumption is rebutted. Only if the presumption is rebutted would a court treat the provision as a restriction on the tribunal's authority, and thus subject to vacatur or denial of confirmation, recognition, or enforcement under this Section.

Commentators are split on whether an incomplete award is a ground for denying recognition or enforcement under the New York Convention and the Panama Convention. Compare Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 322 (1981) (award infra petita is not a ground for non-enforcement), with Gary B. Born, International Commercial Arbitration 2799 (2009) (Article V(1)(c) applies to case in which arbitrators "failed to address the

matters that were submitted to the tribunal (so-called *infra petita*)"). The text of Article V(1)(c), however, does not support extending the Section to an incomplete award. Indeed, an "incomplete" award might be characterized as a partial award—an award that resolves some but not all issues in dispute—and be enforceable as such. A party faced with an incomplete award may nevertheless ask a court to remand it to the arbitrators under Section 4-36, infra, and, in appropriate circumstances, a court may be entitled to provide a remedy using its powers of correction under Section 4-35, infra.

Illustration 1 is based on Tiong Huat Rubber Factory (SDB) BHD v. Wah-Chang Int'l Co., [1991] H.K.L.Y. 51 (Hong Kong Ct. App. 1991).

Illustration 2 is based on Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RATKA), 508 F.2d 969 (2d Cir. 1974), and Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948 (S.D. Ohio 1981).

Illustration 3 is a hypothetical variation on the facts of Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RATKA), 508 F.2d 969 (2d Cir. 1974) and Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948 (S.D. Ohio 1981).

d. Submission to arbitration. The New York and Panama Conventions define the source of the arbitrators' jurisdiction in different ways. Article V(1)(c) of the New York Convention refers to the "submission to arbitration," while Article 5(1)(c) of the Panama Convention refers to "the agreement between the parties to submit to arbitration."

As a practical matter, the disputes within the tribunal's jurisdiction are defined by the arbitration agreement and by any terms of reference agreed to by the parties. They may also be determined by a joint submission by the parties to the arbitral tribunal. These complications are reflected in the French text of the New York Convention, which differs from the English text quoted above. As Albert Jan van den Berg explains, "[t]he English text reads 'a difference not contemplated by or not falling within the terms of the submission to arbitration' . . . . [T]he literal translation of the French text is 'a difference not contemplated by the submission agreement or not falling within the terms of the arbitral clause.'" Albert Jan van den Berg, The New York Convention of 1958: Towards a Uniform Judicial Interpretation 315 (1981). This differing language "implies a two prong test" for Article V(1)(c):

> First, it requires a determination of what constitutes the scope of the arbitration clause. Second, having determined the scope, it requires a determination of the matters that the parties have submitted to the resolution by the arbitral tribunal in question. The latter is also referred to as the tribunal's mandate (in ICC arbitration: Terms of Reference). In certain cases, the matters submitted by the parties to the arbitral tribunal's decision (i.e., its mandate) may be narrower than the scope of the arbitration clause . . . . However, the tribunal's mandate may be broadened by the parties' submissions beyond the scope of the arbitration clause if during the arbitration both parties explicitly or tacitly agreed to such an extension.

Albert Jan van den Berg, The New York Convention of 1958: An Overview 15 (2008), available at http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf. The Restatement uses the phrase "submission to arbitration" to refer to all these potential sources of the tribunal's jurisdiction.

Several American cases consider the extent to which terms of reference or the pleadings in arbitration restrict the arbitrators' jurisdiction to decide issues that otherwise would have been within the scope of the arbitration clause. In Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764 (9th Cir. 1992), the Ninth Circuit rejected a claim that the award was beyond the scope of the submission to arbitration because it was based on a different legal theory from that stated in the pleadings. The court concluded that Iran had raised the legal theory on which the arbitrators had decided during the proceeding, and thus the award was not beyond the scope of the submission to arbitration. Instead, Iran had merely failed to amend its earlier pleadings. According to the court:

> Under the New York Convention, we examine whether the award exceeds the scope of the Claims Settlement Declaration, not whether the award exceeds the scope of the parties' pleadings. A technical pleading error, such as that alleged here, cannot be the basis for refusing to confirm a foreign arbitral award.

Id. at 771. Similarly, in Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc., 29 F. Supp. 2d 1168 (S.D. Cal. 1998), the court rejected an argument that enforcement should be denied because "the Tribunal decided issues not submitted by the Parties and issued a ruling based upon legal theories not contemplated by and/or asserted by the Parties." Id. at 1172. First, the parties had drafted the Terms of Reference so that they did not restrict the scope of the arbitrators' jurisdiction—they expressly provided that "the Arbitral Tribunal may have to consider the following issues (but not necessarily all of these or only these . . . .)." Id. (emphasis omitted). Thus, the terms of reference were permissive rather than mandatory. Second, the court followed *Gould* and held that "the fact that the Award is not based on the same legal theories as stated in the pleadings cannot be a basis for refusing to confirm it." Id. at 1173; see M&C Corp. v. Erwin Behr GmbH, 87 F.3d 844, 850 (6th Cir. 1996) (holding that statutory damage award was within arbitrators' jurisdiction, even though not mentioned in terms of reference, because it "merely designate[d] another measure of damages for the same breach of contract action").

Conversely, terms of reference may expand the arbitrators' jurisdiction beyond the scope of the arbitration clause. See, e.g., CBS Corp. v. WAK Orient Power & Light Ltd., 168 F. Supp. 2d 403, 411 (E.D. Pa. 2001) ("[T]he record of the arbitration proceedings shows unmistakably that WAK agreed to submit to arbitration the question of whether the International [Chamber] of Commerce's Court of Arbitration had jurisdiction to join CBS as a party to the arbitration proceedings.").

e. De novo review of tribunal's scope rulings. Courts review the scope of the arbitration agreement de novo, unless the parties have clearly and unmistakably agreed to have the arbitrators decide that question. See Granite Rock Co. v. Int'l Bhd. of Teamsters, 130 S. Ct. 2847, 2855 (2010); First Options, Inc. v. Kaplan, 514 U.S. 938 (1995) (for further discussion of these issues, see Section 2-___,[20] supra). As the Ninth Circuit stated in Management & Technical Consultants S.A. v. Parsons-Jurden International Corp., 820 F.2d 1531 (9th Cir. 1987): "We review *de novo* a contention that the subject matter of the arbitration lies outside the scope of a contract, since the arbitrability of a dispute concerns contract interpretation and only those disputes which a party has agreed to submit to arbitration may be so resolved." Id. at 1534. While arbitrators have the authority to determine the scope of their own jurisdiction (see § 2-___,[21] supra), that authority does not require courts to defer to arbitrators on the issue of scope when called upon to decide whether to grant post-award relief.

No cases applying Article V(1)(c) of the New York Convention or Article 5(1)(c) of the Panama Convention rely on institutional arbitration rules to find a clear and unmistakable agreement for the arbitrators to resolve scope issues. A number of cases in other settings, however, have found such a clear and unmistakable agreement in the parties' incorporation of arbitration rules granting the arbitrators the authority to determine the scope of the agreement (for cases so holding in actions to enforce arbitration agreements, see Section 2-___,[22] supra). The Restatement rejects those cases as based on a misinterpretation of the institutional rules being applied. Although those rules give the arbitrators the authority to rule on issues of scope, they do not expressly provide that the arbitrators have the final and unreviewable authority to determine scope issues. Under such provisions, if a case proceeds to arbitration and a party raises a jurisdictional objection, the tribunal has the authority to

[20] Cross-reference to Section to be drafted on enforcing arbitration agreements.

[21] Cross-reference to Section to be drafted on enforcing arbitration agreements.

[22] Cross-reference to Section to be drafted on enforcing arbitration agreements.

entertain and resolve the jurisdictional question, and does not have to suspend proceedings so that a court may first resolve the issue. See § 2-___,[23] supra. But the provisions do not prescribe any particular standard of review or measure of deference to the tribunal on questions of the scope of the agreement to arbitrate when the question comes subsequently before a court. Accordingly, they do not show that the parties "clearly agreed to have the arbitrators decide (*i.e.*, to arbitrate) the question of arbitrability." First Options, 514 U.S. at 946. Instead, the language must not only grant the arbitral tribunal the authority to resolve scope questions, but must also indicate that the tribunal's determination is final and entitled to deference by the courts. Cf. Rent-A-Center W., Inc. v. Jackson, 130 S. Ct. 2772, 2775 (2010) (provision in arbitration agreement specifying that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.").

f. Waiver and determination sua sponte. Issues of waiver and sua sponte determination by the court are addressed in Section 4-25, infra. No special rule on either waiver or sua sponte determination applies under this Section.

g. Partial grant of post-award relief. For discussion of the authority of courts to grant post-award relief as to part but not all of an award, see Comment *f* to Section 4-1(d) & (e), supra. Note that the partial grant of post-award relief under this Section overlaps with a court's power to modify or correct an award when "the arbitrators have awarded upon a matter not submitted to them." 9 U.S.C. § 11(b); see § 4-35(c), infra.

[23] Cross-reference to Section to be drafted on enforcing arbitration agreements.

§ 4-15. Arbitral Procedure or Composition of Arbitral Tribunal Violates Party Agreement or Law of the Arbitral Seat

(a) A court may vacate or deny confirmation, recognition, or enforcement of a Convention award to the extent that the composition of the arbitral tribunal or the arbitral procedure is contrary in a material respect to the agreement of the parties or, in the absence of such agreement, to the law of the seat of the arbitration.

(b) In resolving challenges based on alleged violations under this Section, a court affords substantial deference to the procedural decisions of the arbitral tribunal.

Comments:

a. Generally. Parties have very wide latitude to agree upon the procedures that will govern an arbitration. In the absence of such agreement, some national laws provide default procedures that apply to arbitrations having their seat in that jurisdiction. To ensure that arbitral proceedings comply with these requirements, the New York Convention permits an award to be denied recognition or enforcement if the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place. Similarly, the Panama Convention provides that an award may be denied recognition or enforcement if "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." This two-prong ground for vacating or denying confirmation, recognition or enforcement of a foreign Convention award regulates both the manner and character of tribunal composition and constrains an arbitral tribunal's otherwise considerable powers to manage the proceedings.

As with other grounds for granting or denying post-award relief, this ground is interpreted narrowly. Accordingly, the burden is on the party challenging the award to prove that the ground applies and a challenge under this Section will be successful only if the alleged deviation from prescribed procedures is material. This approach is consistent with the pro-enforcement orientation of the New York and Panama Conventions and the discretion that arbitral tribunals enjoy in managing the arbitral proceedings.

b. Applicable law. Parties often include provisions in their arbitration agreement that prescribe how the tribunal is to be constituted and what procedures are to govern the conduct of the arbitration, either by specifying the procedures themselves or by designating institutional arbitral rules that specify them. If an arbitral tribunal materially deviates from the procedures agreed to by the parties, the award may be vacated or denied confirmation, recognition, or enforcement. The national arbitration law of the arbitral seat often applies to fill gaps and supplement

the parties' procedural agreements, but rarely imposes mandatory requirements. Under Article V(1)(d) and Article 5(1)(d) of the New York and Panama Conventions, respectively, the arbitration law of the seat is subsidiary to any agreement between the parties. This prioritization is reflected in the express language of the New York and Panama Conventions, under which the law of the arbitral seat applies only in the absence of party agreement on a particular procedural issue. The arbitral tribunal generally uses the arbitration law of the arbitral seat to interpret or supplement the parties' agreement regarding the composition of the tribunal or arbitral procedures. In appropriate circumstances, generally accepted or established practices of arbitral procedure may also be used to interpret the procedural requirements of the arbitration agreement.

The grounds in this Section are sometimes invoked as the basis for alleging arbitrator partiality or misconduct. While some such allegations may fit within the provisions of this Section, allegations relating to arbitrator partiality or misconduct generally are more appropriately asserted and dealt with under Section 4-13, supra.

c. Party agreement and mandatory law of the arbitral seat. As a practical matter, the arbitration laws of most jurisdictions include few if any mandatory provisions, and instead allow the parties great discretion in ordering the arbitral proceedings. Although the Conventions' text treat the law of the seat as subsidiary to party agreement, different and potentially troubling questions arise when the parties' agreement conflicts with the mandatory law of the seat. As a general principle, parties

cannot contract around mandatory law provisions. The texts of the Conventions, however, do not provide an express exception for the situation in which the parties' agreement regarding particular arbitral procedures or tribunal compositions is contrary to mandatory provisions of the arbitration law of the situs. The drafting history of the Conventions on this issue is inconsistent and inconclusive.

According to one position articulated in the drafting history of the New York Convention, there was no need to state expressly that mandatory provisions of the arbitration law of the seat limit party autonomy because that limitation is inherent in the definition of mandatory law and implicit in the Convention text. This view is consistent with conventional conflict of laws analysis that would give effect to mandatory law of a foreign jurisdiction with respect to activities that take place or are otherwise centered in that jurisdiction. The basic conflict of laws position, however, has not always translated into the international arbitration context.

An alternative position, also evident in the drafting history of the New York Convention and popular among some commentators, is that, in the context of the enforcement of awards, the interest in comity that generally drives choice-of-law determinations is outweighed by the policy in favor of enforcing arbitral awards, and is in any event superseded by the Conventions themselves. Under some versions of this approach to international arbitration, which is sometimes referred to as "a-national," the major innovation of the New York Convention was to liberate parties' arbitration

agreements from burdensome and sometimes idiosyncratic national laws and the text of the Convention should accordingly be applied directly and without exception.

The Restatement does not embrace the so-called a-national approach to international arbitration. The Restatement does, however, take the position that, if a tribunal has complied with the requirements of the arbitration agreement, but in doing so violated a mandatory rule of the arbitration law of the arbitral seat, a court should deny vacatur and grant confirmation, recognition or enforcement, if the conditions for such relief are otherwise met. This approach is consistent with the plain text of the Conventions, the primacy of party autonomy, and the pro-enforcement policies underlying the Conventions and the FAA. This approach also avoids some otherwise intractable problems that arise when party agreements conflict with the mandatory law of the seat. It does not, however, preclude vindication of mandatory arbitration law by other means, such by reference to public policy in an appropriate circumstance.

The most appropriate recourse for an objecting party when the mandatory law of the seat has been violated is to seek to have the award set aside by a competent authority of the arbitral seat. A court in the arbitral seat is better situated to determine whether the provision of the law of arbitration alleged to have been violated is in fact mandatory and whether it is the type of mandatory law that, if violated, would warrant vacatur or denial of confirmation, recognition, or enforcement of an award. In the case of a foreign Convention award, a court at the enforcement stage is less competent than the courts of the seat to assess the mandatory nature of specific provisions of the seat's

arbitration law or to determine the effect that such a violation should have. In the event that the award is set aside, any attempt to have it recognized or enforced in a U.S. court will, except in rare cases, fail. See § 4-16, infra. This fact alone provides adequate protection for the mandatory procedural law of the seat, while minimizing the dilemma that arbitrators face when the parties' arbitration agreement collides with the seat's mandatory law.

Conversely, a competent authority in a foreign arbitral seat might set aside an award because the tribunal departed from the parties' agreement, even though the tribunal did so in an effort to comply with rules of the situs that it deemed mandatory. In that event, a U.S. court may nevertheless in exceptional circumstances enforce the award despite its having been set aside, provided no other ground for denying recognition or enforcement is present. See § 4-16(b), infra. Exceptional circumstances may be found to exist if, in the U.S. court's judgment, the arbitral tribunal made a reasonable decision in disregarding the parties' agreement so as to comply with the mandatory law of the situs. See Comment *d* to § 4-16, infra. While this exception is somewhat in tension with the presumptive hierarchy between party agreement and law of the seat, it again acknowledges the quandary faced by arbitrators when they are forced to decide between violating the agreement of the parties or the mandatory law of the seat.

Illustration:

1. The parties' arbitration agreement requires that all witnesses swear an oath before testifying. The mandatory arbitration law of the foreign arbitral seat, in a Convention State, prohibits the swearing of witnesses in arbitral proceedings. The arbitrators swear witnesses in accordance with the parties' agreement. The losing party resists enforcement of the award on the ground that it violates the mandatory law of the seat. The court enforces the award.

d. Materiality. Unless a deviation from applicable procedures is material, an award will not be vacated or denied confirmation, recognition, or enforcement on the ground that the tribunal violated the agreement of the parties with respect to the composition of the tribunal or arbitral procedure. Materiality requires more than a trivial or technical divergence. A deviation is material if it produces significant prejudice to the objecting party's procedural rights or that party's expectations regarding the procedural conduct of the arbitration. However, the party seeking vacatur or opposing confirmation, recognition, or enforcement does not need to demonstrate that the divergence actually affected the substantive outcome of the arbitration.

In evaluating the materiality of an alleged procedural deviation, a court may consider whether such deviation was a justifiable exercise of arbitrator discretion. For example, an intentional deviation from the parties' agreed upon procedures to protect

the safety of the parties, ensure the enforceability of the award, or comply with relevant mandatory law would not ordinarily be considered a material violation of the parties' agreement. Although framed as justifications for procedural violations, these exceptions will often give effect to the parties' broader intent in submitting their dispute to arbitration and recognize the arbitrators' need to find practical solutions to the difficult problem of conflicts between the parties' agreement and mandatory law of the seat.

e. Party agreement on rules applicable to the substance of the dispute. Under this Section, an award resulting from a proceeding in which a tribunal materially deviated from procedures agreed to by the parties may be vacated or denied confirmation, recognition or enforcement. The agreements on procedure to which this Section refers express the parties' expectations about how the tribunal should proceed in deciding the dispute. Just as it may be alleged that a tribunal ignored agreed upon rules of evidence or a stipulation that the award be fully reasoned, so may a tribunal be accused of ignoring a clear designation or exclusion of governing law and thus significantly prejudicing a party's procedural rights and expectations. See Comment *d* of this Section. Such an attack on the award may plausibly be advanced under more than one Section. See comment *b* of this Section, and § 4-14, supra. This Section, however, supplies particularly appropriate guidance, qualified by the substantial deference principle set forth in paragraph (b). See Comments *a* and *c* of this Section.

Not uncommonly, a party challenging an award will characterize it as the result of an unauthorized use of ex aequo et bono or amiable compositeur powers, thus departing from the procedural framework agreed to by the parties. In all the various scenarios that may be imagined, the burden of proof rests on the party challenging the award. The situation in which this burden is most readily satisfied is one in which the parties expressly precluded ex aequo et bono decisionmaking directly in their contract; such exclusion will almost invariably be found in the arbitration clause itself, but placement of such an exclusion in the contract is not decisive. Analogously, the parties may have designated an arbitration law that itself either expressly proscribes decisionmaking on an ex aequo et bono basis or, more likely, excludes it unless the parties have agreed otherwise. They may also have incorporated institutional or other rules to that same effect. A designation by the parties of a law governing their dispute may be relevant in determining whether they excluded arbitration ex aequo et bono, but is not a decisive factor.

A party challenging an award on this basis nevertheless bears a substantial burden of proof. It must demonstrate that the tribunal expressly adopted and applied ex aequo et bono standards and that the parties' agreement clearly prohibited it from doing so. This level of overtness will generally not be present. The burden on the challenger is heightened by the fact that the body of law that the parties may have adopted to govern the contract, or that the tribunal chose to apply in the absence of a choice by the parties, commonly incorporate principles of equity, good faith, and commercial reasonableness, which may be akin to the notion of ex aequo et bono.

Moreover, arbitral tribunals are accorded very wide latitude in identifying, construing, and applying the governing law. A court will not therefore lightly assume that a tribunal decided a dispute ex aequo et bono. For a court to engage in speculative inquiry as to the genuineness of a tribunal's application of the chosen law, or the otherwise applicable law, would unacceptably jeopardize the finality of the award and defeat the fundamental purposes of arbitration.

f. Waiver and determination sua sponte. Most deviations from agreed upon procedures may be waived. Waiver may be made explicitly either orally or in writing, or implicitly, as when a party complies with or fails to object to an alleged violation during the arbitral proceedings. See § 4-25, infra. There are no limitations on parties' ability to waive default provisions of the arbitration law of the seat. In addition, consistent with Comment *c*, a court may also find that a party has waived an otherwise valid objection that the arbitral proceedings or tribunal composition did not comply with mandatory provisions of the arbitration law of the seat. However, a finding that a party has waived a departure from the rules of arbitration of the seat, whether default or mandatory, does not preclude a court from raising sua sponte the question of whether the procedures that led to the award violate U.S. public policy under Section 4-18, infra.

Illustrations:

2. An arbitration agreement requires the tribunal to appoint an expert on certain technical issues. No expert is appointed by the arbitral

tribunal, and neither party objects during the arbitral proceedings. The tribunal issues an award. A court may recognize or enforce the award despite a claim that the arbitral proceedings violated the parties' agreement because that objection was waived by the failure to raise it during the proceedings.

3. The parties' arbitration agreement provides for hearings to take place in the arbitral seat. The arbitral tribunal decides, for reasons of efficiency and over the objection of *A*, that one of the hearings will be held in another jurisdiction. *A* challenges the award on the ground that the arbitral procedures violated the parties' agreement. The court enforces the award.

4. The parties to a dispute appoint as a sole arbitrator a sitting judge from the arbitral seat. The mandatory law of the arbitral seat expressly prohibits sitting judges from that jurisdiction from acting as arbitrators and renders void any award issued by such an arbitrator. A court may refuse to enforce the award if it determines that the violation of foreign mandatory law also constitutes a violation of U.S. public policy.

g. Partial recognition or enforcement. In appropriate circumstances, as outlined in Section 4-1(d), supra, a court may decide to confirm, recognize or enforce a portion of the award, while denying confirmation, recognition, or enforcement to the rest. Although partial confirmation, recognition, or enforcement of an award is theoretically

possible under this Section, as a practical matter, it will rarely be appropriate. It is often difficult to attribute particular substantive outcomes to specific procedural failings. Courts do not parse and scrutinize each phase or aspect of arbitral procedure to determine whether partial recognition or enforcement is appropriate. As a result, partial enforcement will be most feasible in cases that have been expressly bifurcated, as between liability and quantum of damages. Specifically, with regard to a challenge based on the constitution of the tribunal, it will be even more unusual for a portion of an award to be given effect despite a legitimate challenge under this Section since decisionmaking by an improperly constituted tribunal will rarely, if ever, be substantively divisible.

REPORTERS' NOTES

a. Generally. Article V(1)(d) is intended to place outer limits on arbitrators' otherwise considerable powers to manage proceedings. Consequently, an award may be denied recognition or enforcement if the tribunal fails to comply with the procedures agreed upon by the parties. See Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90-92 (2d Cir. 2005) (refusing to recognize award, under Article V(1)(d) of New York Convention, on grounds that chairman was appointed without co-arbitrators attempting to agree on chairman, as provided for by parties' agreement). Courts have reached similar results in the context of vacatur. Cargill Rice, Inc. v. Empresa Nicaraguense de Alimentos Basicos, 25 F.3d 223, 226 (4th Cir. 1994) ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."); Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830, 831 (11th Cir. 1991) (award vacated for failure to maintain three-person tribunal as required by parties' agreement); W. Can. SS Co. v. Cia de Nav. San Leonardo, 105 F. Supp. 452, 453 (S.D.N.Y. 1952) (vacating award made by two arbitrators because arbitration agreement required three-person tribunal).

Arbitrators enjoy broad discretion over the conduct of the arbitral proceeding unless a particular procedure is prescribed or prohibited by either the parties' agreement or the law of the seat, or produces an award that is so fundamentally unfair that it violates public policy under Section 4-18, infra. See Gary B. Born, International Commercial Arbitration 2764-2769 (2009). As one court explained, Article V(1)(d) was not "intended . . . to permit reviewing courts to police every procedural ruling made by the arbitrator and to set aside the award if any violation of the ICC procedures is found." See Compagnie des Bauxites de Guinee v. Hammermills, Inc., No. 90-0169, 1992 U.S. Dist. LEXIS 8046, at *16 (D.D.C. May 29, 1992); Carte Blanche (Singapore) Pte. v. Carte Blanche Int'l, Ltd., 683 F. Supp. 945, 956 (S.D.N.Y. 1988) ("A major purpose of the Federal Arbitration Act is to avoid delay and unnecessary expense to the parties . . . and the delay that would result from reviewing procedural rulings of the arbitrators would be substantial.").

When parties select arbitral rules, they incorporate by reference those rules and effectively grant arbitrators the discretion afforded under them. As a result, parties are generally precluded from later objecting to arbitrators' exercise of that discretion. See Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1443 (11th Cir. 1998) (rejecting a challenge to the provision of technical report in an allegedly untimely fashion on the ground that arbitral rules did not require parties to provide all documents by any certain deadline and the arbitrators had wide discretion to require the exchange of evidence and to admit or exclude evidence).

In the arbitration agreement, the parties may agree to special arbitral procedures or requirements for the composition of the arbitral tribunal. In the absence of such provisions or any other relevant indication in the arbitral rules, the parties are generally presumed to have agreed that the arbitration legislation of the jurisdiction that they selected as the seat for their arbitration will govern the proceedings. See Albert Jan van den Berg, The Application of the New York Convention by the Courts in Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 25, 26 (Albert Jan van den Berg ed., 1999); Sir Michael J. Mustill & Stewart C. Boyd, The Law and Practice of Commercial Arbitration in England 64 (2d ed. 1989); Alan Scott Rau, The New York Convention in American Courts, 7 Am. Rev. Int'l Arb. 213, 222 (1996). The arbitration legislation of the seat of arbitration has the same effect even if the parties did not directly select the seat, but instead authorized an arbitral institution or the arbitral tribunal to select it.

The arbitrators' interpretation of the parties' agreement or the law of the seat is generally entitled to deference and will be upheld as long as it was not unduly prejudicial. Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 295 (5th Cir. 2004) (finding "no prejudice arising from the consolidation that would justify a refusal to enforce the Award.").

b. Applicable law. Article V of the New York Convention and Article 5 of the Panama Convention both provide that the law of the seat only governs panel composition and arbitral procedure "in the absence" of party agreement regarding such procedures. This interpretation is confirmed by a comparison between the drafting history of the Conventions and the text of the preceding Geneva Convention of 1927. Under the Geneva Convention, arbitral procedure was required to comport with *both* the agreement of the parties *and* the law of the arbitral seat.

Parties may, but rarely do, agree to a law other than the law of the seat to govern their arbitral proceedings. See Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 88 (4th ed. 2004) (acknowledging the possibility of choosing "foreign procedural law," but analyzing the practical problems that arise with such a choice); Karaha Bodas, 364 F.3d at 291 n.37 ("Few reported cases involve arbitration clauses that separate the law of the forum state and the lex arbitri."); see also Zeiler v. Deitsch, 500 F.3d 157, 168 (2d Cir. 2007) (selecting arbitration by a "Beth Din" or Jewish religious tribunal comprised of three rabbis and applying Jewish religious law to govern arbitral procedures). When parties select a separate body of law to govern their arbitral procedures, that law will be used to interpret and apply the provisions of their arbitration agreement.

When parties do not select a separate body of law to govern their arbitral procedure, which is the usual case, the law of the seat can be used to resolve ambiguities and fill gaps in their agreed-upon procedures. See Karaha Bodas, 364 F.3d at 291 n.37 (rejecting challenge under Article V(1)(d) that consolidation was contrary to contracts, which were interpreted based on Swiss arbitration law as the law of the seat); Intercarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 72 (S.D.N.Y. 1993) ("The agreement between the parties here did not establish any particular arbitral procedure, so the question is whether the procedure was in accordance with the law of the United States [which is the arbitral seat].").

While the law of the seat can supplement or clarify the parties' agreement, it cannot be used to alter the parties' agreement. On the relationship between party agreement and the mandatory arbitral law of the seat, see Comment *c* of this Section. Two Italian cases provide a useful illustration of this subtle and sometimes elusive distinction. See S.A. Pando Compabia Naviera v. S.a.S. Filmo, III Y.B. Comm.

Arb. 277 (Corte di Appello di Venezia) (1976); Rederi Aktiebolaget Sally v. S.r.l. Termarea, IV Y.B. Comm. Arb. 294, 296 (Corte di Appello di Firenze) (1978).

In both cases, the parties' agreement provided for a three-member arbitral tribunal in England, but the arbitration proceeded with a two-member arbitral tribunal, as permitted under then-governing English arbitration law. In the first case, decided by the Venice Corte di Appello, the award was enforced. The court reasoned that one party had failed to appoint an arbitrator and that the parties had not agreed upon the procedure in that event. (A more precise analysis might be that the party resisting the award had made the agreed-upon procedure impossible or had waived its right to object when it failed to appoint an arbitrator.) As a result, the court concluded, English law could supplement the arbitration agreement so that the tribunal could be constituted and the case heard. In the second case, English law was not used to fill a gap in the parties' agreed-upon procedures, but instead to displace their agreement to have a three-member tribunal. In that case, the Florence Corte di Appello denied enforcement of the award because it concluded that English arbitration law and customary practice were substituted for the specific terms agreed to by the parties. While these are not U.S. precedents, they provide a useful illustration of the distinction between the law of the seat filling gaps versus displacing party agreement.

c. Party agreement and mandatory law of the arbitral seat. When parties agree to procedures that violate the mandatory law of the seat, arbitrators find themselves in an awkward situation. If the arbitrators deviate from the parties' agreement as to procedures, they run a risk that the resulting award will be challenged by the losing party in the courts of the arbitral seat or in a subsequent action to enforce the award. But if, out of deference to the parties' agreement, the arbitrators choose to violate the mandatory law of the seat, the award risks being vacated at the seat or later denied enforcement elsewhere on that ground. See, e.g., Am. Diagnostica Inc. v. Gradipore Ltd., XXIVa Y.B. Comm. Arb. 574 (N.S.W. S. Ct. 1998) (1999) (concluding that "there must be a limit to the parties' freedom, because their choice of the place of their arbitration may carry with it application of the arbitration of the law of that place according to its terms so as to govern the conduct of the arbitration. . . . So far as the local rules compulsorily apply and are inconsistent with the chosen lex arbitri, they cannot be put aside by agreement that they do not apply [sic]"). Cf. Ministry of Pub. Works v. Societe Bec Freres, Cours d'appel (CA Paris) (Regional Court of Appeal) Paris, Feb. 24, 1994, XXII Y.B. Comm. Arb. 682 (enforcing an award even though arbitral tribunal was not constituted in accordance with parties' arbitration agreement because procedure provided by the parties violated the mandatory law of the seat and reasoning that the "arbitrators did nothing more than make themselves subject to the . . . mandatory law" of the seat). Moreover, some arbitrators may in any event be disinclined to intentionally violate the mandatory law of the arbitral seat.

There is significant disagreement in the commentary about whether an enforcing court should vacate or refuse confirmation, recognition or enforcement of an award that complies with the parties' agreement, but violates the mandatory law of the seat. Compare Born at 1260 ("Under this analysis, the Convention would require Contracting States outside the arbitral seat to give effect to the parties' agreed arbitral procedures notwithstanding contrary mandatory procedural requirements of the arbitral seat."); with Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 326 (1981) (noting the "seemingly curious situation" that "in most cases the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure is . . . subject to the law of [the] country [where the arbitration takes place], whilst by virtue of Article V(1)(d) of the Convention that law is not to be taken into account in enforcement proceedings in another Contracting State, even if the mandatory provisions of that law have been violated"). Notably, the texts of the Conventions are silent on this issue and the drafting histories are inconsistent and inconclusive. The Restatement adheres to a literal reading of the text of the New York Convention, which requires that the parties' agreement be given effect even if that entails violating the mandatory law of the seat. Accordingly, a court should confirm, recognize or enforce (or decline to vacate) an award that complies with the parties' agreement but violates the mandatory law of the seat. See van den Berg, supra, at 326. Nothing in this Section, however, precludes courts from exercising their general discretion to confirm,

recognize, or enforce an award despite the fact that a ground would justify denying recognition or enforcement. See § 4-16(b), supra. In exercising its discretion, it would be appropriate for a court to consider whether the arbitrators had disregarded the parties' agreement for the purpose of complying with the mandatory law of the seat.

One reason for the position adopted by the Restatement is that a challenge to an award based on an alleged violation of the mandatory requirements of the arbitration law of the seat may always be raised in an action to set aside the award by a competent authority in the arbitral seat. See, e.g., Georgios Petrochilos, Procedural Law in International Arbitration 38-39, 352-359 (2004) (arguing that parties "voluntarily assume" risk that agreed arbitral procedures violate law of arbitral seat). The courts in the arbitral seat are in a better position than a court at the recognition or enforcement stage to determine whether the law or rule at issue is indeed mandatory and whether violation of such law would justify the set aside, or a denial of recognition or enforcement of an award made in violation of that law.

If an award is set aside by a competent authority because it violates mandatory law, in the absence of exceptional circumstances, the award would then generally not be entitled to recognition or enforcement by a court in the United States. See van den Berg, supra at 326; Laurence Craig, International Ambition and National Restraints in ICC Arbitration, 1 Arb. Int'l 49, 69-78 (1985); Redfern & Hunter, supra at 86-87. On presumably rare occasions, a court may be requested to recognize or enforce an award that was set aside by a competent authority on the ground that the arbitral procedures violated the mandatory law of the seat. In that context, a court should consider that the arbitrators' respect for the parties' agreement as to arbitral procedure, the mandatory rules of the situs notwithstanding, deserves to be vindicated. In that rare event, the court might recognize or enforce the award despite its having been set aside.

Of course, an award that comports with procedures agreed to by the parties but violates the law of the seat may possibly be refused recognition or enforcement on grounds other than those found in Article V(1)(d) of the New York Convention and Article 5(1)(d) of the Panama Convention. For example, an award may be refused enforcement if it violates fundamental notions of fairness under Article V(1)(b).

d. Materiality. The requirement that an enforceable arbitral award be consistent with the parties' agreement is intended to ensure respect for party autonomy in ordering the arbitral proceedings. It is not intended to provide a hair-trigger for vacatur or for denial of confirmation, recognition, or enforcement of an award. See Compagnie des Bauxites de, 1992 U.S. Dist. LEXIS 8046, at *16. Instead, violations of agreed-upon procedures may only be a basis for vacatur or a denial of confirmation, recognition or enforcement if they cause significant prejudice to a party or unreasonably alter a party's expectations. A materiality requirement is also consistent with the larger intent of the parties to select an effective and efficient method for resolving their dispute. In re Carte Blanche (Singapore) Pte. v. Carte Blanche Int'l, Ltd., 683 F. Supp. 945, 956 (S.D.N.Y. 1988) ("A major purpose of the Federal Arbitration Act is to avoid delay and unnecessary expense to the parties . . . and the delay that would result from reviewing procedural rulings of the arbitrators would be substantial."). Accordingly, relatively minor violations of established time limits are not generally grounds for challenging award. Int'l Ass'n of Machinists v. Mooney Aircraft, Inc., 410 F.2d 681, 683 (5th Cir. 1969); In re Laminoirs-Trefileries-Cableries de Lens v. Southwire Co., 484 F. Supp. 1063, 1066-67 (N.D. Ga. 1980) (failure to comply with ICC six-month limit for issuing award not basis to deny recognition); La Societe Nationale Pour La Recherche v. Shaheen Natural Res. Co., 585 F. Supp. 57, 65-66 (S.D.N.Y. 1983). Violations of established time limits may be grounds for challenge only if they significantly alter the overall temporal framework established by the parties' agreement and reasonably relied on by the parties. See § ___,[24] supra; see also Richard H. Kreindler & Timothy Kautz, Agreed Deadlines and the Setting Aside of Arbitral Awards, 15 Swiss Arb. Ass'n Bull. 576 (1997).

[24] Cross-reference to vacatur Sections regarding time limits.

In determining whether an alleged procedure was a material violation of the parties' agreement or the law of the seat, a court may consider whether such deviation was a justifiable exercise of arbitrator discretion. For example, an intentional deviation from the parties' agreed-upon procedures to protect the safety of the parties, to ensure the enforceability of the award, or to comply with the mandatory law of the seat (a violation of which might trigger set aside of the award) would not ordinarily be considered a material violation of the parties agreement. Although such deviation may violate certain provisions of the parties' agreement, it arguably is intended to serve the parties' larger purposes in submitting their dispute to arbitration and within the arbitrators' discretion and duty to render an enforceable award.

Courts are more willing to vacate or deny confirmation, recognition or enforcement of an award if the tribunal was not constituted in accordance with the parties' agreement. For example, when a party-appointed arbitrator "prematurely" sought to have the President of the Tribunal of Commerce of Luxembourg appoint a third arbitrator, the court refused enforcement since the parties' agreement required that the party-appointed arbitrators first discuss the identity of the third arbitrator and attempt to reach an agreement before requesting appointment by the Tribunal. Encyclopaedia Universalis, 403 F.3d at 85; see also Cargill Rice, 25 F.3d at 223 (refusing to enforce award for failure to comply with requirement of arbitration clause that the arbitrators be chosen by mutual agreement of the parties).

Although there are relatively few U.S. cases raising objections on the grounds of Article V(1)(d), foreign cases occasionally hold that an award may be denied recognition or enforcement if the composition of the tribunal deviates from the parties' agreement. See China Nanhai Oil Joint Serv. Corp. v. Gee Tai Holdings Co. Ltd., [1994] XX Y.B. Comm. Arb. 671, 673, 677-678 (Hong Kong Supreme Court) (1994) (holding that even a "technical" violation of the parties' agreement about selection of arbitrators meant that "the arbitrators did not have jurisdiction to decide the dispute," but nevertheless enforcing the award because objecting party had waived objection by failing to raise it during the arbitration). Foreign courts have found that other types of procedural deviations that did not upset the general procedural expectations of the parties would not be grounds for denying recognition or enforcement. See Tonguan Int'l Trading Group v. Uni-Clan Ltd., XXVI Y.B. Comm. Arb. 886, 889 (Q.B.) (2001) (refusing challenge based on holding of hearings at a place other than the contractually specified seat and reasoning that "[i]n the absence of any language which makes it clear that these parties regarded the venue for the arbitration as a matter of critical importance in all cases . . . a failure to comply with [the choice of situs] must be viewed in the light of the nature and gravity of the particular breach."); Inter-Arab Inv. Guar. Corp. v. Banque Arabe et Internationale d'Investissements, XXII Y.B. Comm. Arb. 643, 665 (Cour d'appel, Brussels) (1997) (finding no violation of parties' agreement requiring a reasoned award where the arbitral tribunal's reasoning supported its award, and was logical and coherent).

e. Party agreement on rules applicable to the substance of the dispute. A party seeking relief from an award may invoke a provision addressing ex aequo et bono reasoning, a choice-of-law clause, or a similar contract term as an agreement on arbitral procedure governed by this Section. However, in doing so, it bears the considerable burden of establishing the existence and content of the putative agreement, its breach, and the materiality of that breach, as required by Comment *d* of this Section.

(i). Violation of an ex aequo et bono exclusion. Parties may stipulate in their arbitration clause that disputes between them are not to be resolved on an ex aequo et bono basis. See Rene David, Arbitration in International Trade 328-53 (1985); Howard M. Holtzmann & Joseph Neuhaus, A Guide to the UNCITRAL Model Law on International Commercial Arbitration 766-807 (1989); W. Lawrence Craig, et al, International Chamber of Commerce Arbitration 347-54 (3d ed., 2000) for discussion of the various conceptions of, and limitations upon, ex aequo et bono and amiable compositeur methodologies. The parties may also preclude ex aequo et bono awards by designating the law of the arbitral seat or a set of arbitration rules that clearly bar use of ex aequo et bono reasoning, or that permit such reasoning only with the parties' express authorization. It will be rare for the parties to so stipulate and for a tribunal nevertheless to expressly decide the dispute by reference to ex aequo et bono standards. But should it do so, the tribunal will have violated the parties' mandate. Cf. Klaus Peter Berger, International

Economic Arbitration 283 (1993) (award can be set aside either for excess of mandate or violation of international public policy); Gary B. Born, International Commercial Arbitration 2600 (2009) (a tribunal that decides a dispute ex aequo et bono when barred from doing so follows "a fundamentally different procedure than that agreed by the parties").

However, a party challenging an award on this basis bears a serious burden. It must show that, despite an express prohibition, the tribunal clearly and unambiguously adopted and applied ex aequo et bono standards, and that the resulting departure from the agreed upon manner of proceeding was material within the meaning of Comment *d*, supra. A party cannot meet this burden merely by arguing that the tribunal, while purporting to decide the dispute by reference to the chosen law, in fact interpreted or applied that law so as to reach a result dictated by ex aequo et bono reasoning rather than by application of the chosen law. The body of law that the parties adopted to govern the contract, or that the tribunal chose to apply in the absence of a choice by the parties, will in any event commonly include general principles of equity, good faith and commercial reasonableness that may resemble, but still not constitute, ex aequo et bono reasoning, thus making it difficult to find that the tribunal decided the dispute ex aequo et bono rather by reference to the chosen law.

(ii). Violation of choice-of-law prescription. A party challenging an award under this Section might seek to characterize an express choice-of-law clause as a form of agreement on arbitral procedure, and claim that the tribunal violated that agreement through its application of a law other than the one expressly designated. See Gary B. Born, supra, at 2599 (while most courts reject arguments that the arbitrators failed to comply with the parties' arbitration agreement by applying the "wrong" law, they will accept them if the arbitrators expressly "refuse[d] to give effect to a concededly valid choice-of-law clause"); cf. Christoph Liebscher, The Healthy Award 351 (2003) (French and German courts have allowed challenges to awards when the "tribunal did not apply the substantive law agreed by the parties"); Stefan Kröll, The German Law on the Recognition and Enforcement of Foreign Arbitral Awards, 18(3) Int'l Arb. Rep. 29, 34 (2003) (tribunal's disregard of the parties' instructions on choice of law constitutes a procedural irregularity justifying recourse against the award or its enforcement).

The burden on a party seeking relief under these circumstances is even greater than the burden on a party objecting to express ex aequo et bono decisionmaking. Indeed, the limited U.S. authority suggesting such a basis for vacating a domestic award appears to have been repudiated by the same court that made the initial suggestion. See Affymax v. Ortho-McNeil-Janssen Pharms, Inc., 660 F.3d 281, at *7 (7th Cir. 2011) (stating that *Edstrom* did not survive the Supreme Court's decision in *Hall Street*). Cf. Stawski Distrib. Co. v. Browary Zywiec S.A., 126 Fed. Appx. 308, 309 (7th Cir. 2005) (unpublished opinion) (misapplication of the chosen law is not a ground for challenge of an award; party must show that the tribunal refused to apply the chosen law in order to establish that it "failed to implement the parties' agreement"); Edstrom Indus., Inc. v. Companion life Ins. Co., 516 F.3d 546, 552 (7th Cir. 2008) ("precisely because arbitration is a creature of contract, the arbitrator cannot disregard the lawful directions the parties have given them; [i]f they tell him to apply Wisconsin law, he cannot apply New York law.").

First, the challenging party must establish that the tribunal expressly predicated its decision on a law other than the law chosen by the parties. Under no circumstances will a court entertain a claim that, while a tribunal purported to apply the law chosen by the parties, it in reality applied some other law, confused the chosen law with some other law, or misapplied the chosen law.

Second, even if the tribunal specifically invokes a law not chosen, the party challenging the award on this ground must further show that the tribunal's doing so is necessarily inconsistent with the parties' choice of law. See generally Guiditta Cordero Moss, Can an Arbitral Tribunal Disregard the Choice of Law Made by the Parties?, 2005:1 Stockholm Int'l Arb. Rev. 1. For a variety of reasons, this will not be easy. See Born, supra, at 2599 (tribunal must expressly refuse to follow a "concededly valid choice-of-law clause"). For example, a tribunal may justifiably apply a different law than the one chosen if it finds the choice-of-law clause to be inapplicable to the issue at hand, for example because it is limited in its application to questions of interpretation; or if it finds the clause to be invalid on some

basis and therefore unenforceable; or if it finds that the parties chose the "whole law" of a body of law, including its choice-of-law rules pointing to application of a different jurisdiction's law; or if it finds the chosen law to be supplanted by mandatory rules of the arbitral seat or of the law of another jurisdiction. See, e.g., James Ford, Inc. v. Ford Dealer Comp. Serv., Inc., 56 Fed. Appx. 324 (9th Cir. 2003) (unpublished opinion) (tribunal's application of California law despite Michigan choice-of-law provision not ground for vacatur unless no plausible explanation could be inferred). On occasion, a choice-of-law clause is combined with an express authorization for the tribunal to act as amiable compositeur. See Henry Brown & Arthur Marriott, ADR Principles and Practice 62 (2d ed. 1999). In that event, the tribunal will enjoy considerable flexibility in its application of the designated law. At a minimum, a party challenging an award on this ground must demonstrate that the tribunal could not possibly justify application of a law other than the one chosen on any such ground.

In any event, the challenging party must establish that express application of a law other than the one chosen resulted in material prejudice. Cf. Berger, supra, at 684 (courts should apply a causality test to uphold most awards alleged to have been decided as amiable compositeur without authorization).

(iii). Relationship to excess of authority. This framework of analysis is consistent with the view stated in Section 4-14, Comment *c*, that contractual exclusions of certain remedies available under a contract are rebuttably presumed to constitute limitations on remedies rather than limitations on arbitral authority. The effect of the presumption stated that Comment is to place on the party challenging an award the burden of establishing that the grant of an excluded remedy represented an excess of authority rather than a merits determination. *Comment e* to this Section places on the challenger a similar burden of establishing that a tribunal expressly decided a dispute ex aequo et bono in violation of the parties' clear intentions to the contrary, or overtly applied a law other than the chosen law and did so in a manner that cannot in any way be reconciled with the parties' agreement on choice of law. In fact, some commentators consider that if a tribunal can be shown to have acted in either of these ways, the award may be challenged on grounds either of excess of authority or violation of agreed upon procedures. See Cordero Moss, supra, at 6-7.

f. Waiver and determination sua sponte. Courts generally find that if a party fails to object to a procedural deviation, it waives its right to object to the deviation. See Halcot Navigation L.P. v. Stolt-Nielsen Transp. Group, BV, 491 F. Supp. 2d 413, 419 (S.D.N.Y. 2007) (rejecting as waived challenge based on arbitrators' alleged lack of jurisdiction over subject matter of the dispute); Karaha Bodas Co., 364 F.3d at 304 (rejecting challenge based on method of appointing arbitrators when party failed to participate or object); Al Haddad Bros. Enters., Inc. v. M/S AGAPI, 635 F. Supp. 205, 210 (D. Del. 1986), aff'd without opinion, 813 F.2d 396 (3d Cir. 1987) (enforcing an award when arbitral tribunal was constituted in violation of the parties' agreement but in accordance with British arbitration law, on the ground that resort to British law was permitted when objecting party failed to appoint an arbitrator and did not object to resort to British procedures); La Societe Nationale Pour La Recherche, 585 F. Supp. 57, 65 (S.D.N.Y. 1983), judgment aff'd per curiam, 733 F.2d 260 (2d Cir. 1984) (rejecting challenge based on deviation from prescribed time limits because party waived objection by failing to raise it at the expiration of the applicable time period).

Consistent with the position taken in Comment *c* of this Section, generally speaking parties can waive alleged violations of both default and mandatory provisions of the arbitral law of the seat. Violations of default rules of the arbitral forum are almost by definition waivable, the only question then being whether they were in fact waived. However, a court may also decide that violation of a mandatory rule of law of the arbitral forum has been waived, provided the violation did not undermine the fundamental procedural fairness of the arbitration. The reason for allowing waiver in these circumstances is that a foreign court asked to recognize or enforce an award may properly expect objections that are based specifically on departures from the arbitral rules of the forum to have been raised before the arbitrators or in a set-aside action in a court of the arbitral seat, if such an action were brought. However, a finding that a party has waived a violation of the rules of the arbitral forum does not in any event preclude the court where confirmation, recognition, or enforcement of the award is

sought from finding that the procedures followed violate the public policy of the United States, regardless of whether the rule that was violated has a default or mandatory character under the law of the seat. See § 4-18, supra. A court may raise the violation sua sponte.

Several other countries have adopted the view that arbitral procedures alleged to violate the law of the arbitral seat must be challenged first in set-aside proceedings in the courts of the arbitral seat. See, e.g., IPOC Int'l Growth Fund Ltd. v. LV Fin. Group Ltd., Civil Appeal No. 30 of 2006 (B.V.I. Court of Appeal June 18, 2007), available at http://www.eccourts.org/judgments/decisions/2007/IPOCvLVFinanceGroupLtdecsc1697.pdf#search=%22IPOC%22 (last visited Mar. 19, 2010) ("[W]here, in an enforcement application, a forum court of supervisory jurisdiction . . . makes a decision on a particular issue under the law of the seat of the arbitration, a foreign court should not reinvestigate allegations of substantial injustice, procedural defects and the conduct of the arbitration which the supervisory court already considered, save in very exceptional cases."); Seller v. Buyer, XXI Y.B. Comm. Arb. 532, 534 (Bundesgerichtshof, Germany) (1990) (requirement that party raise objections to award in arbitral seat applies "to irregularities in the arbitral procedure which violate the law of the State where arbitration takes place"); cf. Minmetals Germany GmbH v. Ferco Steel Ltd., [1999] C.L.C. 647 (Q.B.) ("In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving the final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand."). The Restatement rejects this view in recognition of the fact that one of the primary innovations of the New York Convention was to eliminate the "double exequatur" requirement for arbitral awards that had existed under the Geneva Convention. Born, supra at 1253; see also Yusuf Ahmed Alghanim & Sons, W.L.L v. Toys "R" Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997) ("The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad[.]").

g. Partial recognition or enforcement. Courts generally have authority to recognize or enforce part but not all of an award. See Comment *f* to Section 4-1(d) & (e), supra. Although partial recognition and enforcement of an award is theoretically possible under this Section, it will rarely be appropriate. As a practical matter, those instances when a court can attribute particular substantive outcomes to a specific procedural failing will most likely involve cases that have been expressly bifurcated or otherwise divided into separate procedural phases with separate orders or awards being issued in the different phases. Courts should not parse and scrutinize each phase or aspect of arbitral procedure to determine whether partial confirmation, recognition, or enforcement is appropriate. With regard to challenges based on the constitution of the tribunal, it will be even more unusual for a portion of an award to be confirmed, recognized or enforced despite a legitimate challenge under this Section since decisionmaking by an improperly constituted tribunal will rarely, if ever, be substantively divisible.

§ 4-16. Award Set Aside or Subject to Set-Aside Proceedings

(a) A court may deny confirmation, recognition, or enforcement of a Convention award to the extent that the award has been set aside by a competent authority of the country in which or under the arbitration law of which the award was made.

(b) Even if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances.

(c) If a Convention award is the subject of a set-aside proceeding before a competent authority, a court of the United States may defer the decision whether to grant confirmation, recognition, or enforcement pending the outcome of that proceeding.

(d) For purposes of this Section, a Convention award is deemed made under a particular arbitration law if that law is unambiguously designated by the parties to govern the arbitration.

Comments:

a. Generally. This Section addresses the impact of set-aside proceedings instituted before other courts on an action for post–award relief on a Convention

award in a U.S. court. It sets forth principles developed under Articles V(1)(e) and VI of the New York Convention and Articles 5(1)(e) and 6 of the Panama Convention.

Neither Convention precludes a party from seeking, or a competent court from granting, a judgment setting aside an award. However, even during the pendency of such proceedings or following a set-aside judgment, a party may seek confirmation, recognition, or enforcement of a Convention award in a competent court.

The scope and proper exercise of set-aside authority are determined by the arbitration law of the country in which or under the law of which the award was made. In the usual situation, an award is made under the arbitration law of the arbitral situs. However, the parties may select as the law governing the arbitration the law of a jurisdiction other than the situs. To be effective, that selection must be unambiguously made. If the parties make such a selection, the country "in which" an award is made is different from the country "under the law of which" the award is made. Consequently, more than one jurisdiction may exercise set-aside jurisdiction. See Comment *b* of this Section.

b. Competent authority. An authority (typically a court) is "competent" within the meaning of this Section if it is the proper body to set aside the award in question. See § 1-1(f), supra. Under the Conventions, ordinarily only an authority of the seat of arbitration has that competence. However, it is possible for the parties to make an arbitration expressly and unambiguously subject to the arbitration law of a country other than the country where the seat is located. (This is explicitly recognized in

Articles V(1)(e) and 5(1)(e) of the New York and Panama Conventions, respectively.) In that event, the award may be set aside by competent authorities at the seat as well as by competent authorities of the country whose arbitration law was designated by the parties.

It follows from the parties' power to designate an arbitration law other than the arbitration law of the situs that a Convention award may concurrently be the subject of set-aside actions in both a foreign and a U.S. court. Two scenarios may be contemplated. First, an arbitration may have its situs in the United States, but be subject to the arbitration law of another country. Second, an arbitration may have its situs in a foreign country, but be subject to U.S. arbitration law. In both situations, a U.S. court would share set-aside authority with a foreign court. If a party seeks confirmation or vacatur of the award in a U.S. court after the award has been confirmed by a competent foreign court, the U.S. court proceeds in accordance with Section 4-8, supra; the effects of a foreign judgment vacating an award, by contrast, are governed by this Section.

If a Convention award is made in one foreign country under the arbitration law of another foreign country, the competent courts of both countries have authority to confirm or set aside the award. If the two foreign courts issue inconsistent judgments and the award is later brought to a U.S. court for recognition or enforcement, the U.S. court renders judgment in accordance with its general rules on the recognition or enforcement of inconsistent foreign judgments.

c. Set aside judgment as basis for refusing post-award relief. Ordinarily, a court will not confirm, recognize, or enforce an award that has been set aside by a competent authority. Awards that have been "suspended" are subject to the same rules as awards that have been set aside. It is for the party opposing confirmation, recognition, or enforcement to demonstrate that the award has been set aside by, or is pending before, a competent authority.

d. Extraordinary confirmation, recognition, and enforcement of set-aside awards. In several narrow situations, a Convention award may be entitled to confirmation, recognition, or enforcement, despite having previously been set aside. First, the authority purporting to set aside an award may not have been competent to do so within the meaning of Section 1-1(f), supra.

Second, the judgment setting aside the award may not be entitled to recognition under the rules governing judgment recognition in the court where post-award relief is sought. In most circumstances in which a party seeks confirmation, recognition, or enforcement of a set aside award, the determination to set aside the award will have been made by a foreign court rather than a U.S. court. The forum where post-award relief is sought will accordingly determine the effect of the foreign set-aside judgment by reference to its own law of foreign judgment recognition. In highly extraordinary circumstances, a U.S. court may also disregard a foreign set-aside judgment, even though, under strict application of the forum's principles of foreign judgment recognition, that judgment would ordinarily be recognized. The court may do so, for

example, if the set-aside court knowingly and egregiously departed from the rules governing set-aside in that jurisdiction. It may also do so when other facts give rise to substantial and justifiable doubts about the integrity or independence of the foreign court with respect to the judgment in question.

In the unusual scenario in which a U.S. court vacates a foreign Convention award (due to U.S. arbitration law having been selected by the parties), the effect of that judgment in a subsequent action for post-award relief in U.S. court will be governed by the forum's usual standards for determining the effect of prior domestic judgments, including the constitutional requirements of full faith and credit.

e. Adjournment pending post-award proceedings. Under Article VI of the New York Convention and Article 6 of the Panama Convention, a court asked to grant post-award relief with respect to a Convention award may, in its discretion, adjourn the proceedings pending the outcome of a set-aside action in another jurisdiction. If the court decides to adjourn the action, it may require the posting of appropriate security. The mere fact that a set-aside action could still be brought before a competent authority will not justify a denial or deferral of post-award relief; a set-aside action must be pending. If no such action is pending, post-award relief, if otherwise warranted, must be granted.

f. Waiver and determination sua sponte. A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

g. *Partial grant of post-award relief.* In appropriate circumstances, as outlined in Section 4-1(d) & (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest.

REPORTERS' NOTES

a. Generally. The Conventions contemplate that competent authorities at the seat of arbitration may set aside an award made there on grounds provided for by the arbitration law of that place. Under the Conventions, an award that has been set aside may be refused recognition and enforcement. The New York Convention, Article V(1)(e), states:

> [R]ecognition and enforcement of an arbitral award may be refused, at the request of the party against whom it is invoked . . . if that party furnishes to the competent authority where recognition and enforcement is sought, proof that: . . . (e) 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.

The Panama Convention's counterpart, Article 5(1)(e), is to the same effect.

The Conventions do not preclude a party from seeking confirmation, recognition, or enforcement of an award that has been set aside by a competent authority in the arbitral seat or that is the subject of a pending set-aside action before such an authority. Moreover, the Conventions' permissive language ("may") suggests that a court may grant confirmation, recognition, or enforcement of such an award. The court where such post-award relief is sought may also defer proceedings pending the outcome of a set-aside action. See Comment *e* of this Section. The fact that a court grants an adjournment for this purpose does not prevent the court in its discretion from later confirming, recognizing, or enforcing the award, notwithstanding a set-aside at the place of arbitration. See Comment *d* of this Section. Nevertheless, an award that has been set aside will only in exceptional circumstances be granted confirmation, recognition, or enforcement in a court in the United States. See Comment *e* of this Section.

b. Competent authority. Under both Conventions, it is a basis for refusing confirmation, recognition, and enforcement that an award has been set aside or suspended by "a competent authority." See N.Y. Convention, Article V(1)(e); Panama Convention, Article 5(1)(e). Courts in the United States, with rare exception, have declined to recognize and enforce awards that have been set aside by a court having jurisdiction. See TermoRio S.A., E.S.P v. Electranta S.P, 487 F.3d 928, 936 (D.C. Cir. 2007) (reasoning that "an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made.") (citing with approval Baker Marine (Nigeria) Ltd. v. Chevron (Nigeria) Ltd., 191 F.3d 194, 197 (2d Cir. 1999)); Spier v. Calzaturificio Tecnica, S.p.A., 71 F. Supp. 2d 279, 279 (S.D.N.Y. 1999) ("Spier II"). But see Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp 907 (D.D.C. 1996) (court enforced award set aside by Egyptian courts).

(i). Meaning of "competent." In referring to the adjudicative body purporting to set aside a Convention award, this Section adopts the Conventions' term "authority" instead of "court" to replicate the Convention language and to account for possible differences among legal systems. The Section also uses the Convention term "competent," but gives it a particular meaning. A "competent" authority is one that is entitled under the Convention to perform the functions it ascribes to itself. See § 1-1(f), supra. The qualifier thus distinguishes between courts empowered under a Convention to nullify an award (i.e., those with proper set-aside jurisdiction) and courts whose declarations of set-aside would be exorbitant.

The New York Convention identifies as competent the authorities "of the country in which, or under the law of which, [the] award is made." N.Y. Convention, art. V(1)(e) (1958).

The Conventions do not preclude a court asked to confirm, recognize, or enforce a Convention award from examining the competence, in the Restatement sense, of the authority claiming to have invalidated the award, and courts in the United States have done so. See TermoRio S.A. E.S.P., 487 F.3d at 941 (annulling court was one properly claiming set-aside jurisdiction); Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 267 F. Supp. 2d 1335, 1345-47 (S.D. Fla. 2003) (Florida federal court, not Venezuelan courts, had proper jurisdiction). A court's principal concern is to ensure that the body that asserted set-aside jurisdiction belongs to the country in which or under whose law the award was made. Additionally, a court may properly consider the plausibility of that body's authority within the relevant foreign legal system. Ordinarily, that secondary inquiry requires a court only to confirm the absence of obvious over-reaching by the foreign authority, and does not extend to an examination of the foreign jurisdiction's venue rules or similar technicalities, an inquiry that would be both onerous and inappropriate.

(ii). Awards "made under the law of." Ordinarily only an authority of the seat of arbitration has competence to set aside an award rendered there. Nevertheless, Articles V(1)(e) and 5(1)(e) of the New York and Panama Conventions, respectively, support the notion that, under some circumstances, a court of a country other than the place of arbitration may be authorized to exercise set-aside authority. The relevant language of the Conventions is cryptic. New York Convention Article V(1)(e) refers, without elaboration elsewhere in the treaty, to the possibility of set-aside by a court of the country "in which or under the law of which" the award is made. The Panama Convention's counterpart language is quite similar. This formulation has given rise to difficult questions of interpretation.

A first question concerns the meaning of the treaty language "under the law of" a particular country. The Restatement adopts as the most plausible interpretation of the term "law" in that context the law governing the arbitral proceedings, as distinct from the law governing the parties' contract or their arbitration agreement. See Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, 745 F. Supp. 172 (S.D.N.Y. 1990). Use of the disjunctive "or" suggests that the Conventions contemplate a situation in which the law governing the arbitration is the arbitration law of a jurisdiction other than the seat. A second question to be addressed is whether in any given circumstance an award is made under an arbitration law other than that of the seat. A variety of fact-based and intention-based tests could be devised, however the Restatement, in paragraph (d) of this Section, posits that the parties' joint intentions should control the question and that those intentions need to be expressed unambiguously. Such a requirement promotes legal certainty, while acknowledging that it is uncommon for parties to make such an election. Parties intending to designate an arbitration law other than that of the seat will ordinarily do so in the arbitration clause itself.

The Convention language suggests that the jurisdiction "under the law of which" an award is made enjoys authority to set aside the award, and presumably also to confirm it. That, however, raises a third and quite difficult question, namely the effect that the parties' designation of an arbitration law other than that of the seat has on the set-aside authority of the otherwise competent authorities at the seat. One view is that the authority granted by the parties to the courts of the place whose arbitration law they chose confers exclusive set-aside jurisdiction, thus supplanting the set-aside authority of the courts of the seat. This solution has the advantage of ensuring that one and only one jurisdiction enjoys set-aside authority over any given award. The Restatement does not adopt that position, however, largely because set-aside authority is properly viewed as an inherent power of the arbitral seat. Depriving courts of that authority merely because the parties selected another country's law of arbitration would prevent courts of the arbitral seat from correcting even the most fundamental defects in the arbitral proceeding or the award. The jurisdiction whose arbitration law was chosen may not be disposed or equipped to address such concerns. Preserving a U.S. court's right to consider the full panoply of grounds for challenging an award made in the U.S. is also most consistent with § 4-24(a), infra, which denies effect to agreements to reduce or eliminate grounds for post-award relief. In particular, it preserves for courts of the seat the opportunity to police the arbitrability of the dispute and

the conformity of the award with public policy. These are grounds to which the set-aside court applies its own law and which that court may raise sua sponte.

The Restatement position that the parties do not by choosing a foreign arbitration law deprive the seat's courts of set-aside power is consistent with the Conventions' language. It will presumably also comport well with the parties' expectations. The courts have not yet specifically decided whether two different jurisdictions can have authority to set aside an award, but one opinion in dictum arguably rejects it. See Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas, 364 F.3d 274, 287 (5th Cir. 2004) (suggesting that only one system has set-aside powers).

(iii). Variants on concurrent set-aside jurisdiction. Concurrent set-aside jurisdiction can exist in various configurations. Two such configurations implicate the set-aside authority of a U.S. court. In one scenario, the parties to an international arbitration seated in the United States have designated a non-U.S arbitration law to govern the proceedings. Conversely, the parties to an international arbitration seated in a foreign country have designated U.S. law as the applicable law of arbitration. In that event, the U.S. court and the foreign court have concurrent authority to confirm or set aside the award.

If the award is initially brought to a U.S. court for confirmation or vacatur, the court will treat the request as it would any other request for confirmation or vacatur of a local award. It may happen, however, that the award is brought first to the foreign court for confirmation or vacatur. If, after that court renders judgment, confirmation or vacatur is sought in a U.S. court, the latter must determine the effect of the foreign adjudication. If the foreign judgment confirmed the award, the U.S. court proceeds in accordance with Section 4-8, supra; the effects of a foreign judgment vacating an award, by contrast, are governed by this Section. The two sections will lead to substantially similar analyses; this Section, however, allows a court to consider whether extraordinary circumstances require that it not recognize the foreign vacatur (set aside) judgment in question. A U.S. court may also face problems of concurrent set-aside authority if it is asked to recognize or enforce an award made in one foreign country under the arbitration law of another foreign country. In this scenario, two foreign jurisdictions enjoy concurrent set-aside authority. If the two foreign courts have by then reached inconsistent results, the U.S. court will presumably be guided by its usual judgment recognition rules applicable to inconsistent foreign judgments.

In still a further scenario, two U.S states will have concurrent set-aside authority over a single U.S. Convention award, because the award was made in one U.S. state expressly under the arbitration law of another U.S. state. In keeping with the Restatement position, a vacatur action may be brought in either state. If such an action is brought in both jurisdictions, the second court will give the judgment of the other court, if one has already been rendered, the effect prescribed by its own principles of issue or claim preclusion. If the two competent courts render inconsistent judgments, and recognition or enforcement of the award is later sought in a third state (or if one of the judgments is brought to the third state for recognition or enforcement), a court of the third state will presumably be guided by its general rules applicable to inconsistent sister-state judgments, as well as principles of full faith and credit.

In every concurrent jurisdiction scenario mentioned, the court in which post-award relief is sought has the option of deferring its proceedings to await the outcome of a set-aside action pending before a competent court.

c. Set-aside as basis for refusing post-award relief. Though courts in the United States ordinarily decline to recognize and enforce awards that have been set aside by a court having proper jurisdiction, the Restatement acknowledges that under the Conventions a court may in certain exceptional situations confirm, recognize or enforce an award that has been set aside. This view is consistent with the permissive language—recognition and enforcement "may [not "must"] be refused"—found in the English version of the Conventions. However, the Restatement rule states clearly that it is only in rare circumstances that annulled awards will be given effect.

d. Extraordinary confirmation and enforcement of set-aside awards. The circumstances, other than lack of proper jurisdiction, that might justify confirmation or recognition and enforcement of an award that has been set aside have not been comprehensively canvassed by the courts. In distinguishing the cases before them, some courts have made passing reference to set-aside proceedings that were "fatally flawed" or that produced annulments that were "other than authentic," see TermoRio, 487 F.3d at 941, or that involved local courts acting contrary to their own law, see Baker Marine, 191 F.3d at 197. Commentators on Article V(1)(e) have been more systematic than courts, and have produced a diverse body of scholarship on the matter. See William W. Park, Duty and Discretion in International Arbitration, 93 Am. J. Int'l L. 805 (1999); Jan Paulsson, Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment (LSA), 9(1) ICC Int'l Ct. Arb. Bull. 14 (1998); Richard W. Hulbert, Further Observations on Chromalloy: A Contract Misconstrued, A Law Misapplied, and an Opportunity Foregone, 13 ICSID Rev.-Foreign Inv. L.J. 124 (1998); William W. Park, Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators, 8 Am. Rev. Int'l Arb. 133 (1997).

Though other approaches have been suggested, the Restatement takes as its point of departure the law of judgments of the court where recognition or enforcement is sought, inasmuch as a judgment of set-aside is, after all, a judgment. That jurisprudence alone will address many troubling fact patterns. The Uniform Foreign Money-Judgments Recognition Act (1962) (UFMJRA), enacted in over thirty states, excuses non-recognition, and in some cases precludes recognition, when the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law, or when the court did not have subject matter or personal jurisdiction. Additionally, non-recognition is permitted but not required when the defendant in the proceeding did not receive notice of the proceeding in sufficient time to enable it to defend, when the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case, or when the cause of action (sometimes expressed as "claim for relief") on which the judgment was based was repugnant to the public policy of the enacting state or of the United States. See UFMJRA § 4(b) (1962).

While serviceable and reasonably complete, the standard grounds for non-recognition of judgments may not account for every compelling circumstance, thus calling for the additional flexibility intended by the Restatement language "or in other appropriate circumstances." The residual category envisioned by this phrase is intended to cover judgments of set-aside that might qualify for recognition under the standard grounds, but that nevertheless should be denied recognition in light of troubling circumstances surrounding the set-aside process. For instance, none of the original 1962 UFMJRA grounds neatly fit the situation in which the judge who set aside the award was compromised by especial pressure not characteristic of the entire system. See UFMJRA § 4 (1962).

The ALI Proposed Federal Statute, by contrast, contains an additional ground designed to catch judgments produced amidst disturbing circumstances connected only to the particular proceeding. See ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, § 5(a)(ii) (2006) ("circumstances that raise substantial and justifiable doubt about the integrity of the rendering court with respect to *the judgment in question*") (emphasis added). An equivalent formulation is found in the UFMJRA, as revised in 2005 to become the Uniform Foreign-Country Money Judgment Recognition Act (UFCMJRA). See UFCMJRA § 4(c)(7) (2005). Circumstances of this kind may be deemed to exist when solid proofs (rather than mere speculation) raise substantial and justifiable doubts about the integrity or independence of the rendering court with respect to the judgment in question. The focus is on the specific proceedings that led to the set-aside, and more particularly on whether the set-aside court knowingly and egregiously departed from the rules ordinarily applied to such actions in the jurisdiction.

New York Convention Article VII(1) is sometimes raised in connection with awards that have been set aside. It provides in pertinent part:

> The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the

> extent allowed by the law or treaties of the country where such award is sought to be relied upon.

Article VII is sometimes called the "right to avail clause" or "most favorable provision clause." See, e.g., U.N. Comm. on Int'l Trade Law, 41st sess., June 16–July 3, 2008, U.N. Doc. A/CN.9/661/Add.1 (2008) (May 8, 2008, comments of Spain). The excerpted portion of the Article anticipates at least two circumstances. First, by virtue of a treaty other than the New York Convention, an award recipient may be entitled to recognition or enforcement with fewer obstacles than can arise under the New York Convention, such as, for example, if a Friendship, Commerce, and Navigation Treaty were to supply an alternative, more efficient, mechanism for enforcing awards also covered by the New York Convention.

The second circumstance is contemplated by Article VII(1)'s preservation of an interested party's right to avail itself of an award "in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon." The Restatement rejects the view that this clause might require or even justify giving effect to an award that has been set aside at the seat of arbitration. Regardless of what the Convention's drafters might have meant by use of the imperative language "shall not . . . deprive" in Article VII, that provision does not apply if there exists within the jurisdiction no alternative regime applicable to the Convention award in question. For Convention awards, Chapter One of the FAA does not constitute such an alternative regime. See § 4-1, supra.

The Restatement accordingly does not adopt the reasoning of Chromalloy Aeroservices, Corp. v. Arab Republic of Egypt, 939 F. Supp. 907, 912-13 (D.D.C. 1996), to the extent that it relied on Article VII's "right-to-avail" clause to justify enforcing an award that had been set aside by Egyptian courts at the seat of arbitration. Subsequent courts have distinguished *Chromalloy*, or have rejected it explicitly. See TermoRio S.A., E.S.P v. Electranta S.P, 487 F.3d 928, 937 (D.C. Cir. 2007); Spier II, 71 F. Supp. 2d 279, 287-88 (S.D.N.Y. 1999)(unnecessary to decide *Chromalloy*'s correctness).

e. Adjournment pending post-award proceedings. Under New York Convention practice, recognition, or enforcement of an award is often sought while courts at the arbitral seat remain seized of a set-aside or analogous action directed against the award. See Spier v. Calzaturificio Tecnica S.p.A., 663 F. Supp. 871, 874-75 (S.D.N.Y. 1987) ("Spier I"); Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 961-63 (S.D. Ohio 1981). If a set-aside action before a competent authority operated automatically to defer enforcement, the Conventions' aims could be easily subverted. Nevertheless, to confirm or enforce an award that is later set aside by a competent court potentially burdens the interstate system with inconsistent dispositions of the same dispute.

New York Convention Article VI and its Panama Convention counterpart introduce flexibility into a court's treatment of awards that are the subject of foreign set-aside proceedings. Article VI of the New York Convention states in relevant part:

> 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.

In keeping with the plain meaning of the Convention language, U.S. courts consider adjournment under Article VI to be wholly discretionary. See Spier I, 663 F. Supp. at 875; Fertilizer Corp., 517 F. Supp. at 961-63. As suggested in Article VI, adjourning courts may require the party seeking adjournment to post security. See Caribbean Trading & Fid. Corp. v. Nigerian Nat'l Petrol. Corp., 948 F.2d 111 (2d Cir. 1991). See also Alto Mar Girrossol v. Lumbermens Mut. Cas. Co, 2005 WL947126 (N.D.Ill.) (proceedings stayed; party requesting stay to provide suitable security as a condition of the stay). To justify adjournment, however, the set-aside proceeding must be underway; it is not sufficient that a set-aside proceeding may possibly still be brought by virtue of not yet being time-barred.

The operation of Article VI in U.S. courts is illustrated by *Spier I* and *Spier II*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999). In *Spier I*, an Italian award was presented for enforcement, though set-aside of the award was being sought in the Italian courts. The federal district court, per Judge Haight, after considering the interrelationship of Articles V(1)(e) and VI, and the importance under the Convention of the courts at the arbitral seat, reasoned that adjournment should only be denied if the attack on the award in those courts was "transparently frivolous." Spier I, 663 F. Supp. at 875. Over a decade later, the original award recipient returned to Judge Haight's court seeking enforcement of the award, again under the Convention. By that juncture, the Italian courts had nullified the award. The district court declined to enforce it. See Spier II, 71 F. Supp. 2d at 288-89. Courts, however, have not invariably postponed enforcement when alerted to foreign set-aside proceedings brought against the award in question. See G.E. Transp. S.P.A. v. Republic of Alb., 693 F. Supp. 2d 132, 138 (D.D.C. 2010) (enforcing an award subject to foreign proceedings after balancing "the Convention's policy favoring confirmation of arbitral awards against the principle of international comity embraced by the Convention.") (citation omitted).

f. Waiver and determination sua sponte. A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

g. Partial grant of post-award relief. In appropriate circumstances, as outlined in Section 4-1(d) & (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest.

§ 4-17. Award Decides Matters Not Capable of Resolution by Arbitration

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that the award purports to decide matters that are not capable of resolution by arbitration.

(b) Whether a Convention award decides matters that are not capable of resolution by arbitration is determined by federal law.

(c) A court may examine whether a Convention award decides matters that are not capable of resolution by arbitration even if a party does not raise the issue.

(d) A limitation on arbitrability may be categorical or conditional. An objection that a matter is categorically non-arbitrable cannot be waived. However, if a matter may be arbitrated only if a particular condition is satisfied, an objection that the condition was not satisfied can be waived through a post-dispute agreement or by failure to raise the objection in a clear and timely manner.

Comments:

a. Generally. Under this Section, non-arbitrability under U.S. law can constitute either a basis for vacatur (ordinarily limited to U.S. Convention awards) or a ground for denying confirmation, recognition, and enforcement of an award under Article V(2)(a) of the New York Convention and Article 5(2)(a) of the Panama Convention. Those articles permit a court to deny recognition or enforcement of a Convention award if it

purports to decide matters that may not be arbitrated under the law of the enforcing state.

The Restatement recognizes two broad and analytically distinct categories of non-arbitrability. The first includes matters that are by law categorically, or per se, non-arbitrable. The second category comprises matters that are arbitrable only if certain conditions are satisfied, and thus are characterized by "conditional arbitrability." See Comment *b* of this Section. In the United States, arbitrability limitations are not the norm. When imposed, they ordinarily are of the conditional type. Arbitrability limitations have been greatly diminished through U.S. Supreme Court jurisprudence establishing specialized rules of construction and applying preemption principles to state attempts to regulate arbitration subject matter. See Comment *c* of this Section. Arbitrability may be confirmed by statute, such as in the case of patent disputes, but an affirmative authorization is unnecessary. The vast majority of statutory claims are now arbitrable, making U.S. laws of arbitrability among the more permissive.

This Section employs the short form "arbitrability" to refer to what is often called "subject matter arbitrability." The Restatement, accordingly, rejects the usage encountered in several judicial opinions in which "arbitrability" refers to various aspects of the agreement to arbitrate, and, in particular, the agreement's existence, scope, validity, and related issues.

The Conventions use permissive language with respect to the non-arbitrability defense. See, e.g., N.Y. Convention Article V(2) ("Recognition and enforcement of an arbitral award *may* . . . be refused.") (emphasis added). In empowering federal courts to vacate awards, the FAA also employs non-mandatory phrasing. See FAA § 10(a) ("*may* make an order vacating . . ."). (emphasis added). In keeping with statutory and conventional usage, the Restatement uses the same permissive language. Nevertheless, in the context of a properly pled motion to vacate, or a properly raised arbitrability defense to confirmation, recognition, or enforcement, a court will be unlikely to flout Congress' authority by ignoring its unmistakable declaration that the claim in question should not have been arbitrated under the circumstances presented. In this respect, non-arbitrability and public policy are theories for denying post-award relief that are distinguishable from others. See § 4-18, infra. Concurrently, however, because arbitrability limitations are typically conditional, a party's waiver of a condition may entitle a court to reject a non-arbitrability challenge to an award. See Comment *e* of this Section.

By referring to "matters," the Restatement acknowledges that Congress might intend with respect to a given law that both claims and defenses relying on it shall be non-arbitrable. Although the scope of a limitation is ultimately a matter of statutory interpretation, courts may reasonably hesitate before concluding that Congress intended to preclude defensive reliance on the statute in question. In numerous cases, it will be a plausible construction that only claims based upon the statute have been reserved for judicial adjudication. Such an interpretation minimizes the disruption of

the arbitral process that may arise when purportedly non-arbitrable defenses are raised in answer to arbitrable claims.

b. *Types of arbitrability restrictions.* As noted in Comment *a* of this Section encompasses both categorical and conditional limits on arbitrability. By including the notion of "categorical" (per se) non-arbitrability, the Restatement acknowledges Congress' power unreservedly to bar arbitration of certain matters. The norm is for an arbitrability restriction to apply only if one or more conditions are not fulfilled, such as when consent to arbitration must take a prescribed form or be given after a dispute arises ("post-dispute consent"). Conditions may also be imposed based on the types of issues or parties involved.

A particular type of conditional arbitrability may arise when one of the parties is in bankruptcy. Courts apply fact-dependent tests on a case-by-case basis to determine when a bankrupt party's obligations may be liquidated in arbitration. The applicable judge-made tests vary among the circuits but commonly turn on whether, given all the facts, arbitration would jeopardize the objectives of the Bankruptcy Code or otherwise interfere with the bankruptcy court's functions. Because the arbitrability of claims against parties in bankruptcy typically arise in connection with enforcement of an agreement to arbitrate, full discussion of this matter is reserved to Chapter Two of the Restatement.

In treating questions of conditional arbitrability under this Section, the Restatement excludes the characterization of them as questions of capacity, formal

validity, or other categories that might lead to application of a law other than that of the United States. See Comment *c* of this Section; see also Comment *b* to § 4-12, supra.

c. *Applicable law*. Under the New York and Panama Conventions, whether a court may deny recognition and enforcement on the basis of non-arbitrability is determined by the law of the place where recognition or enforcement is sought. Courts in the United States look exclusively to federal law, which preempts purported state law restrictions on arbitrability. See § ___,[25] supra. Under federal law, a matter will be deemed arbitrable unless the party opposing recognition or enforcement demonstrates Congress's unmistakable intent to place conditions upon or unconditionally to foreclose arbitration. That intent will ordinarily be found in the statute's text. Though not readily, restrictions on arbitrability may also be gleaned from the statute's legislative history or inferred from an inherent incompatibility between arbitration and the statute's underlying objectives. The burden is on the party challenging the award to demonstrate non-arbitrability.

The vast majority of U.S. statutory claims have been held arbitrable. Consequently, arbitrators have competence to decide disputes that may not be arbitrable in other legal systems. The small class of commercial matters that are subject to arbitrability restrictions includes particular claims arising out of automobile dealership agreements, special regulatory regimes, and, on an ad hoc basis, debtor-

[25] Cross-reference to Section to be drafted on FAA preemption.

creditor disputes over which a bankruptcy court has assumed jurisdiction. See Comment *b* of this Section.

In U.S. practice, non-arbitrability is not imposed upon general subject matter areas or generic regulatory fields, such as those addressing competition or securities. Rather, courts examine Congress' intent regarding particular statutory causes of action it has created. That limited inquiry does not allow courts to impose U.S. arbitrability standards on analogous claims arising under foreign law. Therefore, an award deciding a foreign law claim that would be non-arbitrable if brought under a U.S. statute, but which was arbitrable under the foreign law, is neither vacated on that basis nor denied confirmation, recognition, or enforcement. Ordinarily, the same result would occur even though the foreign claim was not arbitrable under the foreign law giving rise to it, although in an exceptional case considerations of comity and public policy as set forth in Section 4-18, infra, may compel a court to vacate or otherwise decline to give effect to the award. See Reporters' Note to Comment *e* of this Section.

Illustrations:

1. In a U.S. Convention award, a tribunal awards damages to the claimant under a statute the application and enforcement of which Congress has unambiguously declared to be non-arbitrable. Pursuant to the respondent's timely motion, a court in the United States vacates the award.

2. In a U.S. Convention award, a tribunal grants damages for breach of a dealership agreement. Under federal law, disputes arising under such agreements may not be arbitrated unless the dealer consents to arbitration after the dispute arises. The tribunal made no finding concerning the timing of the dealer's consent to arbitration. The dealer, having preserved its right to do so, seeks vacatur. A court vacates the award.

3. Claims under State *A*'s Competition Act are not arbitrable under State *A* law. In an award made in State *A*, a tribunal grants monetary relief after finding a contract void under that Act. The equivalent issue is arbitrable under U.S. antitrust and consumer protection laws. A court enforces the award, unless it finds, exceptionally, that enforcement of an award deciding issues under State *A*'s Competition Act violates U.S. public policy as set forth in Section 4-18, infra.

4. In an award made in State *A*, a tribunal awards contract damages representing a significant portion of one party's assets. It does so although a State *B* bankruptcy court determined itself to have exclusive jurisdiction over that party's commercial affairs. Under analogous circumstances, no U.S. bankruptcy court would treat arbitration as being a valid mechanism for establishing rights to a

bankrupt party's estate. A court will recognize and enforce the award unless it determines that enforcement would be contrary to U.S. public policy as set forth in Section 4-18, infra.

d. *Review of arbitral determinations of arbitrability.* Arbitrability issues are often raised initially before the arbitral tribunal, which under modern arbitration laws is empowered to determine its own competence to proceed. An arbitral tribunal's finding that a dispute is arbitrable will not bind a court that is later asked to consider the award. Instead, the court will review the arbitrability of the claim de novo. See § 4-7, supra.

That inquiry, though independent, may vary according to the character of the non-arbitrability objection. Pure questions of statutory interpretation are decided de novo in the ordinary fashion, whereas mixed questions of fact and law (such as whether an arbitration clause is "conspicuous") or purely factual issues (such as the font size) may require reliance upon material in the arbitral record. Regardless of the type of inquiry, the proceeding remains summary in nature. See Comment *a* to § 4-33, infra.

e. *Waiver and determination sua sponte.* A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

f. Partial grant of post-award relief. In appropriate circumstances, as outlined in Section 4-1(d) & (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest.

REPORTERS' NOTES

a. Generally. No legal system confers upon arbitrators a competence as broad as that of the courts. See Julian D. M. Lew et al., Comparative International Commercial Arbitration 187-221 (2003). Many of the subjects that are non-arbitrable are also noncommercial, as the Restatement defines the terms, and thus would ordinarily lie beyond the Restatement's scope. In most systems, for example, criminal liability is entrusted solely to courts or other public tribunals.

(i). Global practices and trends. In many legal orders, a range of questions touching the validity of various kinds of intangible and tangible property rights are exclusively for courts to decide. See Jean-Francois Poudret & Sebastien Besson, Comparative Law of International Arbitration 302-305 (2007). Subject-matter restrictions also exist to varying degrees with respect to claims arising out of enactments that regulate public markets or that confer protections on certain market participants, such as consumers, employees, and the insolvent. Id. at 295-314.

The New York Convention makes a Contracting State's two main undertakings conditional on arbitrability. See Albert Jan van den Berg, The New York Arbitration Convention of 1958: Toward a Uniform Judicial Enforcement 152-154, 368-375 (1981). Article II(1)'s obligation to give effect to written arbitration agreements applies only as to "differences . . . concerning a subject matter capable of settlement by arbitration." See § 2-___,[26] supra. Article V(2)(a), in turn, allows recognition and enforcement of awards to be refused when "the subject matter of the difference is not capable of settlement by arbitration." N.Y. Convention, Article V(2)(a). Article 5(2)(a) of the Panama Convention is to the same effect ("the subject of the dispute cannot be settled by arbitration"). The New York and Panama Conventions do not attempt to unify subject matter arbitrability standards among Contracting States. Rather, they allow those states to pursue enforcement practices that give effect to their individual arbitrability policies.

The question of subject-matter competence is sometimes referred to as "arbitrability ratione materiae" or "objective arbitrability." Fouchard Gaillard Goldman on International Commercial Arbitration 313, 330 (Emmanuel Gaillard & John Savage eds., 1999). This notion—that in order for a matter to be arbitrated, it must be "capable of settlement by arbitration"—should not be confused with the question whether parties have consented to have the arbitrators decide the particular dispute in question. Confusion may arise, however, because courts in the United States often refer to the existence and scope of the parties' consent to arbitrate as "arbitrability" questions. See First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-47 (1995); W. Laurence Craig, et al., International Chamber of Commerce Arbitration 60 (3d ed. 2000).

Questions of objective arbitrability and consent are not always fully independent of each other, however; subject-matter arbitrability limits become an issue only if an agreement to arbitrate is construed to reach the matter in question. In enforcing arbitration agreements, courts have sometimes avoided subject-matter arbitrability questions by attributing to the parties an intent to exclude the claim

[26] Cross-reference to Section to be drafted regarding arbitration agreements.

at hand from arbitration. Additionally, many types of arbitrability restraints are expressed not categorically, but as narrower restrictions on the form and timing of consent.

Non-arbitrability has not often been relied on by courts as a reason for declining recognition or enforcement under the Conventions. See Albert Jan van den Berg, Refusals of Enforcement under the New York Convention of 1958: The Unfortunate Few, in Arbitration in the Next Decade: Proceedings of the International Court of Arbitration's 75th Anniversary Conference 75, 86 (1999) (identifying, nevertheless, some rare examples in which non-arbitrability was enforced); Albert Jan van den Berg, The New York Convention of 1958: Refusals of Enforcement, 18(2) ICC Int'l Ct. Arb. Bull. 1 (2007). The relative infrequency among Contracting States of denying enforcement under Article V(2)(a) is consistent with two related patterns. First, subject-matter restrictions have progressively become more relaxed in modern legal systems. See William W. Park, Arbitration of International Business Disputes 25-26 (2006). Second, States have in general exercised restraint in the application of Article V(2)(b)'s public policy ground for refusal. Being related to public policy, questions of subject-matter arbitrability may have benefited from a similar pro-enforcement orientation. Whatever the explanation, a wide conception of arbitrability has undoubtedly contributed to the success of the New York and Panama Conventions. See G.W. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Summary Analysis of Record of United Nations Conference May/June 1958, at 66-67 (1958) (to give article V(2)(a) an expansive scope could substantially undermine the Convention's effectiveness).

(ii). Wide arbitrability under U.S. law. Few international awards have been vacated or refused recognition or enforcement in the United States on subject-matter arbitrability grounds; the rarity of such cases reflects the considerable breadth of matters deemed arbitrable under the FAA. Broad arbitrability of public law claims in the United States has been accomplished largely by U.S. Supreme Court case law, as distinct from legislative activity. Some of the seminal cases involved international transactions, allowing the Court to draw on the distinctive needs of international trade to endorse a policy favoring wide party autonomy and trust in arbitration. See Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614 (1985) (antitrust claims); Scherk v. Alberto-Culver, Co., 417 U.S. 506 (1974) (1934 Securities Exchange Act claims). International character would later become a helpful but non-essential element in the rationales adduced for pro-arbitrability rules of construction and a corresponding allocation of the burden on the party opposing arbitration to demonstrate Congress' intent to bar arbitration in the case at hand. See Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 483 (1989) (citing Shearson/Am. Exp., Inc. v. McMahon 482 U.S. 220, 226-227 (1987)).

The associated train of decisions construing the FAA has led to arbitrability not only for antitrust claims, see Mitsubishi, 473 U.S. at 637-38, but also under the Carriage of Goods by Sea Act for claims under the 1933 and 1934 Securities Acts. see, respectively, Rodriguez de Quijas, 490 U.S. 477 (COGSA); see Vimar Seguros y Reaseguros, S. A. v. M/V Sky Reefer, 515 U.S. 528, 541 (1995). Federal civil rights protections have also been held arbitrable. See Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 30-32 (1991) (federal age discrimination legislation). It is an important theme in these decisions that, when agreeing to arbitrate statutory claims, the parties have not waived them, but merely have agreed to submit them to an alternative forum. See, Rodriguez de Quijas, 490 U.S. at 482-84; and *McMahon*, under federal racketeering law.482 U.S. at 222 (arbitrability of claims brought under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 et seq.); Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001); Gilmer, 500 U.S. at 26 (quoting Mitsubishi, 473 U.S. at 628).

Contemporaneously, the Court greatly diminished the role of states in regulating subject matter arbitrability and arbitration formalities. See Doctor's Assocs. v. Casarotto, 517 U.S. 681, 683 (1996) (state law conspicuousness requirements specific to arbitration clauses preempted); Southland Corp. v. Keating, 465 U.S. 1 (1984) (state franchise law disallowing arbitration preempted by FAA); and, it held that most employment disputes are arbitrable. See Circuit City, 532 U.S. at 123. Under this case law, states generally lack authority to enact special statutory causes of action and reserve adjudication of them exclusively to courts.

By statute, patent infringement claims and validity defenses are arbitrable, see 35 U.S.C. § 294, and courts have also recognized the arbitrability of other intellectual property issues. See McMahan Secs. Co. v. Forum Capital Mkts. L.P., 35 F.3d 82 (2d Cir. 1994) (no bar to arbitrating plaintiffs' copyright claim); Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F. 2d 1191, 1199 (7th Cir. 1987) (Posner, J.) ("We hold that federal law does not forbid arbitration of the validity of a copyright, at least where that validity becomes an issue in the arbitration of a contract dispute."); Kamakazi Music Corp. v. Robbins Music Corp., 684 F.2d 228, 231 (2d Cir. 1982) (no public policy against arbitration of copyright infringement claim).

The bars to arbitration enacted by Congress are typically exceedingly narrow. Recent examples demonstrate Congress' ability to regulate arbitrability surgically. See Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (foreclosing arbitration of motor-vehicle-franchise contract disputes unless consent is given by all parties, in writing, after dispute arises); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409 (2009) (defense-contractor recipients of certain government funds, inter alia, may not require employees or contractors to arbitrate "any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment"); Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 U.S.C. § 26(n); 18 U.S.C. § 1514A(e) (making pre-dispute arbitration agreements unenforceable as to certain whistle blower claims).

(iii). Nature of court's discretion. Under the Conventions (which permit but do not require a court to deny recognition and enforcement of an award if a ground for doing so is present), and in the context of a vacatur action, a court may in principle confirm, recognize or enforce, or decline to vacate, an award despite its having adjudicated a matter that is non-arbitrable. To this extent, this ground is treated no differently than the other bases for challenging an award recognized by the Conventions. In practice, however, it is extremely unlikely that a court would disregard a non-arbitrability defense or a request to vacate if properly framed and established. To do so would contravene a directive by Congress that the matter in question not be subject to arbitration. Much the same may be said of the public policy ground for non-recognition and non-enforcement. See § 4-18, Reporters' Note to Comment *c*.

(iv). Policy rationales and relationship to public policy. Arbitrability limitations are often associated with particularly powerful public welfare and societal considerations. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 652 (1985) (Stevens, J., dissenting) ("unique public interest in the enforcement of the antitrust laws"). The resulting preference for judicial over arbitral decisionmaking reflected in non-arbitrability may rest on certain concerns about arbitrators, such as their willingness or ability to properly identify and apply governing law.

Arbitrability restrictions may also be driven by a given legal system's rules of jurisdiction, including a policy favoring the consolidation of adjudication in fora empowered to resolve third-party rights contemporaneously with those of the primary litigants. See Poudret & Besson, supra, at 303.

Under U.S. bankruptcy practice—a principal context in which the need to consolidate leads to arbitrability constraints—non-arbitrability does not depend on the subject matter of the dispute, but rather on the larger litigation context. A claim (for instance, a common breach of contract action) may be arbitrable in the abstract but may nevertheless be deemed by the bankruptcy court to be within its exclusive jurisdiction under the circumstances. See Reporters' Note to Comment *b* of this Section.

The arbitrability of claims against a party in bankruptcy most often arises not at the post-award relief stage, but rather at the stage at which a court is asked to enforce an arbitration agreement. The elaborate case law governing the arbitrability of claims against parties in bankruptcy was accordingly developed in that context. See Chapter Two of the Restatement, supra.

In the bankruptcy and other contexts, the policies behind arbitrability restrictions suggest a kinship between the Conventions' non-arbitrability and public policy defenses. Both grounds may be raised by a court sua sponte, and under both the enforcing State is entitled to apply its own law. Semantically, the public policy ground set forth in Article V(2)(b) of the New York Convention is

sufficiently broad to cover problems of subject-matter non-arbitrability. See van den Berg, supra, at 368-369 (Article V(2)(a) might be considered superfluous; borrowed from the Geneva Convention and other texts without full discussion); Haight, supra, at 66 (1958) (some delegates viewed Article V(2)(a) as superfluous). Irrespective of the apparent overlap between the grounds, the Restatement does not give an expansive reading to Article V(2)(b) (public policy) (see Section 4-18, infra), and reserves consideration of subject-matter arbitrability to Article V(2)(a).

(v). Arbitrability and commercial character. Commercial character and subject-matter arbitrability are not coextensive concepts. Limitations based on a transaction's commercial character may nevertheless function as, or analogously to, a subject-matter arbitrability rule. Some foreign laws of arbitration, for instance, define arbitrable subject matter in terms of being "pecuniary" in nature. See Bundesgesetz über das Internationale Privatrecht [IPRG], [Swiss Private International Law] Dec. 18. 1987, SR 291, art. 1 (Switz.). Similarly, numerous arbitration-related regimes delimit their fields of application by reference to a dispute's commercial character or analogous limitation. See UNCITRAL Model Law on International Commercial Arbitration (1985), art. 1 and n.** (restricting its application to "commercial" arbitration, defined broadly); Panama Convention, art. 1 (covering arbitration agreements concerning differences arising "with respect to a *commercial* transaction") (emphasis added).

Finally, Article I(3) of the New York Convention allows states to limit their obligations to "differences . . . which are considered as commercial under the national law of the State making such a declaration." See § 1-1(h), supra. Functionally, the Article I(3) reservation redoubles Contracting States' ability to decline enforcement based on appropriateness limits found in their own law. See van den Berg, The New York Convention of 1958, supra, at 373-374. Courts in the United States do not, however, interpret the commercial-character reservation restrictively. See Comment *e* to § 1-1, supra.

(vi). Scope and effect of non-arbitrability. The Conventions address arbitrability in terms of "the subject matter of the difference" (or, in the Panama Convention, "the subject of the dispute"). That language does not necessarily indicate whether non-arbitrability refers to a generic field (such as competition law) or to particular claims or causes of action, typically statutory, within a field. Arbitrability or non-arbitrability has traditionally been understood in the United States as attaching chiefly to specific claims or causes of action rather than to whole fields. (See, for example, the Motor Vehicle Franchise Contract Arbitration Fairness Act, discussed in the Reporters' Note to Comment *b*). However, nothing would prevent Congress from declaring unspecified claims by certain persons or within a given field to be non-arbitrable. As noted in the Reporters' Note to Comment *c* of this Section, the Conventions specify that the law to be consulted on arbitrability at the recognition and enforcement stage is the law of the place where recognition or enforcement is sought. The same holds in vacatur actions challenging U.S. Convention awards.

Case law offers little guidance on the precise effects of an arbitral tribunal's having purported to adjudicate non-arbitrable subject matter because the issue of arbitrability is more apt to arise at the stage of compelling arbitration.[27] However, almost by definition, an award purporting to grant a remedy upon a federal statutory claim that a court finds to be non-arbitrable would not be entitled to confirmation, recognition, or enforcement; and a U.S. Convention award that purports to have done so would be subject to vacatur.

(vii). Intertwined claims and defenses. A given dispute may possibly involve both arbitrable and non-arbitrable subject matter. The Supreme Court has ruled that arbitrable claims must upon a timely request be sent to arbitration even if they are factually or legally intertwined with claims that are not arbitrable. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985). The Court in *Byrd* was unwilling to allow considerations of efficiency to override the FAA's commitment to the arbitration of arbitrable claims. Cf. KPMG LLP *v.* Robert Cocchi, et al, 565 U. S. ____ (2011) (under the FAA, that two of four claims

[27] Cross-reference to Section to be drafted on arbitrability in the enforcement of arbitration agreements.

were not covered by the arbitration agreement did not permit court to decline to enforce the arbitration agreement as to the other two claims). The Court was not asked in *Byrd* to adopt the alternative solution of sending both claims—the arbitrable and non-arbitrable claims alike—to arbitration. Presumably, it would have refused to do so. Efficiency considerations notwithstanding, courts have neither the option to deny arbitration of arbitrable claims nor to compel arbitration of non-arbitrable ones.

The Supreme Court in *Byrd* decided the arbitrability question in the context of enforcing an arbitration agreement, not an arbitral award. The situation is more difficult when an award purporting to dispose of both arbitrable and non-arbitrable claims is challenged. Despite the general pro-enforcement orientation of the Conventions and the FAA, a court should not confirm or enforce such an award in its entirety, but should respect Congress's determination that certain claims may not be arbitrated. If the arbitrable and non-arbitrable claims are reasonably separable, however, an award may be subject to partial vacatur or partial recognition and enforcement. See Reporters' Note to Comment *g* of this Section; if instead the court finds the arbitrable and non-arbitrable claims to be inseparable, it nevertheless would vacate (or deny recognition or enforcement of) the award in its entirety. Additionally, a court may raise arbitrability sua sponte, insofar as the award disposes of a non-arbitrable claim.

Application of the non-arbitrability exception to *defenses*, as distinct from *claims*, raises much more difficult issues, notably when the claim asserted in arbitration is arbitrable, but the defense to it is not. For example, a contract claim may be met in arbitration with an illegality defense based upon a federal statute that prohibits such contracts, creates a private cause of action for relief from them (in the form of damages, rescission, or some other affirmative remedy), and expressly declares such matters to be non-arbitrable. If the arbitral tribunal entertains such a defense, the viability of the award may come into doubt.

Whether a prohibition on arbitration extends to arbitrator consideration of defenses ultimately depends upon statutory interpretation using standard techniques and rules. Lawmakers may be credited nevertheless with an appreciation of the complexities that a combination of arbitrable claims and non-arbitrable defenses can produce. It follows that not every declaration by Congress of non-arbitrability need be presumed to have intended to bar defensive uses of the statute in question, given that a more restrained construction may help courts avoid certain dilemmas. For instance, a court presented with an award adjudicating both an arbitrable claim and its non-arbitrable defense cannot comfortably recognize or enforce the award in its entirety because to do so would violate the prohibition on arbitration of the defense. Yet, to cull the tribunal's assessment of the defense while giving effect to its adjudication of the claim would be difficult and, even if practicable, would deprive the party asserting the defense of its right to be heard. See § 4-13, supra. A similar deprivation occurs when an arbitral tribunal entertains an arbitrable claim but not a relevant defense precisely because it considered the defense to be non-arbitrable. Again, the respondent would not have had an opportunity to be heard on its defense in the arbitration. Vacatur or a refusal to confirm, recognize, or enforce would likely follow. See § 4-13, supra.

Conceivably, when asked to grant post-award relief in connection with such an award, the court could resolve the defense de novo (because the defense was improperly submitted to arbitration) and then combine its resolution of the defense with the arbitrators' decision on the claim. This solution has surface appeal because ostensibly it properly treats the claim and defense as arbitrable and non-arbitrable, respectively, but is deeply problematic in other respects. Following this strategy would require the court to determine whether and to what extent the tribunal's findings of fact or law in adjudicating the claim (over which the tribunal was competent) should bind the court in adjudicating the defense (over which the court is competent). More generally, the entire exercise would be highly awkward to conduct and would run counter to the preference for summary vacatur, confirmation and enforcement proceedings.

A court denying effect to the entire award because of a non-arbitral defense risks creating another untenable situation: the dispute may be heard neither in arbitration (due to the presence of a

non-arbitrable defense) nor in litigation (due to the presence of an arbitrable claim). Ultimately, the claimant may be induced to abandon its arbitration right and repair to the courts to achieve finality.

An arbitral tribunal's evaluation of a defense may be fully attentive to policies underlying the enactment invoked. If those policies (in the form of a duly raised defense) are ignored, however, U.S. courts when presented with the resulting award may invoke the applicable Convention's public policy exception to deny confirmation or enforcement of the award, or to vacate on grounds of public policy, as the case may be. See Reporters' Note to Comment *c* of this Section.

b. Types of arbitrability restrictions. There are several types of arbitrability restrictions, which the Restatement classifies into two broad categories. The first embraces matters that are by law categorically, or per se, non-arbitrable in that there are no conditions or circumstances under which they may be arbitrated. The second category is much more highly populated. It includes matters that are arbitrable only if certain conditions are satisfied; the Restatement refers to these matters as being subject to "conditional arbitrability."

(i). Conditional arbitrability. Conditional arbitrability often entails issues of timing or form. For example, arbitrability may depend on post-dispute consent having been given or on a predispute agreement to arbitrate having been conspicuous or separately signed, or a "cooling off" period having passed. Attaching such qualifications to arbitrability is usually intended to protect classes of weaker parties, such as consumers and employees, by ensuring that consent to arbitration is knowing and voluntary. See Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (disallowing pre-dispute arbitration agreements in certain franchise agreements); Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 U.S.C. § 26(n) & 18 U.S.C. § 1514A(e) (making pre-dispute arbitration agreements unenforceable as to certain whistle-blower claims).

Conditional arbitrability restrictions are distinct in that compliance with, or post-dispute waiver of, the applicable conditions will allow the matter to be arbitrated and will defeat any non-arbitrability challenges to confirmation, recognition, or enforcement of the award. They also differ in that they are likely to raise questions of fact ordinarily absent from categorical subject-matter arbitrability determinations.

(ii). Bankruptcy. A specialized type of conditional arbitrability arises when a party has entered bankruptcy. U.S. courts pursue highly fact-dependent case-by-case decisionmaking to respond to the basic tension between their acknowledged duty to enforce certain arbitration agreements and the need to maintain the integrity of the bankruptcy process. Significantly, bankruptcy courts both enforce agreements to arbitrate and arbitral awards. See, e. g., Whiting-Turner Contracting Co. v. Elec. Mach. Enters. (In re Elec. Mach. Enters.), 479 F.3d 791, 798-99 (11th Cir. 2007) (granting a motion to compel arbitration to resolve Chapter 11 debtor's claim; no inherent conflict between arbitration and the underlying purposes of the Bankruptcy Code); Pan Amer. World Airways, Inc. v. Air Line Pilots Assoc. (In re Pan Amer. Corp.), 140 B.R. 336, 340 (S.D.N.Y. 1992) (affirming decision of bankruptcy court to uphold an arbitration award in favor of the former employee of a Chapter 11 debtor); Fotochrome, Inc. v. Copal Co., 517 F. 2d 512, 517-520 (2d Cir. 1975) (Japanese award, issued in favor of creditor upon an arbitration initiated before petition in bankruptcy, is a "binding adjudication on the merits," and not reviewable by bankruptcy court, except under Convention's Article V grounds).

Yet, if a court finds that arbitration of the particular claim will appreciably impinge core bankruptcy protections and goals in relation to the bankruptcy at hand, it need not compel arbitration of the claim and may even issue a stay of an arbitration that has begun. See, e.g., Zimmer v. Ocwen Loan Servicing, LLC, 432 B.R. 238 (Bankr. N.D. Tex., 2010) (a bankruptcy court has discretion to deny enforcement of the arbitration clause when it clearly conflicts with the purposes of the Bankruptcy Code, including "the goal of centralized resolution of purely bankruptcy issues, the need to protect creditors and reorganizing debtors from piecemeal litigation, and the undisputed power of a bankruptcy court to enforce its own orders") (quoting In re Nat'l Gypsum, 118 F.3d 1056, 1069 (5th Cir. 1997)).

The prevailing unpredictability with respect to arbitration of a bankrupt's commercial rights and duties is exacerbated by the lack of an agreed upon methodology. See Payton Constr. Corp. v. Zurich Am. Ins. Co., 399 B.R. 352, 360-364 (Bankr. D. Mass. 2009) (identifying the range of approaches and holding an arbitration agreement not enforceable because dissipation of estate's resources would undermine the bankruptcy system and would occur "at the expense of the real parties in interest"); In re Statewide Realty Co., 159 B.R. 719, 724 (Bankr. D.N.J. 1993) (arbitration to proceed, observing that "[t]he fact that the matter before the court is a core proceeding does not mean that arbitration is inappropriate").

Most bankruptcy related arbitration cases involve a party seeking to compel or to stay arbitration of a claim that is arguably subject to adjudication in bankruptcy. The post-award context, by contrast, has not generated substantial jurisprudence, and it is unclear how restrictions on arbitration occasioned by bankruptcy should be enforced once an award is rendered. Presumably, confirmation, recognition and enforcement of an award will be denied, or vacatur of a U.S. Convention award granted, if the arbitration agreement leading to the award would not have been enforced in view of a U.S. bankruptcy court's superior jurisdiction. Cf. Victrix S.S. Co., S.A. v. Salem Dry Cargo A.B., 825 F. 2d 709 (2d Cir. 1987) (strong policies favoring deference to foreign bankruptcy proceedings precluded recognition, given that the award recipient had pursued London arbitration after the Swedish bankruptcy court had suspended suits by creditors against the other party). The bankruptcy court may, however, assess in light of the award's outcome the level of disruption that confirmation or enforcement of it will generate; the award's monetary impact on the rights of other creditors might ultimately be negligible while having the effect of eliminating the creditor that opted for arbitration.

(iii). Characterization of conditions. Conditional arbitrability may pose questions of characterization, in that formal requirements regulating typeface, signatures and the like, and qualifications that apply simply by virtue of a party's status (such as, for example, being a consumer, an employee, or a franchisee) may plausibly be treated as questions of validity or capacity under Section 4-12, supra. The Restatement rejects these alternative characterizations in cases in which the limitation is clearly applicable in the case at hand. Evaluating the effects of such strictures under this Section, instead of Section 4-12, supra, is appropriate to prevent circumvention of U.S. law through the choice-of-law rule laid down in Section 4-12, supra. See Reporters' Note *c* of this Section. This does not mean that a court may not consult foreign law in the process of determining whether a condition has been satisfied.

c. Applicable law. The New York Convention expressly entitles a court to refuse recognition and enforcement when "the subject matter of the difference is not capable of settlement by arbitration" under the enforcing State's law. See N.Y. Convention, Article V(2)(a); see also Panama Convention, art. 5(2)(a) ("the subject of the dispute cannot be settled by arbitration"). As noted above in Reporters Note *a*, in determining arbitrability, a court in the United States will generally apply federal doctrine developed under the FAA, while state law rules limiting arbitrability are ordinarily without effect owing to preemption principles. See Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 683 (1996) (state law conspicuousness requirements specific to arbitration clauses preempted); Southland Corp. v. Keating, 465 U.S. 1 (1984) (state franchise law disallowing arbitration preempted by FAA); Allied-Bruce Terminix Cos. v Dobson, 513 U.S. 265 (1995).

(i). Construction of statutes. Congress may preclude arbitration of the causes of action it creates, but to do so, its intent must either be "deducible from [the law's] text or legislative history," see Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc., 473 U.S. 614, 628 (1985), or apparent from an inherent conflict between arbitration and the underlying purposes of the statute involved, see Rodriguez de Quijas v. Shearson/Am. Exp., Inc., 490 U.S. 477, 483 (1989) (citing Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220, 226-27 (1987)). Significantly, the Supreme Court has been unwilling to "deduce" non-arbitrability from ambiguous indications of congressional intent and has placed on the party opposing arbitration the burden of showing "that Congress intended . . . to preclude a waiver of judicial remedies." Id. at 483. Congress, however, has on rare occasion been textually explicit in excluding the arbitration of federal law claims. For recent examples, see Reporters' Note *a* of this Section.

Congress has on at least one occasion enacted legislation that permits states to decide arbitrability of certain claims individually, thus allowing for limited "reverse preemption." See McCarran-Ferguson Act (MFA), 15 U.S.C. §§ 1011, 1012. Determining the MFA's exact ambit and relationship to FAA Chapters Two and Three has nonetheless preoccupied several courts in connection with agreements to arbitrate. See Chapter 2, supra. The emergent (if not universal) view among lower courts is that the Convention is not affected by the MFA. Limiting the MFA's reach in this way is consistent with the Restatement's overall approach, which assumes that in the international context in which the Convention operates, not every U.S. domestic rule of arbitrability requires enforcement through the mechanism of Article V(2)(a).

As the MFA example demonstrates, when Congress acts to preclude or regulate arbitration of a particular subject matter, it may leave some ambiguity about the intended reach of the restriction. Courts generally resolve such ambiguities in favor of finding a matter to be arbitrable and upholding arbitral jurisdiction, particularly in disputes arising out of international transactions. Cf. Mitsubishi, 473 U.S. at 614; Scherk v. Alberto Culver Co., 417 U.S. 506 (1974); Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's, London, 587 F.3d 714, 730-32 (5th Cir. 2009) (narrow construction of the McCarran-Ferguson Act thus allowing the New York Convention to govern); Assuranceforeningen Skulld (Gjensidig) v. Apollo Ship Chandlers, Inc., 847 So. 2d 991, 993 (Fla. Dist. Ct. App. 2003) (compelling arbitration in Norway under Convention; McCarran-Ferguson Act not applicable "because the parties' dispute involves foreign commerce"); Antillean Marine Shipping Corp. v. Through Transp. Mut. Ins., Ltd., 2002 U.S. Dist. LEXIS 26363, at *7-8 (S.D. Fla. Oct. 31, 2002) (non-arbitrability rule of the McCarran-Ferguson Act "does not apply to international insurance contracts made under the Convention").

Even when an international transaction is not involved, courts will assess with care the prohibition's scope. See Arciniaga v. Gen. Motors Corp., 460 F.3d 231 (2d Cir. 2006) (shareholders' agreement not affected by Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2)); Pride v. Ford Motor Co., 341 F. Supp. 2d 617, 621 (N.D. Miss. 2004) (act inapplicable if contract merely related to a motor vehicle franchise).

(ii). Non-arbitrable claims under foreign law. As indicated above, non-arbitrability under the Conventions is primarily aimed at enforcing U.S. law restrictions on arbitration. Yet, exceptional circumstances may arise in which a court finds it inappropriate to ignore that a foreign law claim was arbitrated in violation of a clearly and emphatically stated policy of the enacting State that the claim be heard exclusively by a court of law. The question arises whether a U.S. court, in such circumstances, may ever give effect to the foreign State's prohibition without violating its own Convention obligations. For reasons developed below, the Restatement's approach only gives effect to foreign arbitrability restrictions to the extent required by U.S. public policy in accordance with Section 4-18, infra. There are other possibilities, however.

One possibility is for a court, exceptionally, to acknowledge a foreign state's dominant interest by applying that state's arbitrability law pursuant to a choice-of-law analysis that emphasizes States' relative interests. Arguably, the Conventions' provisions leave room for such an analysis, since unlike choice-of-law designations in other treaties, the New York and Panama Conventions do not refer explicitly to the "internal" law of the State whose law is designated; nor, however, do they expressly authorize such a "whole law" approach. See 1958 Hague Convention on the Law Governing Transfer of Title in International Sales of Goods, art. 3 (court to apply the *internal* law of the chosen State), available at http://www.hcch.net/index_en.php?act=conventions.text&cid=32 (last visited July 25, 2011); compare ICSID Convention, Art. 42 (directing tribunals to apply "the law of the Contracting State party to the dispute (including its rules on the conflict of laws)").

Selecting a distinctive conflicts approach to deal with highly exceptional circumstances nonetheless creates difficulties. It is unclear what constitute such exceptional circumstances and therefore why choice-of-law analysis should not be applied in every case in which an arbitrability question arises, or indeed in the law of international arbitration generally. To appreciably widen application of foreign law through routine use of conflicts analysis would nevertheless threaten to dilute

U.S. observance of convention obligations by proliferating the circumstances in which recognition and enforcement might be denied. A conflicts approach would also need to navigate situations in which a foreign State's arbitrability law—though deeply implicated in the dispute and powerfully expressed—is idiosyncratic, aligning poorly with U.S. policies favoring arbitration and party autonomy.

This is not to say that U.S. courts are incapable of making reasoned assessments of States' relative interests in the matter, and of developing principled rules reflecting self-restraint. In doing so, courts could legitimately consider a myriad of factors, such as the conduct of the parties. For example, if the party resisting recognition or enforcement could have sought vacatur of the offending award at the seat of arbitration on the ground that the claim was not arbitrable under the law of the seat, a U.S. court might well conclude that the interests of both the foreign State and the party invoking the arbitrability defense were sufficiently well protected. The situation might be otherwise if the State that enacted the purportedly non-arbitrable cause of action was not the seat of arbitration and therefore not competent to entertain an action to set aside the award.

Despite the flexibility that conflicts methodologies afford, the Restatement adopts the alternative approach of giving effect to foreign arbitrability restrictions only to the extent required by U.S. public policy in accordance with Section 4-18, infra. Under that Section, in exceptional circumstances a foreign State's arbitrability prohibitions may coincide with U.S. public policy by expressing an important interest shared by the U.S. By vacating or withholding recognition and enforcement of an award in that circumstance, a court may vindicate U.S. public policy. Cf. Victrix S.S. Co., S.A. v. Salem Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987) (strong policies favoring deference to foreign bankruptcy proceedings precluded recognition). This outcome is especially likely to follow when disregard of the other State's paramount interests would offend international comity. Although it cannot be predicted whether a public policy analysis, rooted in international comity or a sense of shared vital interests, would yield results markedly different from those produced by a choice-of-law approach, public policy doctrine infused with comity considerations would seem to be both appropriately restrictive and less controversial under the Conventions than a conflicts methodology.

d. Review of arbitral tribunal's determinations of arbitrability. Due to the importance under the Convention scheme of the grounds for vacating or denying confirmation, recognition, or enforcement of an award, courts, if asked to do so, generally determine independently the existence of the factual and legal predicates to vacatur or refusing to confirm, recognize, or enforce; deference as such is not accorded to determinations by the arbitral tribunal. See Comment *d* to § 4-7, supra.

The exercise of de novo review is straightforward when a claim of non-arbitrability depends on whether the legislature proscribed arbitration for certain claims or whether, if it did, the claim at hand falls within the borders of that prohibition. Courts are adept at performing the kind of statutory interpretation that these inquiries entail. But judicial review remains in principle de novo even when an arbitrability challenge raises a purely factual issue (such as the date of a signature or the font size of the arbitration clause) or a mixed question of law and fact (such as arbitration clause conspicuousness). Deference to the tribunal may be justified in the rare case in which satisfaction of a condition of arbitrability turns on evidence that was available only to the tribunal, such as the credibility of a witness who is no longer available. Ordinarily, however, the required judicial fact-finding can be accomplished within the limitations of the summary proceedings that are generally favored in determining whether post-award relief is warranted. See § 4-33, infra. In most cases, the requisite information for such fact-finding will already be contained in the arbitral record.

e. Waiver and determination sua sponte. A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

f. Partial grant of post-award relief. In appropriate circumstances, as outlined in Section 4-1(d) & (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest.

§ 4-18. Post-Award Relief Violates Public Policy

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that the grant of post-award relief would be repugnant to the public policy of the United States.

(b) A court may examine whether the grant of post-award relief referred to in paragraph (a) would be repugnant to public policy even if a party does not raise the issue.

(c) A court generally determines whether a grant of post-award relief referred to in paragraph (a) violates public policy in accordance with federal law. However, in exceptional circumstances, a court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award based on repugnance to the public policy of a state if that state has a sufficiently compelling and predominant interest in the matter, and provided that the state policy is not inconsistent with federal policy.

Comments:

a. Generally. A court vacates or denies confirmation of a U.S. Convention award if it finds that confirming or failing to vacate the award would manifestly offend U.S. public policy. A court applies the same test if a party asks it to deny recognition or enforcement of a foreign Convention award under Article V(2)(b) of the New York

Convention and Article 5(2)(b) of the Panama Convention. Under the Conventions, and accordingly under FAA Section 207, the relevant public policy is that of the United States. The Conventions do not define "public policy." However, the prevailing U.S. practice, like the prevailing approach internationally, is to interpret public policy very narrowly.

b. Scope and nature of public policy. As with other grounds for granting or denying post–award relief, public policy is interpreted in light of the presumption in favor of effectuating awards. To overcome the presumption, the award must violate a policy that is well-defined, deeply held, and rooted in basic notions of morality and justice. Public policy is not offended, for example, simply because an award misapplies governing law or gives effect to a law or policy at variance with U.S. law or U.S. foreign policy, provided that the award does not require contractual performance or other acts that violate U.S. public law. Nor is public policy properly implicated merely because the arbitral tribunal followed procedural, evidentiary, or discovery practices unknown in the United States, or because it applied a rule of law different from U.S. law or the law that a U.S. court would have applied to the dispute.

Illustrations:

1. A tribunal makes a U.S. Convention award based on an incorrect understanding of federal securities law. The U.S. party seeks vacatur on that basis. The court declines to vacate the resulting award,

rejecting the contention that the award violates public policy because the tribunal misapplied federal law.

2. In an arbitration seated in the United States between a U.S. company and a company owned by State *B*, the arbitral tribunal rejects the U.S. company's contract defense that its nonperformance was excused by a break in diplomatic relations between the United States and State *B* combined with unfriendly treatment of U.S. workers in State *B*. Finding that the facts alleged do not constitute a violation of public policy, the court declines to vacate the award; it confirms the award pursuant to the counterparty's timely cross-motion.

3. In an arbitration seated in the United States, in the absence of a party agreement governing procedure, the tribunal examines the witnesses itself and declines party *A*'s request for U.S.-style cross-examination. When party *A* seeks vacatur of the eventual award on the ground that to dispense with cross-examination violates public policy, the court declines to vacate the award; it confirms the award pursuant to the counterparty's timely cross-motion.

c. Nature of the confirmation, recognition, and enforcement obligation. The Restatement adopts the general understanding that the Conventions' use of the permissive term "may" entitles a court to grant confirmation, recognition, or enforcement of an arbitral award even though one or more grounds for withholding

such relief has been established. Thus out of deference to the Convention language, the Restatement leaves open the largely theoretical possibility that an award that offends a compelling public policy concern may nevertheless survive a vacatur action or win confirmation, recognition, or enforcement. It seems virtually axiomatic, however, that a court would not choose to confirm, recognize, or enforce an award if doing so would be repugnant to fundamental public policy within the meaning of this Section.

The public policy ground is exceedingly narrow, and courts are extremely reluctant to find that its requirements have been met. Even in the rare case in which a court does reach that conclusion, it may be able to sever the offending portion of the award, perhaps vacating it in part, and proceed to confirm, recognize, or enforce the remainder. See Comment *g* of this Section.

d. Examples of public policy violations. The public policy ground is often invoked, but rarely with success. Nonetheless, it remains an important safeguard for protecting fundamental policies of the United States. Examples of awards that would violate public policy include those punishing compliance with U.S. economic laws, stemming from arbitral procedures that are fundamentally unfair, facilitating corruption or the evasion of fiscal regulations, or promoting other widely condemned criminal conduct such as arms smuggling, human trafficking, or terrorist activity. Additionally, awards made in arbitral proceedings that ignore or circumvent U.S. court orders regarding the dispute may be vacated or denied confirmation, recognition, or enforcement on the basis of public policy.

Illustrations:

4. A U.S. supplier contracts to ship goods for a foreign exporter. The contract prohibits the supplier from employing nationals of State *A* during delivery. This type of provision has been proscribed by U.S. anti-boycott law. In performing, the supplier employed State *A* nationals. In an arbitration seated outside the United States, the tribunal applies the contract's prohibitions, holding that the supplier has forfeited payment under the contract. A court refuses to recognize the award under the public policy exception.

5. Same as *Illustration 4*, except that the arbitration was seated in the United States. Acting on timely cross-motions, a court vacates the award and thus declines to confirm it.

6. Same as *Illustration 4*, except the tribunal holds that the supplier materially failed to care for the goods and thus is not entitled to payment. The contract's clause discriminating against State *A* nationals plays no role in the dispute or the tribunal's decision. A court enforces the award because the presence alone of repugnant or unenforceable clauses in the disputed contract does not itself warrant non-enforcement of the award on the basis of the public policy exception. Similarly, had the arbitration been seated in the United States, the presence in the

contract of the offensive clauses would not have required vacatur or precluded confirmation of the award.

7. In a contract dispute, a court in the United States determines that the seller's standard arbitration clause governs. It orders the parties to arbitrate in State *A* in accordance with the clause. The buyer defies the court's order and instead pursues arbitration in State *B*. The seller does not participate in that arbitration. The State *B* award is in favor of the buyer, who seeks enforcement of that award. The court denies enforcement on the basis of public policy because the award was obtained in violation of a U.S. court order.

e. Applicable law. The language of the Conventions makes clear that the content of public policy is determined by the law of the jurisdiction where recognition or enforcement is sought. The same governing law rule applies in an action seeking confirmation or vacatur of a U.S. Convention award. Therefore, although a court may take into account public policies recognized in other jurisdictions having a connection to the dispute, those policies do not themselves govern the analysis. This is true even with respect to the policies of the seat of arbitration, unless the seat is within the United States.

Courts look principally to federal law to determine the existence and application of public policy. However, its judgments in this regard are legitimately informed by the policies of the several states and, in a rare case, may be determined largely by

reference to the policy of a single state. The offense caused to a single state's policy will not properly justify vacatur, or a denial of confirmation, recognition, or enforcement unless that state has a compelling and paramount interest in the matter that is not inconsistent with federal policy.

Illustration:

8. An American dog breeder fails to deliver imported dogs to a buyer for use in dog fighting events to be held in the United States. Buyer pursues arbitration in New York Convention State *A*. Buyer is awarded contract damages and seeks to enforce the award in the U.S. under the Convention. U.S. federal law does not address dog fighting directly, but a substantial preponderance of U.S. states forbids such events. The court declines to enforce the award on the basis of public policy. Had the award been made in the United States, a court would be entitled to vacate the award on the basis of public policy.

f. Overlap with other grounds for denying confirmation, recognition, or enforcement. The various grounds for vacatur or for denial of confirmation, recognition, or enforcement are not mutually exclusive. Public policy is often raised alongside other more specific grounds, such as those involving alleged irregularities in arbitral procedure, arbitrator bias, and the non-arbitrability of disputes. Rarely, however, will a party successfully invoke the public policy ground when an alleged violation clearly falls within the scope of another Convention ground and application of

that ground would not result in vacatur or a denial of confirmation, recognition, or enforcement**.**

g. *Waiver and determination sua sponte*. A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

h. Partial grant of post-award relief. In appropriate circumstances, as outlined in Section 4-1(d) & (e), supra, a court may decide to grant post-award relief as to a portion of the award while denying post-award relief as to the rest on public policy grounds.

Illustration:

9. In an arbitration between a supplier and a purchaser, the tribunal awards the supplier standard contract damages and interest. It also awards an amount to penalize the purchaser for noncompliance with a tribunal injunction barring participation in certain U.S. litigation. The court seized of the litigation had made affirmative findings that its jurisdiction was proper and unaffected by the parties' arbitration clause. The tribunal's injunction would have had the effect of indirectly interfering with a U.S. court's exercise of jurisdiction; to enforce the tribunal's penalty would offend public policy. The court enforces the tribunal's award of standard contract damages and interest, but not the tribunal's monetary sanction.

REPORTERS' NOTES

a. Generally. Public policy exceptions are a common feature of treaties and statutes regulating the recognition and enforcement of judgments and arbitral awards. See ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, § 5, Reporters' Note 7 (2006); Unif. Foreign Money-Judgments Act § 4(b)(3), 13 U.L.A. 59 (2002) ("A foreign judgment or claim need not be recognized if . . . the [cause of action or claim for relief] on which the judgment is based is repugnant to the public policy of this state."); Council Regulation 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, art. 34(1), 2000 O.J. (L 012) (EC) ("A judgment shall not be recognised: if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought."). The UNCITRAL Model Law on International Commercial Arbitration lists public policy as both a ground for setting aside an award (vacatur), art. 34(2)(b)ii, and for non-enforcement, art. 36(1)(b)(ii) (award contrary to the public policy of the implementing State need not be enforced). Likewise, the New York and Panama Conventions contemplate that in certain circumstances recognition or enforcement of an award might be contrary to the public policy of the country where the award is presented. Both Conventions thus include violation of public policy among the exclusive grounds for declining to recognize or enforce an award. N.Y. Convention, Article V(2)(b); Panama Convention, Article 5(2)(b). By virtue of FAA Section 207, U.S Convention awards are subject to vacatur and refusals to confirm on the same basis.

b. Scope and nature of public policy. Neither the New York nor the Panama Convention defines public policy. The lack of a definition reflects the fact that countries inevitably vary somewhat as to the content and scope of public policy limits in the arbitration context. The dominant pattern among U.S. courts is to conceive of public policy narrowly. The prevailing formulation relied upon by the U.S. courts is derived from Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974), in which the court stated that public policy is properly a basis for denying recognition or enforcement only if enforcement "would violate the forum state's most basic notions of morality and justice." Id. at 974; see also Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975) (relying on *Parsons & Whittemore*); Fitzroy Eng'g, Ltd. v. Flame Eng'g, Inc., 1994 U.S. Dist. LEXIS 17781, at *9-*10 (N.D. Ill. Dec. 13, 1994); Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 819-820 (D. Del. 1990) (quoting *Parsons & Whittemore*). *Parsons & Whittemore* is also often cited for its admonition that a narrow reading of public policy is required to effectuate the New York Convention's goals. See Waterside Ocean Nav. Co. v. Int'l Nav. Ltd., 737 F.2d 150, 152 (2d Cir. 1984) (citing *Parsons & Whittemore*); see also Hewlett-Packard, Inc. v. Berg, 867 F. Supp. 1126, 1131-1132 (D. Mass. 1994); La Societe Nationale Pour La Recherche, La Prod., Le Transp., La Transformation et la Commercialisation Des Hydrocarbures v. Shaneen Natural Res. Co., 585 F. Supp. 57, 63 (S.D.N.Y. 1983).

Courts in the United States do not expressly differentiate between ordinary public policy and international public policy (*ordre public international*) in the fashion that civil law courts commonly do. See International Law Association Committee on International Commercial Arbitration, Final Report on Public Policy 3-4 (2002), available at http://www.ila-hq.org/download.cfm/docid/BD0F9192-2E98-4B17-8D56FFE03B80B3EA (last visited Jul. 29, 2011). Nevertheless, the self-restraint practiced by U.S. courts in evaluating claims based on public policy is fully consistent with the notion that only truly compelling interests warrant protection by reference to Article V(2)(b) of the New York Convention or Article 5(2)(b) of the Panama Convention. Not all U.S. public law engages public policy acutely enough to require vacatur or to defeat confirmation, recognition, or enforcement of a Convention award. A fortiori, foreign public law will not ordinarily prevent a Convention award from being given effect in the United States. By way of exception, however, a U.S. court might plausibly regard recognition or enforcement of an award to be so deeply detrimental to a foreign State's paramount interests that it offends international comity and is, to that extent, repugnant to U.S. public policy. For possible reliance on this reasoning to justify denying recognition or enforcement of an award based on a statutory claim that the enacting State has declared non-arbitrable, see Reporters' Note to Comment *c (ii)*, § 4-17, supra.

Public policy is often invoked; however, it rarely results in vacatur or a denial of confirmation, recognition, or enforcement. *Illustrations 1* and *2* typify the many instances in which judges are invited to test arbitral procedures and outcomes against domestic practices or standards. In these cases, the courts reaffirm that public policy is not offended merely because the court would have acted differently with respect to the law chosen, the procedures used, the evidentiary determinations made, or the substantive result reached. See Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1443 (11th Cir. 1998) (admission of testimony did not prevent enforcement); Generica Ltd. v. Pharm. Basics, Inc., 1996 U.S. Dist. LEXIS 13716 (N.D. Ill. Sept. 18, 1996), aff'd, 125 F.3d 1123 (7th Cir. 1997) (relevancy determinations and resulting limitation on or exclusion of cross-examination not per se a violation of public policy); Nordell Int'l Res. v. Triton Indon., 1993 U.S. App. LEXIS 19616, at *3-*4 (9th Cir. July 23, 1993) (unpublished opinion) (award confirmed despite allegations of fraudulently prepared evidence; court will not substitute its assessments of the evidence for those of the arbitrators); Waterside, 737 F.2d at 152 (alleged self-contradictory testimony did not implicate public policy); Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 308 (S.D. Tex. 1997) (no requirement that tribunal give preliminary rulings on every issue); Avraham v. Shigur Express Ltd., 1991 U.S. Dist. LEXIS 12267, at *7-*9 (S.D.N.Y. Sept. 4, 1991) (tribunal's independent investigation of collateral facts not a violation of public policy absent showing of harm).

In several instances, alleged arbitrator partiality has also been invoked as a public policy ground, but without success. See Imperial Eth. Gov't v. Baruch-Foster Corp., 535 F.2d 334, 337 (5th Cir. 1976) (not a disqualifying connection between arbitrator and the government that many years earlier arbitrator had helped draft a local civil code); Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160, 169 (S.D.N.Y. 1987) (metals-exchange membership of arbitrator in common with one party's representatives not sufficient cause to invoke public policy ground); Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp 948, 954-55 (S.D. Ohio 1981) (arbitrator's failure to disclose former work as advocate for a party, under the circumstances, not violation of public policy); Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., 480 F. Supp. 352, 357 (S.D.N.Y. 1979) (no public policy defense absent a "direct" financial or professional relationship between a party and an arbitrator). While alleged arbitrator partiality is often raised as a violation of public policy, it can also be invoked under Sections 4-13 and 4-15, supra. Because Section 4-13 directly addresses issues of procedural fairness, it is the most appropriate context for raising such allegations. See § 4-13, supra, and Comment *f.*

In the majority of cases in which enforcement would allegedly contravene public policy, the weakness of that defense is reinforced by the resisting party's faulty legal premises, or poor factual proofs, or simply by its failure to preserve its objections. See, e.g., Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. Y Comercial, 745 F. Supp. 172, 180 (S.D.N.Y. 1990) (no objection made to tribunal's failure to identify its expert); Libyan Sun Oil Co., 733 F. Supp. at 815 n.24 ("Contrary to Sun Oil's assertions [the witness'] allegedly inaccurate statement . . . was not material to the Arbitral Tribunal's decision."); La Societe Nationale, 585 F. Supp. at 57 (resisting party mischaracterized U.S. antitrust law and the requirements of the ICC Rules).

Courts in the United States do not equate foreign policy preferences with public policy for purposes of New York Convention Article V(2)(b). *Illustration 3* is based on Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974). In *Parsons & Whittemore*, the party resisting enforcement relied on strained relations between Egypt and the United States as the basis for its public policy challenge. The court responded:

> In equating "national" policy with United States "public" policy, the appellant quite plainly misses the mark. To 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.

Id. at 974. In Libyan Sun Oil Co., 733 F. Supp. at 819-820, the party opposing enforcement emphasized U.S. disaffection with Libya's policies. The court again rejected the public policy challenge, observing that the United States had not declared war on Libya, nor had the executive branch withdrawn recognition of the Qaddafi Government. To the contrary, the U.S. government had endorsed Libya's bringing of the enforcement action in question, thus making it particularly difficult to conclude "that to confirm a validly obtained foreign arbitral award in favor of the Libyan Government would violate the United States' 'most basic notions of morality and justice.'" Id. at 819; see also Antco Shipping Co. v. Sidermar S.p.A, 417 F. Supp. 207 (S.D.N.Y. 1976) (that disputed contract had clause prohibiting use of Israeli ports did not prevent enforcing agreement to arbitrate).

In Northrop Corp. v. Triad Int'l Mktg. S.A., 811 F.2d 1265 (9th Cir. 1987), the arbitrators had given effect to a contract that would have been unlawful under Saudi Arabian law and awarded commissions to a representative of an arms dealer. The lower court inferred that the U.S. Department of Defense (DOD) had adopted the Saudi Arabian policy as its own and refused to confirm the award. The Ninth Circuit reversed. It found that the DOD's policy was not perfectly clear and that the award should have been confirmed. Id. at 1270. It explained:

> To justify refusal to enforce an arbitration award on grounds of public policy, the policy "must be well defined and dominant" [quoting W.R. Grace & Co. v. Local Union 749, 461 U.S. 757, 766 (1983)] . . . . The Saudi Arabian policy the [DOD] arguably adopted was neither. It is clear the Department wished to accommodate Saudi Arabian interests and sensibilities. It is also clear, however, that the Department was interested in encouraging sales to Saudi Arabia of American manufactured military equipment, and considered the efforts of [the representative] critical to that end. It is not clear from the evidence before the arbitrators and the district court what policy the [DOD] adopted in pursuit of these sometimes inconsistent goals.

Id. at 1271. Additionally, the contract in *Northrop* designated California law as governing. California law did not prohibit the transaction in question. The court emphasized the importance of honoring the parties' autonomy in designating applicable law.

c. Nature of the confirmation, recognition, and enforcement obligation. Identifying public policy and determining the extent to which confirmation, recognition, or enforcement of an award would offend it, entails discernment by courts and must take into account the vigorous pro-enforcement policies upon which the Conventions are founded and which are reinforced by relevant case law. As a theoretical matter, the Conventions' use of the permissive term "may" would allow a court to give effect to an international arbitral award despite a finding that confirmation, recognition, or enforcement would offend public policy, just as it may recognize or enforce an award notwithstanding the establishment of the other Convention grounds. The Restatement retains the formulation "may" out of deference to clear treaty language. Nevertheless, it is scarcely conceivable that any court would leave standing or confirm, recognize, or enforce an award having first found it to violate public policy. Instead, a court would be more likely to conclude that the public policy ground, though implicated, had not been fully satisfied. In making this determination, courts have broad discretion to assess a policy's fundamental importance and the degree to which that policy would be compromised by a failure to vacate, or by confirmation, recognition, or enforcement.

d. Examples of public policy violations. The public policy ground, though rarely invoked with success, serves an important function. At a minimum, it stands in reserve for situations in which confirmation, recognition, and enforcement, or a failure to vacate, would be repugnant to fundamental public policy, and yet—uncharacteristically—another more specific ground under the Conventions is not available.

A number of cases implicating public policy involve federal laws addressing international transactions. *Illustrations 4* and *5* are based on dicta in Karen Mar. Ltd. v. Omar Int'l, Inc., 322 F. Supp. 2d 224 (E.D.N.Y. 2004) and demonstrate that in specific instances involving U.S. regulation of business conduct abroad, essential federal policies may be promoted through vacatur or through denial of confirmation, recognition, or enforcement of an award. In general, an award may be denied effect by a

court in the United States if it directly and overtly punishes compliance, or rewards noncompliance, with federal laws addressing marketplace behavior of U.S. citizens. In *Karen*, the disputed contract contained undertakings to boycott Israel. The court explicitly found that the relevant provisions of U.S. anti-boycott law represented "an explicit public policy, well defined and dominant" and that "if [e]nforcement of the award . . . legitimized or perpetuated the Arab boycott of Israel, [enforcement] would violate basic American notions of morality and justice." Id. at 229. The court later reiterated:

> If the breach of contract that Petitioners recovered upon had to do with the Arab boycott—if, for example, the arbitrator's award had been based upon Respondent wishing to have the M/V Karen call at an Israeli port—then refusing to confirm the arbitral award on the basis of public policy might well be appropriate. Such facts are not, however, presented by this case.

Id. at 230. *Illustration 6*, by contrast, is based on the actual holding in *Karen* (arbitration award enforceable under the Convention though contract containing it had clause prohibiting use of Israeli ports). The critical distinction between *Illustrations 4* and *5,* on the one hand, and *Illustration* 6, on the other, is that in *Illustration 7* the prohibited contractual terms were wholly without relevance to the arbitration, therefore playing no role in the tribunal's award. See also Ameropa AG v. Havi Ocean Co. LLC, 2011 WL570130 (S.D.N.Y. 2011) (mere speculation concerning trading with Iran not sufficient to require nonenforcement under public policy ground).

In general, courts are not receptive under the rubric of public policy to allegations of fraud or artifice alleged to have affected documentary or testimonial evidence, particularly when the arbitrators had explicitly or by implication already considered the alleged irregularities in question. See Gary B. Born, International Commercial Arbitration 2814 (2009). Nonetheless, when fraud in the rendition of critical documents, perjured testimony, or other dishonesty perpetrated by a party on the arbitrators is demonstrated by clear and convincing evidence, the fraud is materially related to an issue in the proceeding, and the fraud was not discoverable using due diligence prior to or during the arbitration, vacatur or refusal of confirmation, recognition and enforcement on public policy grounds would be proper. See Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988) (vacatur action).

Public policy is likely to be raised during enforcement proceedings by a party who relied unsuccessfully during the arbitration on protections conferred under a U.S. public law. The U.S. Supreme Court, in its watershed decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), expressed the view that the public policy ground would be an appropriate tool for ensuring that U.S. antitrust law was given due regard when relied on by a party in an international arbitration. The Court ruled enforceable an arbitration clause in a contract designating Swiss law, a foreign seat of arbitration, and an administering institution centered in Japan, even though the party resisting arbitration intended to rely in part on the antitrust protections of the Sherman and Clayton Acts. Id. at 616-35. In addressing the prospect that arbitration abroad might be used to circumvent U.S. antitrust laws, the Court offered what has become known as the "second look" doctrine of *Mitsubishi*:

> Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the "recognition or enforcement of the award would be contrary to the public policy of that country." . . . While the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal *took cognizance of the antitrust claims and actually decided them*.

Id. at 638 (emphasis added; citation omitted). The Court added the practical detail that to investigate whether the tribunal "took cognizance," the enforcing court might need to consult the arbitral transcript and the award's written reasons. Id. at 638 n.20.

The post-*Mitsubishi* decisions suggest that the "took cognizance and actually decided" standard at the heart of the "second look" doctrine has played a negligible role in enforcement cases. See Donald Francis Donovan & Alexander K.A. Greenawalt, *Mitsubishi* After Twenty Years: Mandatory Rules Before Courts and International Arbitrators, in Pervasive Problems in International Arbitration 11, 36-38 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006). The paucity of cases giving inflexible priority to U.S. public law over policies of award enforcement no doubt reflects several factors. One consideration is that anticompetitive contracts may be policed under the competition laws of various jurisdictions; the regulatory interests underpinning U.S. antitrust or other public law may therefore be served through the application of foreign law.

Additionally, the limited role of antitrust and similar defenses accords with the view propounded by some pre-*Mitsubishi* courts that to interpose such defenses is "too likely to enrich [the resisting party] who reap[ed] the benefits of a contract and [now] seeks to avoid the corresponding burdens." La Societe Nationale, 585 F. Supp. at 63 (holding antitrust argument fails to reach the public policy standard contemplated by the Convention and quoting Viacom Int'l Inc. v. Tandem Prods., Inc., 526 F.2d 593, 599 (2d Cir. 1975)). Nevertheless, the "second look" doctrine has not been retracted by the Court and recognition or enforcement presumably can still be resisted under it. Cf. Pacificare Health Sys., Inc v. Book, 538 U.S. 401 (2003) (arbitrators would in the first instance have opportunity to give effect to RICO statutory treble damage remedy notwithstanding limitation clause possibly intended to preclude such damages; Court left open that an unequivocal remedy restriction significantly diluting statutory protections might justify non-enforcement of an arbitration agreement).

Public policy may be engaged when the arbitration producing the award in question was conducted in defiance of a ruling by a court in the United States. *Illustration 7* typifies such a case. A variation of *Illustration 7* would arise if a court, having found a waiver of an arbitration clause, proceeded to judgment in a suit from which the waiving party defendant withdrew, only to prosecute an arbitration abroad. It is permissible for a court to prefer its own judgment to a Convention award predicated on an arbitration agreement previously deemed waived by a court in the United States.

e. Applicable law. The public policy that provides the basis for denying recognition or enforcement is fundamentally that of the United States as a whole, as opposed to the public policy of a single U.S. state. Cf. Sw. Livestock & Trucking Co. v. Ramón, 169 F.3d 317 (5th Cir. 1999) (Mexican judgment not contrary to public policy even though disputed loan agreement carried interest rate exceeding limit set under Texas law). In this respect, practice under the Convention may differ from that under state statutes based on the Uniform Foreign Money Judgments Act. For this and other reasons, the case of Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063 (N.D. Ga. 1980) may be viewed as aberrant, if not unique. There the tribunal's assessment of an escalating French interest rate intended to induce early payment was deemed a penalty and held impermissible under Georgia state policy.

A policy or interest identified by a constituent state as imperative may of course reflect a shared national value. Cf. Libel Terrorism Protection Act, N.Y.C.P.L.R. 5304 (2008) (with respect to judgments, no recognition granted unless protection of expression equivalent to that ensured at New York State and national level had been accorded). Moreover, there may be circumstances in which the common policies of constituent states are especially informative. For example, even in the absence of any articulated federal policy on dog fighting, a strong consensus among the states condemning the practice might provide an adequate public policy basis for denying recognition and enforcement. See *Illustration 8*.

Exceptionally, a single state's interest in a particular dispute may justify giving effect to its policy by vacating or denying confirmation, recognition, or enforcement to a Convention award. Such a situation will be infrequent for several reasons. First, to the extent that a state policy has the aim or effect of limiting arbitration, such as by restricting subject-matter arbitrability, it will generally be preempted by federal arbitration law. More generally, before relying on the violation of a state's public

policy as a basis for vacatur, or denial of confirmation, recognition, or enforcement of an award, a court should satisfy itself that vindication of that public policy would not conflict with or thwart some other overriding federal interest.

A court should not decline recognition and enforcement of a Convention award on the basis of a state's public policy unless, at a minimum, an analogous foreign country judgment would be denied recognition or enforcement under the state's law governing recognition and enforcement of foreign country judgments. It is noteworthy that the Uniform Foreign-Country Money Judgment Act's public policy exception typically is construed quite narrowly. See generally ALI, Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, § 5, Reporters' Note 7(b) (2006). See, e.g., Southwest Livestock & Trucking Co. v. Ramón, 169 F.3d 317 (5th Cir. 1999) (public policy focuses on cause of action—debt collection—not interest terms of the contract itself, even though those terms were contrary to usury laws of Texas).

The policy of a state having only a slight connection to a dispute generally would not warrant consideration. Rather, only when the facts involved make the interest of that state predominant and compelling should the state's distinctive public policy result in vacatur or a denial of recognition or enforcement. The state's interest may be considered predominant when, for instance, one or both parties have a significant presence in the state and the use of arbitration in combination with a governing-law clause was a means by which to evade state regulatory law. Cf. Aguerre v. Schering Plough Corp., 924 A.2d 571 (N.J. Super. Ct. App. Div. 2007) (non-recognition of foreign settlements that were coerced by New Jersey corporation to evade effects of state whistle-blower law; employees had helped bring to light violations of federal law). A highly fact-dependent analysis may therefore be required.

At least one Convention case linked comity and public policy analysis, with the result that enforcement of an English default award against a bankrupt entity was denied. In Victrix S. S. Co., S.A. v. Salem Dry Cargo, A.B., 825 F.2d 709 (2d Cir. 1987), the Second Circuit held that strong countervailing policies favoring deference to foreign bankruptcy proceedings precluded recognition because the award recipient had pursued London arbitration after the Swedish bankruptcy court had appointed an administrator and suspended creditors' suits against the debtor in bankruptcy. The award recipient had also pursued its claims in the bankruptcy proceeding. In declining to recognize or enforce the award, the court cited the "public policy of ensuring equitable and orderly distribution of local assets of a foreign bankrupt." Id. at 714. The court explained further that "[a]ny distribution of [the debtor's] limited assets is likely to affect other creditors, not parties to the proceeding, who obeyed the Swedish court's stay and sought relief only in the bankruptcy proceeding." Id. The decision may be viewed as one grounded in the two countries' shared policy favoring efficient international bankruptcy proceedings and protection of third parties.

f. Overlap with other grounds for denying confirmation, recognition, or enforcement. In many instances in which public policy might be invoked, another more specific ground for challenging an award would be satisfied and therefore available. For example, the fact that a sole arbitrator was partial to, or lacked independence from, a party would be a solid public policy basis for vacatur or refusing confirmation, recognition, and enforcement, although a legitimate attack on the award could equally be justified under Section 4-13 on the ground that the arbitrator's partiality and lack of independence impaired the complaining party's opportunity to present its case, rendering the arbitral procedure fundamentally unfair. See § 4-13, Reporters' Note to Comment *b*, supra. *Fitzroy Eng'g., Ltd*., though involving a lawyer's alleged conflict of interest, produced the following observation:

> [T]he court by no means suggests that conflicts of interest, whether they are held by an arbitrator, or as is alleged here, the attorney for one of the parties to an arbitration proceeding, can never give rise to a public policy based defense. The notion that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome" lies at the heart of this nation's due process jurisprudence. .

> . . To prevail on such a defense, however, the respondent must convincingly show that a clear, direct conflict existed that could have affected the outcome of the proceeding.

Fitzroy Eng'g., Ltd., 1994 U.S. Dist. LEXIS 17781, at *11 (emphasis and internal citations omitted). Cf. Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds, 748 F.2d 79 (2d Cir. 1984) (vacatur required because arbitrator's father was an officer of the winning party).

When, as often happens, arguments that confirmation or enforcement of an award would violate public policy duplicate arguments under more specific grounds for vacatur, or denying confirmation, recognition, or enforcement, the court's analysis typically concentrates on the more specific ground. See, e.g., Generica Ltd., 1996 U.S. Dist. LEXIS 13716, at *8 ("Because PBI's invocation of Article V(2)(b) is essentially duplicative of the due process defense, the Court will treat the two defenses as one."); Trans Chem., Ltd., 978 F. Supp at 310 n.193 ("to the extent that [resisting party] makes a separate claim under Article V, § 2(b), neither the failure to produce the . . . report nor the alleged misconduct by the arbitrators rises to the level of a public policy violation"); Geotech Lizenz AG v. Evergreen Sys., Inc., 697 F. Supp. 1248, 1254 (E.D.N.Y. 1988) ("[the] public policy argument rehashes the arguments previously [made regarding] . . . the absence of a valid agreement to arbitrate . . . [and] the scope of the arbitrator's powers and . . . proper notice.").

g. Waiver and determination sua sponte. A court may examine whether the grant of post-award relief referred to in paragraph (a) would be repugnant to public policy even if a party does not raise the issue.

h. Partial grant of post-award relief. *Illustration 9* demonstrates that a court may give effect to only part of an award, while declining on public policy grounds to do so with respect to the remainder. For discussion of the authority of courts to grant post-award relief as to part but not all of an award, see Section 4-1(d) & (e); Comment *f* of this Section.

SUB-TOPIC (B). NON-CONVENTION AWARDS

§ 4-19. Award Procured by Corruption, Fraud, or Undue Means

A court may deny recognition or enforcement of a non-Convention award to the extent that the court finds that the award was procured through corruption, fraud, or undue means.

Comments:

a. Generally. Section 10(a)(1) of the Federal Arbitration Act provides that a court "may make an order vacating the award upon the application of any party to the arbitration . . . where the award was procured by corruption, fraud, or undue means." Consistent with this provision, a non-Convention award may be refused recognition or enforcement if a party demonstrates that its rights were materially prejudiced by corruption, fraud, or undue means in procuring the award. This ground for challenging non-Convention awards essentially parallels Article V(1)(b) of the New York Convention and Article 5(1)(b) of the Panama Convention, which would likewise permit a court to vacate, or deny confirmation, recognition or enforcement of a Convention award due to fraud. See § 4-13(c), supra.

A party seeking to invoke this ground must not only prove the occurrence of corruption, fraud, or undue means, but also that such fraud, corruption, or undue means were used to procure the award or affected the resolution of issues material to the award. It is not necessary, however, for the party opposing recognition or

enforcement to establish that, absent the objectionable conduct, the substantive outcome of the award would have been different.

b. Fraud or corruption. A court may deny recognition or enforcement of a non-Convention award when a party demonstrates by clear and convincing evidence that the award was procured through fraud or corruption affecting an issue material to the award. Lack of candor on the part of a party or dishonest testimony by a witness in the arbitration proceeding is generally insufficient to constitute fraud or corruption sufficient to justify denying recognition or enforcement of a non-Convention award. Because the fraud or corruption must be material to the arbitral proceedings, perjured or misleading evidence cannot be grounds for denying recognition or enforcement if the arbitral tribunal had a basis for the reaching the substantive outcome that was independent of, and unaffected by, the alleged fraud. Moreover, if the factual evidence underlying the alleged fraud or corruption was presented to the tribunal and the tribunal determined that there was no basis for a finding of fraud or corruption affecting the fundamental fairness of the arbitral proceedings or the substantive outcome of the award, a court will not deny recognition or enforcement of the award.

Illustrations:

1. *A* opposes enforcement of an arbitral award on the ground that a witness *X* for *B* perjured herself in describing a critical fact that called into question whether the contract in the underlying the dispute was ever formed. *A* presented another witness during the proceedings that

contradicted the testimony of witness *X*. The tribunal determined that witness *X* was credible and *A*'s witness was not. In the absence of any additional evidence of fraud that was discovered after the hearing and thus not considered by the tribunal, a court enforces the award.

2. Same facts as *Illustration 1*, except that a document comes to light after the close of the proceedings that was previously unknown to either party. The document reveals clearly and convincingly that witness *X* perjured herself regarding the existence of the underlying contract, whose existence was material to the substantive outcome of the award. A court may, upon a finding that the perjured testimony was relied on by the tribunal in reaching its substantive determination, refuse to enforce the award.

3. Same facts as *Illustration 2*, except that the perjured testimony of witness *X* pertains to whether a company was validly incorporated. Because the issue of corporate status is not material to the tribunal's determination that the contract was breached, a court enforces the award.

c. Undue means. Courts have interpreted "undue means" to connote conduct that is immoral, even if it is not illegal, and that does not rise to the level of actual corruption or fraud, such as making threats to an arbitrator or otherwise attempting to improperly influence the proceedings. A party opposing recognition or enforcement

on the ground that the award was procured by undue means must also prove that the means used were contrary to the reasonable procedural expectations of the parties and severely prejudiced the fundamental fairness of the proceedings.

d. Burden of proof. As with other grounds for opposing post-award relief (see § 4-6, supra), a party resisting recognition and enforcement of a non-Convention award bears the burden of proving the factual basis for application of this ground. In addressing claims of fraud or corruption, courts require the party opposing recognition or enforcement of an award to establish by clear and convincing evidence that the award was procured through fraud or corruption. This standard imposes an additional burden that is more exacting than the general standard of proof required for establishing other grounds for denying recognition or enforcement. Because "undue means," is generally defined as conduct that, while immoral and inappropriate, does not constitute fraud or corruption, courts have not held parties invoking this ground to the same clear and convincing standard that is required for fraud or corruption. Under either standard, however, the burden cannot be satisfied by mere suspicion or unsubstantiated claims. Courts also often require the party opposing recognition or enforcement under this Section to make an affirmative showing that essential facts underlying the challenge were not, and could not have been, discovered by the exercise of due diligence prior to or during the arbitral proceedings.

e. Waiver and determination sua sponte. A party's ability to waive challenges based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

f. Partial grant of post-award relief. In appropriate circumstances, as outlined in Comment *b* to Section 4-1(d), supra, a court may decide to confirm a portion a U.S. Convention award, or recognize or enforce a portion of a foreign Convention award, while denying relief to the rest. Although partial grant of post-award relief is theoretically possible under this Section, as a practical matter, it will rarely be appropriate. It is especially difficult to justify partial, as opposed to full, post-award relief if the award is challenged on the basis that it was obtained through corruption or undue means under this Section.

REPORTERS' NOTES

a. Generally. It is axiomatic that an award whose making was materially affected by fraud, corruption or other undue means is not legitimate and therefore not entitled to recognition or enforcement. Section 10(a)(1) of the FAA, which governs non-Convention awards, codifies this principle, which is also embedded in the Convention grounds that ensure the procedural fairness of Convention awards. Notably, however, this ground does not justify denying recognition or enforcement of a non-Convention award merely because fraud, corruption or other undue means are implicated in the dispute being arbitrated or in the arbitral proceedings. Instead, this ground requires proof of the occurrence of corruption, fraud, or undue means, as well as proof that such fraud, corruption, or undue means were used to procure the award or affected the resolution of issues material to the award. It is not necessary, however, for the party opposing recognition or enforcement to establish that, absent the objectionable conduct, the substantive outcome of the award would have been different.

b. Fraud or corruption. It is axiomatic that an award that is procured through fraud or corruption should not be treated as binding, and thus not recognized or enforced. The primary difficulty in applying this ground is determining what proof is required to demonstrate fraud, see Comment *d* of this Section, and when such fraud affects an issue that was material to the making of the award. Envtl. Barrier Co., LLC v. Slurry Sys., Inc., 540 F.3d 598, 608 (7th Cir. 2008) (award enforceable when there was no nexus between purported fraud and arbitrator's final decision). When a tribunal rules on the alleged fraud or makes findings regarding the facts underlying the allegations of fraud, courts generally defer to the arbitrators' decision and enforce the award. See Forsythe Intern., S.A. v. Gibbs Oil Co., 915 F.2d 1017, 1022-23 (5th Cir. 1990) (award not affected by alleged fraud since tribunal heard argument on allegations of fraud and rendered decision that rested on parties' intent as measured by their actions,

and not allegedly fraudulent witness testimony); Belmont Partners v. Mina Mar Group, Inc., 741 F. Supp. 2d 743, 753-54 (W.D. Va. 2010) (allegedly fraudulent statement was central to the parties' dispute, fully briefed by both sides, and essentially a credibility determination for arbitrator to make).

c. Undue means. Courts have interpreted "undue means" to connote conduct that is immoral, even if not illegal, that does not rise to the level of actual corruption or fraud, such as making threats to an arbitrator or otherwise attempting to improperly influence the proceedings. See Catz Am. Co. v. Pearl Grange Fruit Exch., Inc., 292 F. Supp. 549, 554 (S.D.N.Y. 1968). A party opposing recognition or enforcement on the ground that the award was procured by undue means must also prove that the means used were contrary to the reasonable procedural expectations of the parties and severely prejudiced the fundamental fairness of the proceedings. See id.

d. Burden of proof. A party resisting recognition and enforcement of a non-Convention award bears the burden of proving the factual basis for application of this ground. For claims of fraud or corruption, courts require that the party opposing recognition or enforcement of an award establish by clear and convincing evidence that the award was procured through fraud or corruption. To satisfy this burden, a party cannot advance a mere suspicion or unsubstantiated claims. Instead, the party bears an additional burden that is more exacting than the general standard of proof required for establishing other grounds for denying recognition or enforcement of awards. Courts also often require that the party opposing recognition or enforcement under this Section make an affirmative showing that essential facts underlying the challenge were not, and could not have been, discovered by the exercise of due diligence prior to or during the arbitral proceedings. For post-award relief under this Section other than fraud, the party seeking vacatur or challenging confirmation need only establish the basis for the ground by a preponderance of the evidence.

e. Waiver and determination sua sponte. Issues of waiver and sua sponte determination by the court are addressed in Section 4-25, infra. No special rule on either waiver or sua sponte determination applies under this Section.

f. Partial grant of post-award relief. For discussion of the authority of courts to grant post-award relief as to part but not all of an award, see Section 4-1(d), (e), Comment __, supra.

§ 4-20. Evident Partiality by the Arbitrators

A court may deny recognition or enforcement of a non-Convention award to the extent that the court finds evident partiality on the part of an arbitrator. Evident partiality exists when there is proof that would cause an objective, disinterested observer who is fully informed of the relevant facts relating to the arbitrator's conduct or alleged conflicts to have a serious doubt regarding the fundamental fairness of the arbitral proceedings.

Comments:

a. Generally. An essential feature of adjudication is that the parties be able to present their claims to, and have them assessed by, an impartial decisionmaker. Under Section 10(a)(2) of the FAA, a court may deny recognition or enforcement of a non-Convention award when there is proof of evident partiality on the part of one or more of the arbitrators. This ground corresponds with some applications of Articles V(1)(b), V(1)(d), and the public policy exception in Article V(2)(b) of the New York Convention and Articles 5(1)(b), 5(1)(d), and the public policy exception in Article 5(2)(b) of the Panama Convention. See §§ 5-13, 5-15, and 5-18, infra.

b. Definition of "evident partiality." Under U.S. law, "evident partiality" is the standard for determining when an arbitrator is improperly biased in a manner that precludes a party from having a meaningful opportunity to present its case. The Supreme Court has not provided any clear or recent guidance on the meaning of this

statutory term. In the absence of such guidance, lower federal courts have diverged significantly in defining "evident partiality," as that term is used in the FAA. Although numerous tests have been articulated, they fall into three general categories. First, some courts have required for application of this ground that an arbitrator have a connection to one of the parties or the dispute that creates the appearance of partiality or impropriety. This standard is often described as akin to the conflict-of-interest standard imposed on judges. Second, a few courts have required for satisfaction of this ground that an arbitrator have some personal interest, including but not limited to a pecuniary interest, in the outcome of the dispute, as when the arbitrator has an ongoing contractual relationship with one of the parties. This view is often characterized as requiring proof of actual bias. The third category of cases might be considered an intermediate view. Under this view, to establish evident partiality, a party must present evidence that would cause an objective, disinterested observer who is fully informed of the facts relevant to the arbitrator's conduct or conflicts to develop a significant doubt about the fundamental fairness of the proceeding in that case.

Each of the first two approaches engenders significant conceptual and pragmatic concerns, albeit at opposite ends of the spectrum. Accordingly, the Restatement adopts the third approach, namely that in order to establish evident partiality sufficient to justify vacating, or refusing to confirm, recognize or enforce an award, a party must present evidence that would cause an objective, disinterested observer to entertain a serious doubt about the fundamental fairness of the proceedings. This position strikes an appropriate balance. On the one hand, it serves

to preserve the integrity of the arbitral process and acknowledges the difficulty of proving actual bias. On the other hand, it recognizes that parties who consent to arbitration generally contemplate arbitrators who have specialized knowledge that is a consequence of their remaining engaged in professional relationships and maintaining professional affiliations.

In determining whether this standard is satisfied, a court considers the specific facts of each individual case. In evaluating these facts, courts generally consider:1) the extent and character of the relevant personal interest, pecuniary or otherwise, or relationship of the arbitrator; 2) the directness of the relationship between the arbitrator and the party that it was alleged to favor; 3) the connection between the arbitrator's interest or the relationship and the arbitration; 4) the proximity in time between the interest or relationship and the arbitral proceeding; 5) any relevant industry practices that may affect the parties' expectations regarding relationships between the arbitrator, and the parties and their dispute; and 6) the extent to which the arbitrator undertook a reasonable investigation to discover potential conflicts and actually knew of, or should have known of, the information that was not disclosed. A court may also consider whether the arbitrator undertook a reasonable investigation to discover potential conflicts and whether the arbitrator was aware of the information that was not disclosed.

c. Burden of proof. As with other grounds for post-award relief (see § 4-6, supra), a party opposing recognition or enforcement on the basis of evident partiality

bears the burden of proving the factual basis for application of this ground. This burden cannot be satisfied by mere suspicion or unsubstantiated claims, but instead requires evidence of bias that is direct, definite, and capable of demonstration. Courts also often require that the party opposing recognition or enforcement make an affirmative showing that essential facts underlying the challenge were not, and could not have been, discovered by the exercise of due diligence prior to or during the arbitral proceedings.

d. Waiver and determination sua sponte. A party's ability to waive a challenge based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

e. Partial grant of post-award relief. In appropriate circumstances, as outlined in Comment *b* to Section 4-1(d), supra, a court may decide to confirm a portion a U.S. Convention award, or recognize or enforce a portion of a foreign Convention award, while denying relief to the rest. Although partial grant of post-award relief is theoretically possible under this Section, as a practical matter, it will rarely be appropriate. As a result, a partial grant of post-award relief will be most feasible in cases that have been expressly bifurcated, for example, as between liability and quantum of damages. It is especially difficult to justify partial, as opposed to full, post-award relief if the award is challenged on the basis of arbitrator bias.

REPORTERS' NOTES

a. Generally. Section 10 of the FAA governs the grounds for post-award relief with respect to Non-Convention awards. Under Section 10(a)(2) of the FAA, a non-Convention award may be denied recognition or enforcement if there is proof of evident partiality on the part of one or more of the arbitrators that affects the fundamental fairness of the proceedings. This ground corresponds with some applications of Articles V(1)(b), V(1)(d), and the public policy exception in Article V(2)(b) of the New York Convention and Articles 5(1)(b), 5(1)(d), and the public policy exception in Article 5(2)(b) of the Panama Convention. See §§ 4-13, 4-15, and 4-18, supra.

b. Definition of "evident partiality." Under this ground, a non-Convention award may be denied recognition or enforcement "where there was evident partiality . . . in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). Like obscenity, evident partiality "is an elusive concept: one knows it when one sees it, but it is awfully difficult to define in exact terms." Int'l Bhd. of Elec. Workers v. Coral Elec. Corp., 104 F.R.D. 88, 89 (S.D. Fla. 1985).

The first and last time the Supreme Court has offered any guidance on the meaning of "evident partiality" was in Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968). The decision, however, does not provide clear guidance. Justice Black, writing the opinion of the Court, reasoned that "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." Id. at 150 (emphasis added). Justice White ostensibly concurred with Justice Black's opinion, but appeared to offer a contrary definition of evident partiality. Specifically, Justice White's concurrence reasoned that "arbitrators are not "automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial." Id. Because Justice White's reasoning seems to differ so markedly from Justice Black's opinion, courts disagree about whether Justice Black's opinion in *Commonwealth Coatings* was a plurality or a majority opinion, meaning whether Justice White concurred in Justice Black's reasoning, joined the opinion to make it a majority, or joined only in the outcome, leaving Justice Black's opinion as a plurality opinion. Compare Schmitz v. Zilveti, 20 F.3d 1043, 1045 (9th Cir. 1994) ("Commonwealth Coatings is not a plurality opinion."); Beebe Med. Ctr., Inc. v. InSight Health Serv. Corp., 751 A.2d 426, 434 (Del. Ch. 1999) ("Federal courts have struggled over the meaning and application of Commonwealth Coatings, principally because of the unusual nature of Justice White's concurrence in which he purported to join the majority opinion while delimiting its application."); with Morelite Constr. Corp. v. N.Y. City Dist. Council Carpenters Benefit Funds, 748 F.2d 79, 82 (2d Cir. 1984) ("Four justices . . . [who joined Justice Black's opinion] do not constitute a majority of the Supreme Court.").

In light of the confusion over Supreme Court precedent, and in the absence of more recent guidance, lower federal courts have diverged significantly in attempting to define "evident impartiality." See Burlington N. R.R. v. Tuco, Inc., 960 S.W.2d 629, 633-35 (Tex. 1997) (reviewing various splits in both state and federal cases). Judicial definitions of "evident partiality" fall into three general categories. Some courts, consistent with Black's majority opinion, require only proof of a reasonable impression or appearance of bias. See New Regency Productions, Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1106 (9th Cir. 2007); Montez v. Prudential Sec., Inc., 260 F.3d 980, 983 (8th Cir. 2001); Olson v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 51 F.3d 157, 160 (8th Cir. 1995); Schmitz, 20 F.3d at 1045. A few other courts have adopted the view that only proof of actual bias can qualify as evident partiality. See Positive Software Solutions v. New Century Mortgage Corp., 476 F.3d 278, 281 (5th Cir. 2007) (en banc); Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co., 307 F.3d 617, 621-23 (7th Cir. 2002); Health Servs. Mgmt. Corp. v. Hughes, 975 F.2d 1253, 1264 (7th Cir. 1992); Ormsbee Dev. Co. v. Grace, 668 F.2d 1140, 150 (10th Cir. 1982).

The definition of evident partiality adopted by a majority of courts, and by the Restatement, requires an objective, disinterested observer who is fully informed of the facts relevant to the arbitrator's conduct or alleged conflicts to develop a serious doubt regarding the fundamental fairness of

the arbitral proceedings. See Dauphin Precision Tool v. United Steelworkers of Am., 338 Fed. Appx. 219, 223 (3d Cir. 2009) (unpublished opinion); Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007); Nationwide Mut. Ins. Co. v. Home Ins. Co., 429 F.3d 640, 644 (6th Cir. 2005); JCI Commc'ns, Inc. v. Int'l Broth. of Elec. Workers, Local 103, 324 F.3d 42, 51 (1st Cir. 2003); ANR Coal Co., Inc. v. Cogentrix of N.C., Inc., 173 F.3d 493, 500-01 (4th Cir. 1999); Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc., 146 F.3d 1309, 1312-13 (11th Cir. 1998); Al-Harbi v. Citibank, N.A., 85 F.3d 680 683 (D.C. Cir. 1996); Morelite Const. Corp., 478 F.2d at 79; Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681 (7th Cir. 1983), cert. denied, 464 U.S. 1009, modified, 728 F.2d 943 (7th Cir. 1984); see also DeBaker v. Shah, 194 Wis. 2d 104, 118 (Wis. 1995). This definition strikes an appropriate balance. Actual bias can be extremely difficult to prove, even when it exists. See Morelite Const. Corp., 748 F.2d at 84 (referring to actual bias as an "insurmountable standard"). On other hand, allowing awards to be denied recognition or enforcement simply because of an impression of bias would encourage parties to bring potentially frivolous challenges and jeopardize the finality of arbitral awards. The intermediate position adopted by the Restatement avoids the risks of these two extremes.

In evaluating alleged conflicts under this Section, courts weigh a range of factors, including: 1) the extent and character of the relevant personal interest, pecuniary or otherwise, or relationship of the arbitrator; 2) the directness of the relationship between the arbitrator and the party that it was alleged to favor; 3) the connection between the arbitrator's interest or the relationship and the arbitration; 4) the proximity in time between the interest or relationship and the arbitral proceeding; 5) any relevant industry practices that may affect the parties' expectations regarding relationships between the arbitrator, and the parties and their dispute; and 6) the extent to which the arbitrator undertook a reasonable investigation to discover potential conflicts and actually knew of, or should have known of, the information that was not disclosed. The first four of these factors are based on those originally articulated in ANR Coal Co. v. Cogentrix of North Carolina, Inc., 173 F.3d 493, 500 (4th Cir. 1999), and followed by other courts. See Canadian Aviation Simulator Servs., Inc. v. Thales Training, Ltd., 2006 WL 1975932, at *4 (S.D.N.Y. July 13, 2006); RZS Holdings AVV v. PDVSA Petroleos S.A., 598 F. Supp. 2d 762, 773 (E.D. Va. 2009).

Factor 5 is designed to address trade practices within specific industries or geographic regions that can affect parties' expectations regarding the conduct and relationships of an arbitrator. See Carina Int'l Shipping Corp. v Adam Mar. Corp., 961 F. Supp. 559, 568-69 (S.D.N.Y. 1997); see also IBA Guidelines on Conflicts of Interest in International Arbitration, n.6 ("It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice.").

Factor 6 relates both to an arbitrator's duty to investigate and to actual knowledge of potential conflicts. The prevailing view in international practice is that arbitrators have a duty to conduct a reasonable investigation into potential conflicts. See Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 138 (2d Cir. 2007) (arbitrators have duty to investigate non-trivial conflicts); see also General Standard 6(c) of the IBA Guidelines ("An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned."). This obligation is also acknowledged in rules that govern domestic arbitration. See § 12 AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes (1973); RUAA § 12(a) (requiring "a reasonable inquiry" before making pre-appointment disclosure). The duty to investigate requires reasonable investigation, and what constitutes a reasonable investigation may vary depending on the facts and circumstances of an individual case. Failure to investigate, like failure to disclose generally, is not itself a basis for establishing evident partiality under this standard, but instead functions as a factor relevant to the court's assessment of the facts.

The obligations in this Section continue to apply throughout the course of arbitral proceedings, including after the initial appointment of the tribunal. For further discussion of the evident partiality standard and its application to specific contexts, see Comment *f* to Section 4-13, supra.

c. Burden of proof. A party opposing recognition or enforcement on grounds of evident partiality bears the burden of proving the factual basis for application of this ground. This burden cannot be satisfied by mere suspicion or unsubstantiated claims, but instead requires evidence of bias that is direct, definite, and capable of demonstration. Courts also often require that the party opposing recognition or enforcement make an affirmative showing that essential facts underlying the challenge were not, and could not have been, discovered by the exercise of due diligence prior to or during the arbitral proceedings.

d. Waiver and determination sua sponte. Issues of waiver and sua sponte determination by the court are addressed in Section 4-25, infra. No special rule on either waiver or sua sponte determination applies under this Section.

e. Partial recognition or enforcement. In appropriate circumstances, as outlined in Section 4-1(d),(e), supra, a court may decide to recognize or enforce a portion of the award, while denying recognition or enforcement to the rest. Although partial recognition and enforcement of an award is theoretically possible under this Section, it will rarely be appropriate. As a practical matter, those instances in which a court can attribute particular substantive outcomes to a specific procedural failing will occur when a proceeding has been expressly bifurcated or otherwise divided into separate procedural phases, with separate orders or awards being produced in the different phases. Courts should not parse and scrutinize each phase or aspect of arbitral procedure to determine whether partial recognition or enforcement is appropriate. With regard to challenges based on alleged bias of an arbitrator, it will be even more unusual for a portion of an award to be recognized or enforced despite a legitimate challenge under this Section.

§ 4-21. Arbitrator Misconduct

A court may refuse recognition or enforcement of a non-Convention award to the extent that:

(1) there was misconduct by an arbitrator in unjustifiably refusing to postpone a hearing, improperly refusing to hear pertinent and material evidence, or engaging in other misconduct; and

(2) such misconduct affected the fundamental fairness of the arbitral proceedings or resulted in significant prejudice to the basic procedural rights of a party.

Comments:

a. Generally. Pursuant to Article 10(a)(3) of the FAA, a non-Convention award may be refused recognition or enforcement when misconduct by an arbitrator affects the fundamental fairness of the proceeding and results in significant prejudice to a party. This ground corresponds with some aspects of Articles V(1)(b) and V(1)(d) of the New York Convention and Articles 5(1)(b) and 5(1)(d) of the Panama Convention, which also protect the fundamental fairness of arbitral proceedings and the basic procedural rights of the parties. See §§ 4-13 & 4-15, supra. Arbitrators generally have broad discretion in managing the arbitral proceedings, including scheduling hearings and making determinations about the admissibility or relevance of evidence. This Section is interpreted against the background of that broad discretion, as well as

against the presumptive validity of arbitral awards. Consequently, this ground for denying recognition or enforcement is interpreted narrowly, affording relief only on the basis of arbitral decisions or conduct that is so egregious that it renders the proceedings fundamentally unfair or severely prejudices a party's basic procedural rights. Misconduct in this Section most often refers to arbitral decisions regarding the conduct of arbitral proceedings, but it need not.

b. *Source of standards of procedural fairness.* The standards for what constitutes substantial prejudice or fundamental unfairness, such as to justify refusing to recognize or enforce an award under this Section, are often referred to as "due process" standards. The fact that these standards serve to ensure fundamental procedural fairness, however, does not imply that domestic constitutional due process protections directly apply in arbitration. Among other things, the absence of state action in arbitral proceedings means that constitutional standards do not apply in arbitral proceedings. Moreover, the procedural protections that assure fundamental fairness in a consensual arbitral process, particularly one involving parties from different legal cultures and procedural traditions, are distinct from those that would be required in national court proceedings where domestic constitutional standards, such as due process within the meaning of the Fifth and Fourteenth Amendments of the U.S. Constitution, do apply.

c. Content of procedural fairness standards. In the United States, procedural fairness requires that each party have a fair opportunity to present its case to the

tribunal and to rebut its opponent's case at a meaningful time and in a meaningful manner. Violation of these standards is only a basis for refusing to recognize or enforce a non-Convention award, however, if the violation results in severe procedural prejudice against a party that had a material effect on the fundamental fairness of the arbitral proceedings.

Illustrations:

1. An arbitral tribunal refuses to reschedule a hearing based on the alleged unavailability of *B*'s expert but admits, over *A*'s objection, the expert's witness statement and allows *A* to conduct cross-examination by videoconference. *A* later challenges enforcement of an award in favor of *B*, arguing that failure to reschedule constitutes misconduct by the arbitrators. The court enforces the award.

2. An arbitral tribunal affords *A* seven days to present its case, but rules that because certain of B's intended witnesses would offer only duplicative and marginally relevant testimony, *B* is limited to five days to respond. *B* later challenges enforcement of an award in favor of *A* on the ground that it was not accorded equal time to present its arguments. The court enforces the award.

3. Over the objection of *B*, an arbitral tribunal decides on the strength of *A*'s written submissions alone to issue an award in favor of *A* without permitting counter-submissions by *B*. *A* seeks to enforce the

award, and *B* challenges the award on the ground that the arbitral tribunal committed misconduct in refusing to permit counter-submissions. A court may refuse to enforce the award.

4. The parties provided in their arbitration agreement for a "documents only" arbitration. Pursuant to the agreement, the arbitral tribunal does not hold any evidentiary hearings and instead decides the dispute based on written submissions. *A* later challenges enforcement of the resulting award, claiming that the arbitral tribunal committed misconduct by not permitting it to submit live witness testimony. The court enforces the award.

Parties often raise unsuccessful allegations of arbitrator misconduct based on a tribunal's refusal to permit discovery, to allow witness testimony or cross-examination, or to accommodate attorney or witness schedules. These types of challenges are rarely successful because they cannot be shown to have produced serious procedural prejudice or to have affected the fundamental fairness of the proceedings. Such procedural decisions are generally determined to be within the tribunal's discretion in managing the proceedings.

d. Waiver and determination sua sponte. Parties may waive most procedural protections. Waiver may be explicit, either in the parties' written arbitration agreement or during the hearings. Most often, waiver is implied by a party's failure to object to procedural defects on a timely basis. Thus, if a party does not object to a

particular procedure during the arbitration, it ordinarily may not later challenge the award on that procedural ground. Relatedly, if a party defaults in an arbitration, it is generally precluded from objecting to the procedures the tribunal has followed. Conceivably, some decisions may be so egregiously unfair as to constitute violations of public policy within the meaning of Section 4-18, infra, and thus not subject to waiver. To date, however, such situations remain hypothetical.

e. Burden of proof. As with other grounds for vacating arbitral awards, the burden is on the party seeking vacatur to prove not only the existence of a procedural defect under this Section, but also severe impairment of a party's basic procedural rights or of the fundamental fairness of the proceedings. It is not necessary, however, that the party seeking vacatur prove that the procedural defect actually affected the substantive outcome of the case.

f. Partial grant of post-award relief. In appropriate circumstances, as outlined in Comment *b* to Section 4-1(d), supra, a court may decide to confirm a portion a U.S. Convention award, or recognize or enforce a portion of a foreign Convention award, while denying relief to the rest. Although partial grant of post-award relief is theoretically possible under this Section, as a practical matter, it will rarely be appropriate. It is especially difficult to justify partial, as opposed to full, post-award relief if the award is challenged on the basis of arbitrator bias.

REPORTERS' NOTES

a. Generally. Arbitrators have broad discretion to order arbitral proceedings, which includes discretion to determine what is generally a fair balance between efficiency and opportunity to present evidence. TIG Ins. Co. v. Global Intern. Reinsurance Co., Ltd., 640 F. Supp. 2d 519, 523 (S.D.N.Y. 2009) (dismissal of case was not misconduct because arbitration agreement granted arbitrator broad procedural powers, and arbitrator gave unrestricted opportunity to respond to evidence and heard extensive oral arguments). This is especially true with international arbitrations, in which arbitrators are also often required to strike a balance between contrasting procedural expectations of parties from different legal cultures.

There are some limits to this power imposed by Section 10(a)(3) of the FAA, which governs review of non-Convention awards. Courts only find that arbitrators abuse their discretion and, consequently, commit misconduct under this Section in rare and exceptional circumstances when a tribunal's procedural decision regarding the postponement of a hearing, refusal to hear evidence or other misconduct is unjustified, and affects the fundamental fairness of the proceedings or results in a significant prejudice to the basic rights of a party. See Roche v. Local 32B-32J SEIU, 755 F. Supp. 622, 624 (S.D.N.Y. 1991) (for arbitrator misconduct to be found under this ground, misconduct must amount to denial of fundamental fairness of arbitration proceeding).

b. Source of standards of procedural fairness. As a matter of terminology, in discussing the nature of procedural protections available in arbitration, the phrase "due process" is used in both a technical sense and a more generic sense. In the United States, notions of procedural fairness derive conceptually from the Due Process Clauses of the Fifth and Fourteenth Amendments of the Constitution. All U.S. courts that have considered the issue, however, have concluded that, due to the absence of state action, constitutional due-process standards do not apply directly in an arbitral proceeding to which parties have agreed. See Desiderio v. Nat'l Ass'n of Sec. Dealers, Inc., 191 F.3d 198, 206 (2d Cir. 1999); Fed. Deposit Ins. Co. v. Air Fla. Sys., Inc., 822 F.2d 833, 842 n.9 (9th Cir. 1987); Elmore v. Chi. & Ill. Midland Ry. Co., 782 F.2d 94, 96 (7th Cir. 1986). Cases that have expressly considered the state-action issue, however, indicate that references to "due process" are illustrative. They do not denote direct application of constitutional protections in international commercial arbitration, but refer to more generic conceptions of procedural fairness that are inherent in any adjudicatory process. Instead, the nature of procedural opportunities and protections available in international arbitration are determined by reference to caselaw interpreting this ground under the FAA.

c. Content of procedural fairness standards. When parties agree to arbitrate a dispute, they agree to substitute arbitral procedures for the procedures that would otherwise apply in judicial proceedings. Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 299 (S.D. Tex. 1997), judgment aff'd on other grounds, 161 F.3d 314, 319 (5th Cir. 1998). To satisfy the standard under this Section, the party challenging the award must prove that the arbitrator had no reasonable basis for his decision. See In Re Time Constr., Inc., 43 F.3d 1041, 1045-46 (6th Cir. 1995); DVC-JPW Investors v. Gershman, 5 F.3d 1172, 1174 (8th Cir. 1993) ("If any reasonable basis exists for the arbitrators' decision not to postpone a hearing, we will not intervene.").

The significant latitude arbitrators have to determine the applicable procedures is necessary in order for arbitral proceedings to accommodate the preferences of parties from different legal traditions. Moreover, in agreeing to arbitrate, the parties confer on arbitrators certain powers to order the arbitral proceedings that are necessary for their effective management. As the court explained in Hoteles Condado Beach, La Concha & Convention Center v. Union De Tranquistas Local 901:

> An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence; the arbitrator's role is to resolve disputes, based on his consideration of all relevant

> evidence, once the parties to the dispute have had a full opportunity to present their cases.

763 F.2d 34, 38 (1st Cir. 1985). While this case involved domestic arbitration, the court's characterization of an arbitral tribunal's procedural powers applies with equal, if not greater, force in international arbitration. Accordingly, as long as procedures prescribed by an arbitral tribunal do not violate fundamental notions of procedural fairness, they will not later provide a basis for denying recognition or enforcement of the award under this Section.

In evaluating claims under this Section, a court affords significant deference to the evidentiary rulings by an arbitral tribunal and other decisions regarding the management of proceedings. See Trans Chem. Ltd., 978 F. Supp. at 306-07 (enforcing award despite claim that tribunal had issued an "irrational" scheduling order, erred in ruling on requests for interim measures, and failed to issue a reasoned award). Moreover, courts do not reevaluate an arbitral tribunal's assessment of the evidence or of a witness's credibility. See Asociacion De Empleados Del Estado Libre Asociado De Puerto Rico v. Union Internacional De Trabajadores De La Industria De Automoviles, Aeroespacio e Implementos Agricolas, 2008 U.S. Dist. LEXIS 50373, at *8-9 (D.P.R. June 23, 2008). Courts may, however, refuse recognition or enforcement under this Section when arbitrators' evidentiary rulings undermine the fundamental fairness of the arbitration by denying a party an adequate opportunity to present its evidence and argument. An example of such a ruling would be if the tribunal refused to postpone a hearing when a key witness is unavailable due to an unforeseen medical emergency. See Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997).

Generally, denial of a party's request to have even a single oral hearing may be grounds for denying recognition or enforcement. There are, however, exceptions. For example, if the parties have agreed in their arbitral agreement to a "documents only" or an online arbitration, denial of a subsequently requested oral hearing is not adequate grounds for challenge. Relatedly, if the party is requesting an additional hearing or hearings, or other procedural opportunities, decisions of arbitral tribunals are afforded deference and denial of such a request will not generally be sufficient ground for denying recognition or enforcement of an arbitral award. Other challenges based on limitations on a party's ability to present evidence rarely suffice to justify a refusal of recognition or enforcement, unless the limitations are applied to the parties in a grossly unequal manner or they materially prevent a party from being able to assert a critical claim or defense. Otherwise, arbitrators have broad discretion to limit the number of hearing days or the number of witnesses who may be called to testify, to limit the availability or extent of discovery, and to limit or exclude formal evidentiary objections and cross-examination. A refusal to reschedule hearings to accommodate witnesses or attorneys is also generally not a sufficient basis for defeating recognition or enforcement of an award.

Consistent with Section 4-13, supra, an arbitral tribunal may be deemed, in appropriate circumstances, to have committed misconduct under this Section if the tribunal's decision is based on facts or legal issues that were not presented or argued by the parties. See Comment *f* to § 4-13, supra. A decision that relies on facts or legal issues that a party was not permitted an opportunity to comment on or respond to may affect the fundamental fairness of the proceedings. Nothing in this Section, however, prevents an arbitral tribunal from raising factual or legal issues sua sponte during the proceedings, as long as it affords the parties an opportunity to address and respond to those issues.

d. Waiver and determination sua sponte. The rules of many arbitral institutions expressly provide that failure to object to a procedural ruling or act constitutes a waiver of a party's right to later object to it. See UNCITRAL Rules, art. 30; ICC Rules, art. 33; ICDR Rules, art. 25. As a result, parties will be deemed to have agreed in advance of any dispute either to raise procedural objections during arbitral proceedings or to forgo such objections. The purpose of this temporal limitation is two-fold: both to prevent parties from relying on unspecified procedural objections as the basis for later attack on an award in the event they do not prevail on the merits and to give the arbitral tribunal an opportunity to correct the alleged procedural defect.

Even in the absence of express agreement regarding the timing of objections, courts often treat objections to procedures as waived unless raised during the arbitral proceedings. See § 4-25, infra. While objections must be made in a timely fashion, there are no strict form requirements for how the objection must be made.

e. Burden of proof. To satisfy its burden of proof under this Section, the party challenging recognition or enforcement must furnish evidence that the conduct underlying the challenge was not only an improper denial of a material evidentiary or procedural opportunity, but also that the denial affected the fundamental fairness of the arbitral proceedings or resulted in significant prejudice to the basic procedural rights of a party. See Weinberg v. Silber, 140 F. Supp. 2d 712, 719-20 (N.D. Tex. 2001) (finding that plaintiff has failed to meet burden of proof that arbitrator improperly excluded evidence because plaintiff made no attempt to describe the evidence that the arbitrator did not accept or otherwise demonstrate that the evidence was "pertinent and material" within the meaning of section 10(a)(3)).

For the same reason it is not required under the corresponding Convention grounds, a party is not required to demonstrate under this Section that the alleged misconduct altered the substantive outcome of the award. See Comment *g* to § 4-13, supra.

As with grounds under Article V(1)(b) of the New York Convention and Article 5(1)(b) of the Panama Convention, see § 4-13, supra, this Section may also be a basis for denying recognition or enforcement to a non-Convention award that is predicated on material facts that were not presented by the parties, and which the parties did not have an opportunity to comment on or respond to. Similarly, and again in line with the corresponding articles of the Conventions, an award based on material legal issues that were not presented by or commented on by the parties may be refused recognition or enforcement under this Section. The treatment of such objections in arbitration differs from their treatment in judicial settings, where judges are presumed to have an independent familiarity with the law and parties can address on appeal erroneous legal analysis or wholly unsupported factual claims. The absence of substantive appellate review of arbitral awards requires that parties be afforded an opportunity to address all material arguments in the first instance and denial of such an opportunity may be regarded as a significant procedural defect. Cf. St. George's Inv. Co. v. Gemini Consulting Ltd., [2005] EWHC 1 EGLR 5 (Ch.) ("[A]n arbitrator is entitled to use his expert knowledge to arrive at his award, provided it is of the kind and in the range of knowledge that one would reasonably expect the arbitrator to have and providing that he uses it to evaluate the evidence called and not to introduce new and different evidence.").

f. Partial grant of post-award relief. In appropriate circumstances, as outlined in Comment *b* to Section 4-1(d), supra, a court may decide to recognize or enforce a portion of the award, while denying recognition or enforcement to the rest. Although partial recognition and enforcement of an award is theoretically possible under this Section, it will rarely be appropriate. As a practical matter, those instances when a court can attribute particular substantive outcomes to a specific procedural failing will most likely involve cases that have been expressly bifurcated or otherwise divided into separate procedural phases with separate orders or awards being produced in the different phases. Courts should not parse and scrutinize each phase or aspect of arbitral procedure to determine whether partial recognition or enforcement is appropriate.

§ 4-22. Arbitral Tribunal Exceeded Its Powers

(a) A court may deny recognition or enforcement of a non-Convention award to the extent that the arbitral tribunal exceeded its powers in making the award.

(b) An arbitral tribunal exceeds its powers in making an award if:

(1) the arbitration agreement does not exist or is invalid under Section 4-12;

(2) the arbitral award decides a matter beyond the terms of the submission to arbitration under Section 4-14;

(3) the arbitral procedure is contrary in a material respect to the agreement of the parties under Section 4-15;

(4) the arbitral award decides a matter not capable of arbitral adjudication under Section 4-17; or

(5) recognizing or enforcing the arbitral award would be repugnant to public policy under Section 4-18.

Comments:

a. Generally. Section 10(a)(4) of the Federal Arbitration Act provides that a court may vacate an award "where the arbitrators exceeded their powers." Because Chapter One of the FAA governs the recognition and enforcement of non-Convention awards (see § 4-3(b), supra), FAA Section 10(a)(4) provides one of the grounds for denying recognition and enforcement of a non-Convention award.

The powers of the arbitral tribunal derive in the first instance from the parties' agreement. If the parties do not agree to arbitrate a dispute or a particular claim in the dispute, then the tribunal does not have the power to adjudicate that dispute or claim. Similarly, if the parties agree to certain procedures and the tribunal materially deviates from those procedures, the tribunal exceeds its powers.

In addition to the parties' agreement, statutes and case law may restrict the arbitral tribunal's powers. Congress might enact legislation precluding arbitration of a certain type of claim or making arbitration agreements unenforceable in certain circumstances. In that event, awards resolving those claims or arising out of such agreements would exceed the tribunal's powers. Similarly, it might be repugnant to public policy for a court to recognize or enforce a particular award. In that case too, the court may refuse to recognize or enforce the award on the ground that the award exceeded the arbitrators' powers.

The circumstances that constitute an excess of powers under this Section track the grounds for vacating or denying confirmation, recognition, or enforcement of awards under the New York and Panama Conventions. Accordingly, this Section analyzes the excess-of-power ground using the terminology of the Conventions. See §§ 4-12, 4-14 through 4-18, supra. Likewise, the discussions in Sections 4-12 and 4-14 through 4-18 of issues such as the applicable law and court review of arbitral determinations apply to this Section as well—recognizing, of course, that seat of arbitration in cases addressed by this Section is the United States.

b. Arbitration agreement does not exist or is invalid. One situation in which an arbitral tribunal exceeds its powers is when the arbitration agreement does not exist or is invalid. If the parties have not agreed to arbitrate, the arbitral tribunal exceeds its powers if it nonetheless proceeds to make an award. For a more detailed analysis, see Section 4-12, supra.

c. Award on matters beyond the terms of the submission to arbitration. An arbitral tribunal also exceeds its powers if it decides an issue that is beyond the terms of the submission to arbitration. As with Section 4-14, supra, the contention that the tribunal decided an issue beyond the terms of the submission arises principally in two situations: first, when the arbitral tribunal decides an issue that lies outside the scope of the arbitration agreement; and, second, when the arbitral tribunal in making the award exercises a power that the parties' agreement denies to the tribunal. For a more detailed analysis, see Section 4-14, supra.

d. Arbitral procedure contrary to the parties' agreement. Parties can agree on the procedure to be followed in the arbitration, addressing matters ranging from the selection of the arbitral tribunal to the form of any hearing that takes place. If the parties do not agree on the procedure expressly (including by incorporating institutional arbitral rules), the arbitration law of the arbitral seat fills the gaps in their agreement. If the selection of the tribunal is contrary to the parties' agreement in a material respect, or if the procedure followed in the arbitration fails materially to

comply with the parties' agreement, the resulting award exceeds the tribunal's powers. For a more detailed analysis, see Section 4-15, supra.

e. Matter not capable of arbitral adjudication. By statute, Congress has declared certain claims or types of disputes "not capable of arbitral adjudication" under pre-dispute arbitration agreements. If an arbitral tribunal resolves such a claim or type of dispute, it exceeds its powers, and a court may refuse to recognize or enforce the resulting award. For a more detailed analysis, see Section 4-17, supra.

f. Enforcement of award repugnant to public policy. Unlike the New York and Panama Conventions, the FAA does not expressly make violation of public policy a ground on which a court may vacate an award. However, the Supreme Court has indicated in the labor arbitration context that arbitral awards may be vacated for violation of public policy, and lower federal courts have applied the rule more generally to awards subject to the FAA. An award whose recognition or enforcement would violate public policy is by definition an award in excess of an arbitral tribunal's powers. For a more detailed analysis, see Section 4-18, supra.

g. Manifest disregard of the law. Courts are divided over the availability of "manifest disregard of the law" as a ground for vacating arbitral awards under the FAA. The Supreme Court has indicated that the FAA Section 10 grounds are exclusive, thus excluding any non-statutory vacatur grounds. Accordingly, this Section proceeds from the view that if manifest disregard is available under the FAA, it must be derived from

Section 10(a)(4) of the FAA as an instance in which the arbitrators exceeded their powers.

According to the most common definition, an arbitral tribunal manifestly disregards the law if it knowingly refuses to follow a controlling legal rule. That definition is inconsistent with the historical evidence on the availability of manifest disregard review as well as with the limited nature of court review of arbitral awards. The Restatement instead adopts the definition of manifest disregard used by the United States Court of Appeals for the Seventh Circuit, namely that a tribunal manifestly disregards the law only if it directs the parties to violate the law. So defined, manifest disregard is an application of the public policy ground (see Comment *f* of this Section) and has no independent substantive force. Accordingly, the Restatement does not recognize manifest disregard of the law as a ground for denying recognition or enforcement of a non-Convention award.

h. *Waiver and determination sua sponte.* A party's ability to waive a challenge based on this ground and the court's ability to raise the challenge sua sponte are governed by Section 4-25, infra.

i. *Partial recognition or enforcement.* In appropriate circumstances, as outlined in Section 4-1(d), (e), supra, a court may recognize or enforce a portion of the award while denying recognition or enforcement of the rest.

REPORTERS' NOTES

a. Generally. Although FAA Section 10(a)(4) permits courts to vacate an award (and thus deny recognition or enforcement of a non-Convention award) if the arbitral tribunal exceeds its powers, 9 U.S.C. § 10(a)(4), the FAA nowhere defines the scope of the powers the tribunal is permitted to exercise. As such, "the statutory phrase, 'exceeding their powers,' is an empty vessel into which content must be poured by judicial determinations of what are the powers of the arbitrators." IV Ian R. Macneil, Federal Arbitration Law § 40.5.1.1 (Supp. 1999) ("The phrase cannot, however, be called a catch-all, since . . . courts are extremely reluctant to find that arbitrators have exceeded their powers."). Consistent with the axiom that arbitration is a matter of contract, the primary source of the tribunal's powers is the parties' arbitration agreement. First Options, Inc. v. Kaplan, 514 U.S. 938, 943 (1995); AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648-49 (1986). But legal constraints also define and constrain the power of the tribunal.

Courts and commentators have often suggested that the FAA Section 10 vacatur grounds are largely, if not completely, congruent with the Convention grounds for denying confirmation, recognition, and enforcement of awards. See Lander Co. v. MMP Invs., 107 F.3d 476, 481 (7th Cir.) ("The only substantive defense to the enforcement of the award that MMP claims to have, however, is a defense that . . . the arbitrator had exceeded his terms of reference. And that is a defense under both the Federal Arbitration Act and the New York Convention. The wording is slightly different but there is no reason to think the meaning different."), cert. denied, 522 U.S. 811 (1997); Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie Du Papier (RAKATA), 508 F.2d 969, 976 (2d Cir. 1974) ("This provision [Article V(1)(c)] tracks in more detailed form [§ 10(a)(4)] of the Federal Arbitration Act . . . which authorizes vacating an award 'where the arbitrators exceeded their powers.'"); see also Alan Scott Rau, The New York Convention in American Courts, 7 Am. Rev. Int'l Arb. 213, 236 (1996) ("[A]s a general matter I think it is reasonably safe to assume that in operation the standards of the Convention and the FAA will be identical."). But see Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech., 763 F. Supp. 2d 12, at *38-39 (D.D.C. 2011) ("[A] situation where an arbitrator 'deals with a difference not contemplated by or not falling within the terms of the submission to arbitration' . . . is just one 'detailed' example of a broader category of acts that can be considered an excessive use of power by an arbitrator under Section 10(a)(4) of the FAA. But arguably, it is only that specific scenario, not other actions that would be encompassed under Section 10(a)(4), that is covered under the New York Convention.").

The relevant correlation for purposes of this Section is between FAA Section 10(a)(4)—the arbitral tribunal exceeded its powers—and a number of Convention grounds, all of which are examples of circumstances in which a tribunal exceeds its powers. Thus, a tribunal exceeds its powers if: the arbitration agreement does not exist or is invalid (New York Convention, art. V(1)(a)); the tribunal decides a matter beyond the terms of the submission (id. art. V(1)(c)); the arbitral procedure is contrary to the parties' agreement (id. art. (V)(1)(d)); the tribunal decides a matter not capable of arbitral adjudication (id. art. V(2)(a)); and confirming, recognizing, or enforcing the award would be repugnant to public policy (id. art. V(2)(b)). Accordingly, this Section incorporates by reference the relevant provisions of Sections 4-12, 4-14, 4-15, 4-17, and 4-18, supra. Given how rarely non-Convention awards are litigated, U.S. courts' interpretations of comparable provisions of the New York Convention provide persuasive analogies for application of the FAA to non-Convention awards.

Note that FAA section 10(a)(4) also permits a court to vacate an award when the arbitrators "so imperfectly executed [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). In the domestic setting, this vacatur ground overlaps to a substantial degree with the power of a court to remand a matter to the tribunal to complete or clarify the award. See Olympia & York Fla. Equity Corp. v. Gould, 776 F.2d 42, 45 (2d Cir. 1985) ("The Award was thus ambiguous and did not constitute 'a mutual, final, and definite award upon the subject matter submitted' within the meaning of 9 U.S.C. § 10(d). While this defect may not bring the Award within the provisions of 9 U.S.C. § 11(c) empowering the district court to make an order modifying or correcting an

award where it 'is imperfect in matter of form not affecting the merits of the controversy,' there is sufficient evidence of lack of a 'mutual, final, and definite award' within § 10(d) to warrant a remand to the arbitrators to enable them to state what their true intention was if Gould, having elected to purchase, should thereafter default."); Fisher v. Gen. Steel Corp., 2011 U.S. Dist. LEXIS 125826, at *10 (D. Colo. Oct. 31, 2011) ("[W]hile I have the authority to vacate the arbitrator's award under 9 U.S.C. § 10(a)(4), I find that remanding the matter back to the arbitrator is more appropriate as I conclude that the arbitrator failed to make a final determination on a material, threshold issue."); Escobar v. Shearson Lehman Hutton, Inc., 762 F. Supp. 461, 464 (D.P.R. 1991) ("While arbitrators are not required to explain the reasoning behind an award, this is a case where the award rendered by the panel strongly implies that the arbitrators 'imperfectly executed their powers.' 9 U.S.C. § 10(d). The award rendered by the NYSE arbitrators is ambiguous and/or incomplete. . . . In short, the award should be remanded to the arbitrators for clarification."). For international arbitrations, courts have the authority to remand only U.S. Convention awards to the tribunal. See Section 4-36, infra. For foreign Convention awards, the more likely result is that the court would simply deny recognition or enforcement.

b. Arbitration agreement does not exist or is invalid. As the Supreme Court stated in AT&T Tech., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648-49 (1986), "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." If the parties have not agreed to arbitrate, the arbitral tribunal has no authority over them. If the arbitral tribunal nonetheless proceeds to make an award against the parties, it exceeds its powers. See Gary B. Born, International Commercial Arbitration 2569 n.90 (2009) (noting that FAA Section 10(a)(4) permits vacatur of award on ground that the arbitration agreement does not exist or is invalid); Stephen L. Hayford, Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards, 30 Ga. L. Rev. 731, 753 (1996) ("[I]f an arbitrator decides an issue involving a nonparty to the arbitration [agreement], vacatur is appropriate under section 10(a)(4)."); see, e.g., First Options, Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (holding that courts review de novo arbitral finding that non-signatory has agreed to arbitrate); Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC, 497 F.3d 133, 140-41 (2d Cir. 2007) (vacating award ordering attorney to return fees to client under Section 10(a)(4)) ("Porzig's attorney was not before the arbitration panel in any manner other than as Porzig's counsel; Porzig was not before the Panel with respect to his relationship with his attorney; and neither Porzig nor Attorney O'Donnell had agreed to arbitrate a dispute, if in fact there was one, over their fee contract. The Panel here was plainly without jurisdiction to order Porzig's lawyer to pay back to his client the specified contingency fee.").

c. Award on matters beyond the terms of the submission to arbitration. Relatedly, an arbitral tribunal exceeds its powers if it makes an award that is beyond the terms of the parties' submission to arbitration. As with Article V(1)(c) of the New York Convention (see § 4-14, Comment *c*, supra) awards challenged as beyond the terms of the submission to arbitration fall into two main categories. See Jock v. Sterling Jewelers Inc., 646 F.3d 113, 122 (2d Cir. 2011) ("[A]n arbitrator may exceed her authority by, first, considering issues beyond those the parties have submitted for her consideration, or, second, reaching issues clearly prohibited by law or by the terms of the parties' agreement.").

First, a tribunal makes an award that is beyond the terms of the submission if it decides an issue that is beyond the scope of the arbitration agreement. See Stephen L. Hayford, Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards, 30 Ga. L. Rev. 731, 754 (1996) ("An arbitrator who determines an issue beyond the scope of the arbitration clause similarly exceeds his powers under the contract and subjects the award to vacatur."); see, e.g., Raymond James Fin. Servs. v. Bishop, 596 F.3d 183, 193 (4th Cir.) ("[B]y rendering an award whose underlying legal basis exceeded the bounds of arbitrable employment-related disputes cognizable under NASD Rule 10101 . . . , the panel 'exceeded [its] powers' under 9 U.S.C. § 10(a)(4)."), cert. denied 131 S. Ct. 224 (2010).

Second, a tribunal makes an award that is beyond the terms of the submission if it exercises a power that was expressly denied to it by the parties' arbitration agreement. See IV Ian R. Macneil, Federal Arbitration Law § 40.5.2.3 (Supp. 1999) ("Where . . . the parties stipulate, either explicitly in the agreement or by incorporation of rules that the arbitrators are more narrowly bound than usual . . .,

arbitrators going beyond the bounds exceed their powers, and hence their awards could be vacated under [FAA § 10(a)(4)].").

A particularly difficult issue is whether a provision that precludes the award of a form of damages (such as consequential damages or punitive damages) is a remedy limitation or a restriction on the arbitrators' authority. If the provision is a remedy limitation, a broad arbitration clause would give the tribunal the authority to rule on its validity with only very limited court review. If the provision is a restriction on the arbitrators' authority, a court could vacate the award under Section 10(a)(4) if the tribunal violates the restriction by awarding such damages. The case law under FAA Section 10(a)(4) is similar to the case law under Article V(1)(c) of the New York Convention. For example, in Apache Bohai Corp. v. Texaco China BV, 480 F.3d 397 (5th Cir. 2007), the Fifth Circuit refused to vacate an award of consequential damages as contrary to a provision in the parties' contract that "[n]otwithstanding any other provision of the Agreement, neither party shall in any circumstance be liable to the other Party . . . for any consequential loss or damage." Id. at 401, n.1. The arbitrator had held the consequential damages exclusion void under New York Law, and the court of appeals determined that the validity of the exclusion was an issue for the arbitrator to decide. According to the court:

> In the Exculpatory Clause in the farm-in agreement there is no indication that the parties did not intend to arbitrate the validity of the Exculpatory Clause. Texaco and Apache did not designate an alternate forum to determine the clause's validity; there is no indication that the parties contemplated any judicial involvement in the contract; and neither party consented to any court's jurisdiction. The farm-in agreement included a very broad arbitration clause covering "any dispute" arising from the agreement, including "any question regarding its . . . validity."

Id. at 404. The court concluded that "[g]iven the requirement that limitations on an arbitrator's authority must be plain and unambiguous and that we resolve all doubts in favor of arbitration, we will not read a clause that refers neither to arbitration nor to any other method of dispute resolution as precluding arbitral jurisdiction to consider the validity of the clause." Id; see also EST, LLC v. Smith, 2011 U.S. Dist. LEXIS 56824, at *16-17 (W.D.N.C. May 24, 2011) (holding that "an arbitrator, if given the authority to resolve all disputes between the parties, does not exceed his powers by invalidating a liquidated damages provision in the arbitration agreement under applicable state law"); Saturn Telecomms. Servs. v. Covad Commc'ns Co., 560 F. Supp. 2d 1278, 1286 (S.D. Fla. 2008) ("when parties vest the arbitrator with the power to resolve all disputes arising from their agreement, the arbitrator may interpret the agreement and apply relevant state law to determine whether certain provisions of the contract are enforceable") (upholding award of lost profits despite contract provision prohibiting recovery of lost profits); cf. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 976 (2d Cir. 1974) (following same approach under New York Convention); Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 960 (S.D. Ohio 1981) (same). Compare Mastrobuono v. Shearson Lehman Hutton, Inc., 20 F.3d 713, 716 (7th Cir. 1994) (vacating award of punitive damages when parties' arbitration agreement incorporated by reference a state law providing that arbitrators lacked the power to award punitive damages; "[T]here is no clearer case of a case falling . . . within' § 10(a)(4) of the Act.") (quoting Barbier v. Shearson Lehman Hutton Inc., 948 F.2d 117, 122 (2d Cir. 1991)), rev'd on other grounds, 514 U.S. 52 (1995).

d. Arbitral procedure contrary to the parties' agreement. The tribunal also exceeds its powers if the arbitral procedure is contrary in a material respect to the agreement of the parties, including gap-fillers added by the arbitral rules the parties may have incorporated into their agreement or by the applicable law. For example, if the method for selecting arbitrators (including the number of arbitrators or their qualifications) is contrary to the parties' agreement in a material respect, any award made by the arbitrators so selected exceeds their powers. See, e.g., Cargill Rice, Inc. v. Empresa Nicaraguense de Alimentos Basicos, 25 F.3d 223, 226 (4th Cir. 1994) ("Arbitration awards made by arbitrators not appointed under the method provided in the parties' contract must be vacated."); Szuts v. Dean Witter Reynolds, Inc., 931 F.2d 830, 832 (11th Cir. 1991) ("Because the arbitrators violated the provisions of the arbitration agreement requiring arbitration before at least three arbitrators, they exceeded their

authority under the arbitration agreement."). The tribunal also exceeds its powers if the arbitral procedure is contrary to the parties' agreement in other respects, but, again, only if material. Stephen L. Hayford, Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards, 30 Ga. L. Rev. 731, 753-54 (1996) ("If an arbitrator fails to comply with an express requirement set forth in the arbitration agreement as to the form, nature, or content of the arbitration award, the award will be vacated."); see, e.g., Rain CII Carbon LLC v. ConocoPhillips Co., 2011 U.S. Dist. LEXIS 68994, at *15 (E.D. La. June 27, 2011) ("[I]t is clear that the provisions of the Agreement required the arbitrator to render a reasoned award, and if he failed to do so he thus exceeded his power and therefore vacatur is proper.") (dicta). As under Article V(1)(d) of the New York Convention, however, this ground is construed narrowly, consistent with the tribunal's broad discretion over the conduct of the arbitral proceeding. See § 4-15, Comment *a*, supra.

The Supreme Court's decision in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010), might be construed as a decision addressing the tribunal's authority to determine the arbitral procedures. In *Stolt-Nielsen*, the Court vacated an arbitral award holding that the parties' arbitration agreement permitted arbitration to proceed on a class basis. According to the Court, rather than construing the agreement or looking to governing state law gap-fillers, the tribunal "simply . . . impose[d] its own view of sound policy regarding class arbitration," which it did not have the power to do. Id. at 1767-68. The Court rejected the dissent's characterization of the case as involving the "procedural mode" for resolving the parties' dispute, instead characterizing the issue in the case "as being whether the parties *agreed to authorize* class arbitration." Id. at 1776. Class arbitration, according to the Court, "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." Id. at 1775. Subsequent decisions have confirmed awards when the tribunal construed the agreement to permit class arbitration, not on the basis of its own views of public policy, but rather on the basis of its interpretation of the contract language or applicable state law. See Jock v. Sterling Jewelers Inc., 646 F.3d 113, 116-17 (2d Cir. 2011); Sutter v. Oxford Health Plans LLC, 2011 U.S. Dist. LEXIS 17123, at *14-16 (D.N.J. Feb. 22, 2011); Smith & Wollensky Rest. Grp., Inc. v. Passow, 2011 U.S. Dist. LEXIS 4495, at *3–4 (D. Mass. Jan. 18, 2011); La. Health Serv. Indem. Co. v. Gambro A B, 2010 U.S. Dist. LEXIS 135579, at *22 (W.D. La. Dec. 21, 2010), appeal dismissed, 2011 U.S. App. LEXIS 7726 (5th Cir. Apr. 13, 2011).

e. Matter not capable of arbitral adjudication. In recent years, Congress has enacted a number of statutes that make pre-dispute arbitration agreements unenforceable as to certain claims or certain types of parties. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 U.S.C. § 26(n) & 18 U.S.C. § 1514A(e) (making pre-dispute arbitration agreements unenforceable as to certain whistle-blower claims); Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (making pre-dispute arbitration agreements unenforceable in franchise agreements between car dealers and manufacturers). A tribunal exceeds its authority if it makes an award on the basis of an arbitration agreement that is unenforceable as a matter of federal law.

f. Enforcement of award repugnant to public policy. Although FAA Section 10 does not expressly list public policy as a ground for vacating an arbitral award, such a ground is a necessary part of a national arbitration law. See § 4-18, supra; see also Jonathan A. Marcantel, The Crumbled Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception, 14 Fordham J. Corp. & Fin. L. 597, 597-98 (2009) (providing examples). The Supreme Court has recognized such a ground in labor arbitration cases. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42 (1987); W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983). Numerous courts of appeals have considered whether to vacate an award on public policy grounds, but in the vast majority of cases refused to do so. E.g., Lagstein v. Certain Underwriters at Lloyd's, London, 607 F.3d 634, 641 n.4 (9th Cir.), cert. denied, 131 S. Ct. 832 (2010); Lessin v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 481 F.3d 813, 821 (D.C. Cir. 2007); Gallus Invs., L.P. v Pudgie's Famous Chicken, Ltd., 134 F.3d 231, 234 n.* (4th Cir. 1998). All or most of the cases in which courts of appeals have vacated awards on public policy grounds are labor arbitration cases. Gary B. Born, International Commercial Arbitration 2626 n.384 (2009).

The Supreme Court's rationale for recognizing a public policy vacatur ground, as explained in the labor arbitration context, applies as well to commercial arbitration:

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.

Misco, 484 U.S. at 42 (citations omitted). So viewed, public policy limits the powers of a tribunal, and if enforcing the award would violate public policy the tribunal exceeds its powers. See IV Ian R. Macneil, Federal Arbitration Law § 40.1.3, at 40:11-40:12 (Supp. 1999) ("[A]ll these [purportedly non-statutory] grounds [including public policy] can very easily be viewed as simply definitions of what it means for the arbitrators to exceed their powers . . . ."); id. at § 40.5.3 (listing public policy as example of excess-of-powers ground under FAA Section 10(a)(4)). But see Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) (holding that review of awards on public policy grounds no longer available after *Hall Street*).

According to the Supreme Court in Eastern Associated Coal Corp. v. United Mine Workers of America, 531 U.S. 57 (2000), for a court to refuse to enforce an award as contrary to public policy, enforcement must "run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests." Id. at 63; see also W.R. Grace & Co., 461 U.S. at 766 (same). As under the Conventions, courts construe the public policy ground under FAA Chapter One extremely narrowly, and "the overwhelming majority of U.S. decisions reject applications to vacate awards on public policy grounds." Born, supra, at 2626.

g. Manifest disregard of the law. Prior to Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008), every U.S. court of appeals and many state courts had recognized some form of review for manifest disregard of the law. See Birmingham News Co. v. Horn, 901 So. 2d 27, 48-49 (Ala. 2004) (citing cases). Because nothing in the language of FAA Section 10 expressly provides for manifest disregard review, courts often identified manifest disregard as a "non-statutory" vacatur ground. E.g., Prestige Ford v. Ford Dealer Computer Servs., Inc., 324 F.3d 391, 395 (5th Cir.), cert. denied, 540 U.S. 878 (2003). Given *Hall Street*'s rationale—that the text of FAA Section 10 makes the statutory vacatur grounds exclusive (at least to the extent that parties cannot contract to expand them)—the decision raises questions about the continued availability of manifest disregard review.

The usual formulation for manifest disregard of the law is that an award may be vacated if "the arbitrators appreciated the existence and applicability of a controlling legal rule but intentionally decided not to apply it." Cytyc Corp. v. DEKA Prods., L.P., 439 F.3d 27, 35 (1st Cir. 2006). By comparison, the Seventh Circuit has stated a much narrower standard: that "an arbitrator may not direct the parties to violate the law"; only if the tribunal does so can the award be vacated for manifest disregard of the law. George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 580 (7th Cir. 2001); see also Halim v. Great Gatsby's Auction Gallery, Inc., 516 F.3d 557, 563 (7th Cir. 2008); Wise v. Wachovia Secs., LLC, 450 F.3d 265, 268 (7th Cir. 2006). As such, according to the Seventh Circuit, manifest disregard "fits comfortably" in Section 10(a)(4) as an example of excess of powers. See Wise, 450 F.3d at 268.

The Restatement adopts the Seventh Circuit's approach to manifest disregard of the law. First, because the FAA Section 10 grounds are exclusive, manifest disregard of the law, if it is available at all, must fall within the excess-of-powers ground stated in Section 10(a)(4). Second, as defined by the Seventh Circuit, manifest disregard is a special case of the public policy ground for vacating or denying recognition or enforcement of awards (see Paragraph (b)(5)). That is, enforcing an award that directs the parties to violate the law would be repugnant to public policy, and the tribunal exceeds its power in

issuing such an award. See Alan Scott Rau, Fear of Freedom, 17 Am. Rev. Int'l Arb. 469, 500-01 (2006) ("Most of the isolated holdings in which a finding of 'manifest disregard' has actually led to vacatur can be fitted within this rationale. And it is evident that this leg of the analysis conflates 'manifest disregard' and the notion of vacatur on grounds of 'public policy' as now understood by the Supreme Court—in the process, rendering the former essentially irrelevant."). Stated otherwise, the more common conception of manifest disregard of the law, defined as the knowing refusal to apply the applicable law, is not a ground for vacating or denying recognition or enforcement of an award under FAA Section 10.

The rest of this note discusses the relevant Supreme Court and court of appeals precedents, the historical evidence on the availability of manifest disregard review, and various policy considerations.

(i). Supreme Court precedent. Review of arbitral awards for manifest disregard of the law is usually traced back to the Supreme Court's decision in Wilko v. Swan, 346 U.S. 427, 436-37 (1953), overruled on other grounds, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989). In *Wilko*, the Court held that claims under the Securities Act of 1933 could not be arbitrated under pre-dispute agreements to arbitrate. In so holding, the Court stated:

> In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators *in contrast to manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation.

Wilko, 346 U.S. at 436-37 (emphasis added). This language was dictum because the Court did not hold that an arbitral award could be vacated on that basis. Indeed, the holding of *Wilko*—that 1933 Securities Act claims are not arbitrable—has since been overruled. See Rodriguez de Quijas, 490 U.S. at 484. Nonetheless, courts continue to cite *Wilko* as the source of the manifest disregard doctrine.

After *Wilko*, Supreme Court opinions have mentioned manifest disregard review on several occasions. See First Options, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) (citing *Wilko* for the proposition that "parties [are] bound by [an] arbitrator's decision not in 'manifest disregard' of the law"); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 548-49 (1995) (Stevens, J., dissenting) (citing *Wilko* for the "high standard applicable to vacation of arbitration awards"); Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220, 259 (1987) (Blackmun, J., concurring in part and dissenting in part) ("Judicial review is still substantially limited to the four grounds listed in § 10 of the Arbitration Act and to the concept of 'manifest disregard' of the law."); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207 . . . . "); see also IV Ian R. Macneil et al., Federal Arbitration Law § 40.7.1, at 40:43-40:44 (Supp. 1999) ("In First Options of Chicago, Inc. v. Kaplan (U.S. 1995), the Supreme Court made clear that the only nonstatutory ground for vacation is manifest disregard of the law."). But in each of those cases, the Court merely referred to manifest disregard or cited *Wilko*. In none of the cases did the Court rely on manifest disregard of the law as a ground for vacating an award.

The Supreme Court did not discuss manifest disregard review at length until Hall St. Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 585 (2008). The issue in *Hall Street* was whether parties by contract could expand the grounds for vacating awards beyond those stated in FAA Section 10. The petitioner argued that the Section 10 grounds were not exclusive, relying on the asserted availability of manifest disregard as a non-statutory ground for review. The Court rejected that argument, reasoning as follows:

> Quite apart from its leap from a supposed judicial expansion by interpretation to a private expansion by contract, Hall Street overlooks the fact that the statement it relies on expressly rejects just what Hall Street asks for here, general review for an arbitrator's legal errors. Then there is the vagueness of *Wilko*'s phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them. See, *e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656 (1985) (Stevens, J., dissenting) ("Arbitration awards are only reviewable for manifest disregard of the law, 9 U.S.C. §§ 10, 207"); *I/S Stavborg v. National Metal Converters, Inc.*,

> 500 F.2d 424, 431 (CA2 1974). Or, as some courts have thought, "manifest disregard" may have been shorthand for § 10(a)(3) or § 10(a)(4), the paragraphs authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." See, *e.g., Kyocera, supra*, at 997. We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, see *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995), and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

Id. at 585. Relying on the plain language of the FAA—which provides that a court "must grant" an order confirming an award "unless the award is vacated, modified, or corrected," 9 U.S.C. § 9—the Court ultimately held that parties cannot expand by contract the statutory grounds for vacating awards. 552 U.S. at 587 ("There is nothing malleable about 'must grant,' which unequivocally tells courts to grant confirmation in all cases, except when one of the 'prescribed' exceptions applies.").

Thereafter, in Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010), the Court actually decided that an award should be vacated for manifest disregard of the law, but only after assuming for the sake of argument that the ground was available after *Hall Street*. In *Stolt-Nielsen*, the losing party in the arbitration sought to have the award vacated on the ground, among others, that the award was in manifest disregard of the law. The prevailing party opposed vacatur for two reasons: first, that manifest disregard of the law was no longer available after *Hall Street*; and, second, that even if it was available, the award was not in manifest disregard of the law. The court of appeals concluded that manifest disregard was still available, but held that the award should be confirmed because it was not in manifest disregard of the law.

The Supreme Court reversed, primarily on grounds other than manifest disregard. But in a footnote, the Court said the following about manifest disregard review:

> We do not decide whether "'manifest disregard'" survives our decision in *Hall Street Associates, L.L.C.* v. *Mattel, Inc.*, 552 U.S. 576, 585 (2008), as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. AnimalFeeds characterizes that standard as requiring a showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it." Brief for Respondent 25 (internal quotation marks omitted). Assuming, *arguendo,* that such a standard applies, we find it satisfied for the reasons that follow.

Stolt-Nielson, 130 S. Ct. at 1768 n.3. In other words, the Court assumed without deciding that manifest disregard was available—despite the respondent's argument to the contrary—and then proceeded to hold that the ground was satisfied, using the usual standard. The Court did not offer any further explanation for why the award was made in manifest disregard of the law; the rest of the opinion took the view that the award exceeded the arbitrators' powers, not that it was in manifest disregard of the law.

It is difficult to know how much weight to give to the Court's analysis of manifest disregard in *Stolt-Nielsen*. The Court did not decide that manifest disregard of the law was available as a vacatur ground; it merely assumed it. Nor did the Court decide what constituted manifest disregard; it merely took the usual standard, as described by the respondent, and "[a]ssum[ed] *arguendo*" that it applied. Id. Given that the Court's analysis is based on assumptions rather than conclusions, it appears that the availability of manifest disregard review, as well as what constitutes manifest disregard (if it is available), remain open questions.

(ii). Courts of appeals decisions. As noted above, prior to *Hall Street*, every U.S. court of appeals had recognized some form of review for manifest disregard of the law. Since *Hall Street,* however, the courts of appeals have split on whether manifest disregard is available.

Several circuits have held (or at least indicated in dicta) that review for manifest disregard of the law is no longer available after *Hall Street*. See Frazier v. CitiFinancial Corp., 604 F.3d 1313, 1324 (11th Cir. 2010) ("We hold that our judicially-created bases for vacatur are no longer valid in light of Hall Street. In so holding, we agree with the Fifth Circuit that the categorical language of Hall Street compels such a conclusion."); Citigroup Global Mkts. Inc. v. Bacon, 562 F.3d 349, 358 (5th Cir. 2009) (rejecting availability of manifest disregard as non-statutory vacatur ground, although leaving open the possibility that manifest disregard review might still be available as an application of Section 10(a)(4)); Ramos-Santiago v. United Parcel Serv., 524 F.3d 120, 124 n.3 (1st Cir. 2008) (dicta).

At least one circuit has continued to rely on its prior cases recognizing manifest disregard of the law as a non-statutory vacatur ground. In Coffee Beanery, Ltd. v. WW L.L.C., 2008 U.S. App. LEXIS 23645 (6th Cir. Nov. 14, 2008) (unpublished opinion), cert. denied, 130 S. Ct. 81 (2009), the Sixth Circuit reasoned that *Hall Street* "did not come to a conclusion regarding the precise meaning of *Wilko*, holding only that *Wilko* could not be read to allow parties to expand the scope of judicial review by their own agreement." As such, "we believe it would be imprudent to cease employing such a universally recognized principle." Id. at **11-12. Given that the Supreme Court has never held that manifest disregard is available as a ground for vacating awards, it is not likely to adopt the Sixth Circuit's rationale.

Other courts have linked manifest disregard to one of the statutory grounds for vacatur in FAA Section 10, most commonly Section 10(a)(4). See Stolt-Nielsen, SA v. AnimalFeeds Int'l Corp., 548 F.3d 85, 94 (2d Cir. 2008) ("'[M]anifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards."), rev'd on other grounds, 130 S. Ct. 1758 (2010); Comedy Club, Inc. v. Improv W. Assocs., 553 F.3d 1277, 1290 (9th Cir.), cert. denied, 130 S. Ct. 145 (2009) ("[A]fter Hall Street Associates, manifest disregard of the law remains a valid ground for vacatur because it is a part of § 10(a)(4)."); see also Stephen L. Hayford, Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards, 30 Ga. L. Rev. 731, 816 (1996) ("[A] more plausible reading of the Wilko dictum is one in which its oblique reference to 'manifest disregard' is viewed as identifying a type of arbitral misconduct or misbehavior of the nature addressed in section 10(a)(3) of the FAA, which can trigger vacatur under that provision.").

A potential difficulty with treating manifest disregard as an application of the excess-of-powers vacatur ground is that, logically, one needs to find a source for the proposition that arbitrators lack power to decide cases in manifest disregard of the law. No such limit is expressed in the FAA. The Second Circuit in *Stolt-Nielsen* cited the parties' contract as the source of the limit, stating that "parties do not agree in advance to submit to arbitration that is carried out in manifest disregard of the law." 548 F.3d at 95. Presumably the court viewed that limitation as implicit in the parties' contract, because arbitration agreements ordinarily do not address the question whether tribunals have authority to act in manifest disregard of the law. But if the limitation on arbitral authority is merely an implied contract term, it typically would be a default rule that parties can contract around. Conversely, if the limit is a mandatory term of the parties' contract, the source of that mandatory limit is not clear (particularly since, as discussed below, prior to the FAA arbitrators likely could make awards that were in manifest disregard of the law as currently understood). But see Michael A. Scodro, Deterrence and Implied Limits on Arbitral Power, 55 Duke L.J. 547, 588 (2005) ("Predispute arbitration clauses should be understood to impose a duty on arbitrators to identify and apply the law in good faith when such [non-waivable statutory and common law] rights are at issue. Without that duty, arbitration would materially undermine the law's deterrent effect, and the arbitration clause would therefore become an unenforceable, prospective waiver of the right to sue. Arbitrators' failure to satisfy this duty to apply the law in good faith would permit courts to overturn the resulting awards on the ground that the arbitrators exceeded their authority under contract, a basis for vacating awards under the FAA.").

Another potential difficulty is reconciling the notion that arbitrators exceed their authority by issuing awards in manifest disregard of the law with the language of the New York Convention grounds for denying recognition and enforcement of awards. Article V(1)(c) of the Convention, which permits a

court to deny recognition or enforcement if "[t]he 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," is often treated as permitting review of awards for excess of power. If Section 10(a)(4) is construed to permit review for manifest disregard of the law, it raises the possibility that a court might also construe Article V(1)(c) as permitting review for manifest disregard of the law. But it is well established that importing manifest disregard review into the New York Convention would be "contrary to the language and purposes of the Convention, as well as of § 207 of the FAA, and the overwhelming weight of U.S. judicial authority." Gary B. Born, International Commercial Arbitration 2869 (2009). On the other hand, Article V(1)(c) may plausibly be construed narrowly to exclude manifest disregard review, even if manifest disregard is available as a vacatur ground under Section 10(a)(4).

(iii). History. As noted above, courts have derived manifest disregard review from language in Wilko v. Swan, 346 U.S. 427 (1953). They have followed what might be described as a textual analysis of the *Wilko* dictum. As Hans Smit has explained:

> In subsequent lower court decisions, the courts have stressed that disregard implies an element of deliberateness and have required that the arbitrators knowingly and purposely disregarded what they knew the law to be. The circumstance that the errors of law had to be manifest or obvious, to a certain extent, facilitated the requisite finding of deliberativeness.

Hans Smit, Manifest Disregard of the Law in the New York Supreme Court, Appellate Division, First Department, 15 Am. Rev. Int'l Arb. 111, 121 (2004); see also Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990) ("In this context . . . 'disregard' implies that the arbitrators appreciated the existence of a governing legal rule but willfully decided not to apply it.").

But the authorities cited by the *Wilko* Court suggest that what the Court meant by "manifest disregard" may have been different from the modern understanding of the phrase—i.e., that an arbitral tribunal manifestly disregards the law if it knowingly refuses to follow a controlling legal rule. See 346 U.S. at 437 n.24. Those authorities, including three Supreme Court cases that predated enactment of the FAA, provide evidence that the modern view of manifest disregard was not what the Court was describing in *Wilko*. As Professor Michael Scodro has written:

> [T]he authorities on which the Wilko majority relied for its "manifest disregard" dicta do not support the doctrine in its current form—that is, as a check on an arbitrator's intentional departure from established law. On the contrary, courts and commentators contemplated judicial intervention as a means to give effect to the arbitrator's intent. Courts following this rationale would vacate an award when the arbitrator manifested an intention to adhere to the law but erred in executing this intention, not when the arbitrator consciously disregarded legal rules, as the modern "manifest disregard" standard allows.

Scodro, supra, at 585-86; see also Christopher R. Drahozal, Codifying Manifest Disregard, 8 Nev. L.J. 234, 242 (2007) ("Under the common law of arbitration predating the FAA—as reflected in the sources cited by the Court in Wilko (among others)—the rule was the opposite: Arbitrators could knowingly disregard the law, but if they tried to follow it and did so incorrectly, the award would be set aside."); James M. Gaitis, Unraveling the Mystery of Wilko v. Swan: American Arbitration Vacatur Law and the Accidental Demise of Party Autonomy, 7 Pepp. Disp. Resol. L.J. 1, 4-5 (2007) ("[C]ontrary to the general thrust of the Wilko 'manifest disregard' statement, under 'unrestricted' arbitration submissions, arbitrators should be deemed to be authorized to intentionally disregard applicable law should they so choose.").

Justice Story's opinion while riding circuit in Kleine v. Catara, 14 F. Cas. 732 (C.C.D. Mass. 1814) (No. 7,869) (cited in Wilko), provides an illustration. Justice Story described the standards for court review of arbitral awards as follows:

> If, therefore, under an unqualified submission, the referees meaning to take upon themselves the whole responsibility, and not to refer it to the court, to decide differently from what the court would on a point of law, the award ought not to be set aside. If, however, the referees mean to decide according to law, and mistake, and refer it to the court to review their decision, (as in all cases, where they specially state the principles, on which they have acted, they are presumed to do,) in such cases, the court will set aside the award, for it is not the award, which the referees meant to make, and they acted under a mistake.

Id. at 735. In short, as described by Story, a court would not vacate an award because the arbitral tribunal intentionally disregarded the law. Rather, a court would vacate an award because the tribunal tried to follow the law and, on the face of the award (i.e., manifestly), got it wrong.

That said, there is limited authority—not cited in Wilko—that provides some historical support for the modern understanding of manifest disregard of the law. In Allen v. Miles, 4 Del. (4 Harr.) 234 (1845), a Delaware Superior Court described the standard of review for arbitral awards as follows:

> But in no case will the court re-try the cause, or go into an examination of the merits of an award; or set it aside because they would have drawn different conclusions from the arbitrators, from conflicting testimony; or would have made a different award. But where it manifestly appears that the arbitrators have clearly mistaken the law, or that they knew what the law was, and purposely disregarded it, or that they have made an evident mistake in matter of fact, the court are bound to set aside an award, as they are to set aside a verdict which is manifestly against the law or the facts.

Id. at 236-37 (emphasis added). Philip G. Phillips in turn relied on *Allen* in a 1934 Harvard Law Review article, stating that it provided "some intimation . . . that if the arbitrators know the law, and deliberately choose to disregard it, their awards may be set aside." Philip G. Phillips, Rules of Law or Laissez-Faire in Commercial Arbitration, 47 Harv. L. Rev. 590, 604 (1934). The bulk of authority, including that cited in *Wilko*, is to the contrary, however. The legislative history of the FAA provides no indication whether Congress, by omitting manifest disregard of the law (however defined) from FAA Section 10, intended to include it or exclude it as a ground for vacating an award.

(iv). Policy considerations. The most common justification offered for manifest disregard review is that it provides some degree of court oversight of merits determinations by arbitrators. The concern is that without some court oversight of the merits of awards, parties will be able to avoid application of mandatory law rules, effectively turning mandatory rules into default rules. Stephen J. Ware, Default Rules from Mandatory Rules: Privatizing Law Through Arbitration, 83 Minn. L. Rev. 703, 704 (1999); see also Scodro, supra, at 588. The argument is made most commonly with respect to federal statutory claims; indeed, some courts have linked the availability of manifest disregard review to the Supreme Court's jurisprudence permitting federal statutory claims to be arbitrated. E.g., Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1487 (D.C. Cir. 1997) ("These twin assumptions regarding the arbitration of statutory claims are valid only if judicial review under the 'manifest disregard of the law' standard is sufficiently rigorous to ensure that arbitrators have properly interpreted and applied statutory law.").

But a narrow formulation of manifest disregard review could be readily circumvented by arbitrators who wanted to disregard the law, either by not issuing written awards (more common in domestic arbitration) or by making their decision turn on factual findings rather than legal conclusions (courts have rejected manifest disregard of the facts as a ground for vacating awards; see Wallace v. Buttar, 378 F.3d 182, 193 (2d Cir. 2004)). In response, courts might apply a more expansive form of manifest disregard review, one that results in more intrusive oversight of the arbitral process. For a possible example, see Halligan v. Piper Jaffray, Inc., 148 F.3d 197, 204 (2d Cir. 1998), cert. denied, 526 U.S. 1034 (1999) (holding that that an employment arbitration award should be vacated for manifest disregard of the law, with the court of appeals relying on the absence of a reasoned award to bolster its conclusion).

An alternative justification for manifest disregard review is that it helps preserve the legitimacy of the courts when they enforce arbitral awards. Without manifest disregard review, courts might have to enforce an award in which the arbitral tribunal blatantly refused to apply a clearly applicable rule of law, thus thwarting the parties' actual or assumed choice of substantive law. Enforcing such an award could lessen confidence in both arbitral tribunals and reviewing courts, to the detriment of arbitration as an alternate form of dispute resolution. Stated otherwise, this justification for manifest disregard review "is based not on the fact that the arbitrator is disregarding the law, but rather on the open and notorious use of the judicial system to enforce an award in which the arbitrator disregards the law." Drahozal, supra, at 247.

On the other hand, the availability of manifest disregard review causes uncertainty about the enforceability of arbitral awards and discourages parties from choosing the United States as an arbitral seat. William W. Park has said that manifest disregard review "hangs like the sword of Damocles to be grasped by award debtors who understandably seek relief from costly damages." William W. Park, Procedural Evolution in Business Arbitration: Three Studies in Change 18 (2006). According to Park, "the prospect of such judicial meddling in the arbitral process can only alarm foreign enterprises contemplating arbitration in the United States." William W. Park, The Specificity of International Arbitration: The Case for FAA Reform, 36 Vand. J. Transnat'l L. 1241, 1253 (2003). Hans Smit has more emphatically asserted that the availability to parties and use by the courts of manifest disregard review has resulted in "the very foundations of the institution of arbitration [being] eaten away." Smit, supra, at 122.

h. Waiver and determination sua sponte. Issues of waiver and sua sponte determination by the court are addressed in Section 4-25, infra. No special rule on either waiver or sua sponte determination applies under this Section.

i. Partial recognition or enforcement. For discussion of the authority of courts to recognize or enforce part but not all of an award, see Comment *f* to Section 4-1(d) & (e), supra.

SUB-TOPIC (C).

PARTY MODIFICATION AND WAIVER OF GROUNDS

§ 4-23. Agreements to Expand Grounds for Post-Award Relief

(a) Parties may not by agreement expand or supplement the grounds for vacating or denying confirmation of a U.S. Convention award or for denying recognition or enforcement of a foreign Convention award, including by agreeing to subject their dispute to the arbitration law of a state within the United States that allows expanded review or provides grounds for such relief other than those provided in the applicable Convention.

(b) Parties may not by agreement expand or supplement the grounds for denying recognition or enforcement of a non-Convention award, including by agreeing to subject their dispute to the arbitration law of a state within the United States that allows expanded review or provides grounds for such relief other than those provided in Chapter One of the Federal Arbitration Act.

Comments:

a. Generally. Article V of the New York Convention, Article 5 of the Panama Convention, and Section 10 of the Federal Arbitration Act establish the exclusive grounds for granting vacatur or denying confirmation, recognition, or enforcement of the awards to which they apply. See § 4-11, supra. These grounds constitute limited

and exclusive exceptions to the presumptive validity and enforceability of arbitral awards. This Section provides that parties may not, as a matter of federal law, validly agree to expand or supplement the grounds for the grant of such post-award relief beyond those set forth under the applicable law. Treating these grounds as exclusive advances harmonization of the standards for granting or denying post-award relief, which in turn increases certainty and predictability in post-award actions. Permitting parties to agree to expand or supplement the grounds for the grant or denial of such relief would, to the extent of the expansion, essentially shift substantive decisionmaking authority from the arbitral tribunal to the courts and undermine the structural balance established by the Conventions and the FAA with respect to post-award relief.

b. Expanding or supplementing grounds through choice of state law. In addition to agreeing directly to expand or supplement the grounds for vacating or denying confirmation, recognition, or enforcement of awards, parties may seek to displace the Conventions or the FAA, as otherwise applicable, by agreeing instead to subject their arbitration agreement or arbitral proceedings or awards to state arbitration law. The Restatement takes the position that state laws that purport to provide additional grounds for challenging awards conflict with the Conventions and the FAA, and are therefore preempted. Consequently, such state law provisions cannot be effectively invoked by the parties. See § ___,[28] supra.

[28] Cross-reference to Section to be drafted on FAA preemption.

c. Agreements to limit the authority of the tribunal. As stated in this Section, parties may not expand or supplement the grounds for challenging a grant of post-award relief, either directly or by adopting state arbitration law. There remains, however, the question whether parties may reach the same result by agreeing to limit the decisional authority of the tribunal in ways that effectively expand the bases on which a court may vacate an award, or deny it confirmation, recognition or enforcement, on the ground that the tribunal exceeded its scope of authority. For example, some courts have suggested that requiring an arbitral tribunal to "strictly" or "correctly" apply the law may permit them to evaluate whether a tribunal exceeded its power by failing to apply the proper law, by applying it incorrectly or by applying it correctly to incorrect facts. While the caselaw on this question is mixed, the Restatement rejects the notion that parties may effectively expand judicial review in this manner. An agreement to that effect would amount to re-characterizing a non-reviewable merits issue as a reviewable issue of scope of arbitral authority.

While parties may not rely on contractual provisions that limit arbitral authority to "correct" or "strict" application of the law as a basis for vacating an award or denying it confirmation, recognition, or enforcement, they may limit the arbitral tribunal's powers through other means. For example, parties may agree to preclude arbitral competence to consider certain categories of claims or issues, or to award certain forms of relief, such as consequential damages (see Comment *c* to § 4-14, supra). Similarly, parties may confine arbitral authority to determinations of fact (as in the case of an expert panel), or preclude arbitrators from acting ex aequo et bono. In

these latter examples, the parties will have intentionally circumscribed the substantive authority of the tribunal. This Section does not preclude post-award review to ensure compliance with such restrictions on the scope of the arbitrators' authority. See Comment *c* to § 4-14, supra. Post-award review in these instances is consistent with fundamental principles of party autonomy in arbitration.

REPORTERS' NOTES

a. Generally. The Conventions and their implementing legislation establish the exclusive grounds for granting vacatur and denying confirmation, recognition, and enforcement of Convention awards. See Comment *c*, to § 4-1, supra. Because the grounds for challenging an award constitute exceptions to the presumption in favor of the enforcement of awards, courts uniformly agree that they are to be narrowly construed. See Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576, 582, 584 (2008) (FAA Section 10); Bergesen v. Joseph Muller Corp., 710 F.2d 928, 933 (2d Cir. 1983) (New York Convention); Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (New York Convention).

Despite this precept, parties occasionally draft arbitration clauses that purport to expand or supplement the grounds on which courts may review an award. Until recently, courts were divided over whether such agreements to expand the grounds for review were enforceable. Compare P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 31 (1st Cir. 2005) (allowing expanded review); Gateway Techs., Inc. v. MCI Telecomm. Corp., 64 F.3d 993, 997 (5th Cir. 1995) (same); with Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 1000 (9th Cir. 2003) (en banc) (rejecting expanded review); Schoch v. InfoUSA, Inc., 341 F.3d 785, 789 n.3 (8th Cir. 2003) (same).

Recently, the Supreme Court took up and resolved this issue in the vacatur context in Hall Street Associates v. Mattel, Inc., 552 U.S. 576 (2008). In *Hall Street*, the Court held that parties could not contractually agree to expand the grounds for challenging an award under FAA Chapter One. *Hall Street* specifically addressed the vacatur context and the grounds under Section 10 of Chapter One of the FAA. To date, no courts have directly addressed *Hall Street's* extension to the recognition and enforcement of Convention awards under FAA Chapters Two and Three. In its *Hall Street* ruling, however, the Court emphasized the restrictive text of the FAA and the FAA's purpose of providing efficient means of resolving disputes. Hall Street, 522 U.S. at 585.

Although the Supreme Court's holding in *Hall Street* applied only to awards subject to FAA Chapter One, its reasoning applies with equal or greater force to Convention awards. As under FAA Chapter One, the grounds for challenging an award under the Conventions are to be construed narrowly to help ensure efficient resolution of disputes. See Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005) ("[R]eview of arbitral awards under the New York Convention is 'very limited . . . in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'") (quoting Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997)).

In addition, narrow construction of the grounds for challenge under the Conventions increases international certainty and predictability, and limits undue influence by national judiciaries. See James B. Hamlin, Contractual Alteration of the Scope of Judicial Review: The US Experience, 15(4) J. Int'l Arb. 46 (1998); Victoria L. C. Holstein, Co-Opting the Federal Judiciary: Contractual Expansion of Judicial Review

of Arbitral Awards, 12 World Arb. & Med. Rep'r 276 (2001). Another central purpose of the Conventions "was 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." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (precluding parties from expanding or supplementing grounds for challenge promotes these goals).

b. Expanding or supplementing grounds through choice of state law. In addition to agreeing expressly to expand or supplement the grounds for reviewing awards under FAA Chapter One or the Conventions, parties may seek to achieve a similar result by displacing the FAA or the Conventions with a state law that permits courts to engage in more searching post-award review. In *Hall Street*, the Supreme Court appears to have left open this possibility when it stated:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.

See Hall Street, 552 U.S. at 590. Based on this apparent opening, the California Supreme Court in Cable Connection, Inc. v. DirectTV, Inc., 190 P.3d 586, 589 (Cal. 2008), held that *Hall Street*'s holding precluding arbitration agreements that expand judicial review of an award in the vacatur context did not apply to arbitration under the California Arbitration Act. Noting that *Hall Street* "unanimously left open other avenues for judicial review, including those provided by state statutory or common law," the California Supreme Court held that "the *Hall Street* holding is restricted to proceedings to review arbitration awards under the FAA, and does not require state law to conform with its limitations." See id. at 599; see also Hogoboom v. Hogoboom, 924 A.2d 602, 606 (N.J. Super. Ct. App. Div. 2007) (approving parties' contractual expansion of scope of review under New Jersey arbitration law). The court based this result on its understanding that the FAA did not preempt California state law permitting more expansive review of awards. DirectTV, 190 P.2d at 599. Given the Supreme Court dictum in *Hall Street*, the California Supreme Court's position in *DirectTV* is plausible. However, the better view with respect to international arbitral awards, and the view adopted by the Restatement, is that the parties cannot obviate the limitations of the FAA and the Conventions by choosing state law in its place. See § ___,[29] supra.

c. Agreements to limit the authority of the tribunal. Another way by which parties have sought to expand post-award review is by agreeing to limit the decisional authority of the tribunal. For example, some courts have suggested that requiring an arbitral tribunal to "strictly apply the law" would permit courts to evaluate whether a tribunal exceeded its authority by not following the mandate to apply the chosen law, or to apply it correctly. This would effectively engage the court in a substantive review of the tribunal's findings of law. See Edstrom Indus., Inc. v. Companion Life Ins. Co., 516 F.3d 546, 550-53 (7th Cir. 2008) (vacating arbitral award on ground that tribunal "exceeded [its] powers" where the contract required it to "strictly apply" Wisconsin law and the tribunal was not "even trying to interpret" the applicable Wisconsin statute and distinguishing *Hall Street*: "The question in our case is different. It is whether the arbitrator can be directed to apply specific substantive norms and held to the application."). But see Wood v. Penntex Res. LP., 2008 U.S. Dist. LEXIS 50071 (S.D. Tex. June 27, 2008) (rejecting a similar argument); Raymond Prof'l Group, Inc. v. William A. Pope Co., 397 B.R. 414, 431 (Bankr. N.D. Ill. 2008) ("Until *Hall Street* was decided, the Seventh Circuit panel opinion in *Edstrom Indus.* could have been read to expand the standard of review for vacating an arbitral award. However, after *Hall Street*, the *Edstrom Indus*. opinion must be read more narrowly. Under this reading, the arbitrator's

[29] Cross-reference to Section to be drafted on FAA preemption.

complete disregard of applicable law found by the *Edstrom Indus.* opinion was determined from the face of the award and that justified reversal under accepted standards. *Edstrom Indus.* must therefore be read as limited to those facts.").

While there are conflicting judicial authorities, the Restatement rejects the notion that parties may effectively expand judicial review through language that defines the arbitrators' mandate as limited to application (or to the correct application) of legal principles. Allowing the parties to do so would invite judicial review of the merits of an award and circumvention of the limitations imposed by *Hall Street*. In fact, most modern arbitral rules already expressly limit arbitrator authority to applying the law selected by the parties or otherwise applicable, and preclude arbitrators from extra-legal decisionmaking based on equitable principles or other non-legal doctrines not expressly authorized by the parties. See, e.g., International Chamber of Commerce Rules of Arbitration, art. 17(3) ("The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers."); UNCITRAL Arbitration Rules, art. 33(1) ("The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute."). It would be inconsistent with the limited review provided in the New York and Panama Conventions and the FAA to interpret such limitations on arbitral authority, or related limitations drafted directly by the parties, as permitting judicial review of the arbitral tribunal's decisions on legal issues.

The Restatement position does not, however, preclude parties from agreeing to limit the mandate of arbitrators in other ways, such as by precluding them from entertaining certain issues, from granting certain specified forms of relief, or from applying equity based standards such as those associated with decisions ex aequo et bono. See Comment *c* to § 4-14, supra.

§ 4-24. Agreements to Reduce or Eliminate Grounds for Post-Award Relief

(a) Parties may not by agreement reduce or eliminate the grounds for vacating or denying confirmation of a U.S. Convention award or for denying recognition or enforcement of a foreign Convention award, including by agreeing to subject their dispute to the arbitration law of a state within the United States that allows reduced review or provides fewer grounds for such relief than those provided in the applicable Convention.

(b) Parties may not by agreement reduce or eliminate the grounds for denying recognition or enforcement of a non-Convention award, including by agreeing to subject their dispute to the arbitration law of a state within the United States that allows reduced review or provides fewer grounds for such relief than those provided in the applicable Convention.

Comments:

a. Generally. As described in Section 4-25, infra, specific objections that might otherwise constitute a ground for vacating or denying confirmation, recognition, or enforcement of an award may be waived before, during, or after the arbitral proceedings if, at the time the objecting party sought post-award relief, it knew or should have known of the basis for such objections but failed to raise it. However, the grounds specified in the applicable law for challenging the grant of post-award relief may not themselves be reduced or eliminated by agreement. The parties may also not

agree before, during, or after the arbitral proceedings to refrain from seeking vacatur or resisting confirmation, recognition, or enforcement of an award, or otherwise relinquish in advance the right to seek such relief. Contractual language to the effect that an award shall be "final and binding" on the parties does not in itself constitute an agreement to reduce or eliminate the grounds for granting or denying post-award relief or to refrain from seeking such relief. As in the case of agreements to expand the grounds for post-award relief (see § 4-23, supra), the purpose of precluding agreements to reduce or eliminate grounds for challenging awards promotes harmonization of the standards for post-award relief, which in turn increases certainty and predictability in judicial review of awards. The grounds established by the Conventions for granting or denying post-award relief are basically designed to ensure that awards comport with minimum standards procedural fairness, are made by a jurisdictionally competent tribunal and do not offend fundamental public policy mandates.

b. Reducing or eliminating grounds through choice of state law. As an alternative to agreeing directly to reduce or eliminate grounds for vacating or denying confirmation, recognition, or enforcement of awards, parties may seek to achieve the same result by subjecting their arbitration agreement or arbitral proceedings or award to state arbitration law. While judicial authority on this question is not well settled, the Restatement takes the position that parties may not select or invoke state arbitration law to accomplish a reduction or elimination of otherwise available grounds for the grant of post-award relief.

c. Agreements that have an effect on post-award relief. While parties may not agree to reduce or eliminate the grounds for challenging a grant of post-award relief, they may validly include within their arbitration agreement provisions that affect the application of those grounds. For example, the parties may delimit arbitral jurisdiction or specify certain arbitral procedures. These agreements do not themselves purport to alter the nature or content of the grounds specified in the New York and Panama Conventions or the FAA, or to preclude a court from conducting the review contemplated by the Conventions or the FAA. Parties also remain free to settle a dispute in whole or in part, even if the settlement agreement comprehends issues on the basis of which a party might otherwise have advanced a ground for post-award relief provided by the Conventions or the FAA, as applicable.

Illustrations:

1. An arbitral tribunal decides not to hold any hearings and instead to conduct a "documents only" arbitration over the objection of one party and in a context in which parties would normally expect to have and be entitled to have hearings. The objecting party seeks vacatur of the resulting award on the ground that the absence of a hearing meant that the denial of a hearing was misconduct by the tribunal. The court may vacate the award under Section 4-13, supra.

2. Same facts as *Illustration 1*, except the parties provided in their arbitration agreement for a "documents only" arbitration. The court

applies the ground in Section 4-13, supra, but in light of the parties' agreement refuses to vacate the award.

3. The parties enter into a submission agreement that unequivocally submits to the arbitrators all questions regarding the scope of arbitral jurisdiction. After the arbitration, a party seeks vacatur of the award on the ground that the arbitrators exceeded their power under Section 4-14, supra. The court applies the ground in Section 4-14 and, after finding that the parties agreed to have the arbitrators make final determinations regarding the scope of arbitral jurisdiction, the court defers the arbitral determinations on scope and refuses to vacate the award.

REPORTERS' NOTES

a. Generally. Parties may attempt to limit judicial review of arbitral awards through various means, making it more restrictive than the grounds permitted under the Conventions for vacating or denying confirmation, recognition, or enforcement of Convention awards, and under Section 10 of the FAA for non-Convention awards. Courts have generally refused to interpret arbitration rules containing language about the "final and binding" effect of an award as constituting an agreement to reduce or eliminate the grounds for challenging arbitral awards under the Conventions. See M&C Corp. v. Erwin Behr GmbH, 87 F.3d 844, 847 (6th Cir. 1996) (rejecting argument that ICC Arbitration Rules, which provided for waiver of appeal of an award, barred review of grounds for denying enforcement under the New York Convention); Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145 (2d Cir. 1992) (provision in Iran-U.S. Claims Tribunal agreement that awards are "final and binding" does not "bar consideration of the defenses to enforcement provided for in the New York Convention.").

Courts have been less consistent with respect to the enforceability of agreements to reduce or eliminate grounds for judicial review when expressly incorporated into the parties' agreement. Compare Bowen v. Amoco Pipeline Co., 254 F.3d 925, 931 (10th Cir. 2001) (reasoning in dicta that the "parties to an arbitration agreement may eliminate judicial review by contract" so long as they clearly and unequivocally indicate their intention to do so); with Hoeft v. MVL Group, Inc., 343 F.3d 57, 63-64 (2d Cir. 2003) (finding party agreement that the arbitrator's award "shall not be subject to any type of review or appeal whatsoever" was unenforceable because "§ 10(a) represent[s] a floor for judicial review of arbitration awards below which parties cannot require courts to go, no matter how clear the parties' intentions."). The Restatement takes the position that parties cannot, even through express agreement, reduce or eliminate the grounds for reviewing arbitral awards. No court has addressed

directly this issue under the Conventions, but the rationale for finding such agreements unenforceable under FAA Chapter One naturally extends to Convention awards.[30] Moreover, this conclusion is consistent both with the primary purpose of the Conventions in promoting internationally uniform standards for review of arbitral awards, see Scherk v. Alberto-Culver Co., 417 U.S. 506, 520, n.15 (1974), and with the Supreme Court's reasoning in Hall Street Assocs. v. Mattel, Inc., 552 U.S. 576 (2008). While there are few precedents directly addressing whether *Hall Street* applies to agreements to limit or restrict judicial review of arbitral awards, some courts have interpreted it as doing so. See Lustfield v. Milne, 5 Pa. D. & C.5th 469, 478 (Pa. Ct. Com. Pl. 2008) (interpreting *Hall Street* as abrogating case law that have held enforceable contractual agreements to reduce or eliminate grounds for review).

The fact that parties may not validly relinquish in advance of litigation the right to seek vacatur, or oppose confirmation, recognition, or enforcement of an award, or the right to advance one or more grounds in support of such opposition, does not mean that they may not validly waive specific objections during the arbitral procedure or at any time thereafter up to and including the action for post-award relief. Objections that might serve as a basis for vacatur or denial of confirmation, recognition, or enforcement of an international arbitral award may thus be waived at virtually any time, provided the party making the waiver knew or ought to have known of the factual basis for the objection and provided the waiver is otherwise valid. See § ___, infra.

The key distinction is between waiver of objections, which is permissible, and attempts to waive grounds or preclude the right to seek vacatur or resist confirmation, recognition, or enforcement altogether, which are not permissible. Nothing in this Section limits the freedom of a party, as litigant, to choose not to assert an otherwise available objection or ground in the course of a post-award action. Nor does this Section limit the parties' freedom to enter into a settlement of their dispute, in whole or in part, even though as a result of the settlement, a party does not assert a ground that might have otherwise successfully resulted in vacatur or denial of confirmation, recognition or enforcement of an award.

b. Reducing or eliminating grounds through choice of state law. As an alternative to express contractual provisions that reduce or eliminate grounds for granting vacatur, or denying confirmation, recognition, or enforcement to Convention awards, parties may seek to achieve the same result by subjecting their arbitration agreement and proceedings to a state arbitration law that entails a more relaxed review of awards in post-award actions. There is some judicial support for the view that such agreements are enforceable. See, e.g., Roadway Package Sys., Inc. v. Kayser, 257 F.3d 287 (3d Cir. 2001) (reasoning, in dicta, that although they did not effectively do so in the present case, the parties could have contracted for a reduced standard of review if they had clearly selected Pennsylvania law to govern their arbitration).

The Restatement, however, takes the position that parties may not select or invoke state arbitration law to accomplish a reduction or elimination of grounds for vacating, or denying confirmation, recognition, or enforcement of Convention awards. See also § 4-23, supra. No court reviewing a Convention award has addressed the question of whether such agreement would be valid if expressly and unambiguously incorporated into the parties' agreement, but the Restatement position is consistent with the Supreme Court's analysis in *Hall Street*. In fact, some courts have expressly interpreted *Hall Street* as extending to agreements that purport to reduce or eliminate grounds, and thus as abrogating case law suggesting that such agreements might be enforceable. See Lustfield v. Milne, 5 Pa. D. & C.5th 469, 478 n. 2 (2008) (interpreting *Hall Street* as repudiating *Kayser*); see also Schoch v. InfoUSA, Inc., 341 F.3d 785 (8th Cir. 2003) (doubting the continued vitality of *Kayser*).

c. Agreements that have an effect on grounds for denying recognition and enforcement. Agreements to reduce or eliminate the grounds for vacating, or denying confirmation, recognition, or

[30] Cross-reference to Section to be drafted on reducing grounds for challenge under FAA Chapter One.

enforcement of a Convention award, which are unenforceable under this Section, are distinguishable from agreements that indirectly affect the application of those grounds. Nothing in this Section affects the enforceability of the latter type of agreement. For example, the parties may enter into an agreement that affects the circumstances under which the presence or absence of a ground for post-award relief will be determined. Such an agreement may relate to the conduct of the arbitration. For example, under Section ___, supra, a party might be successful in challenging the enforcement of an award if the arbitrators imposed a "documents-only" arbitration on an objecting party in the context of a dispute in which oral hearings would be reasonably anticipated, appropriate, and necessary for a party to be able to present its case. See Intercarbon Bermuda, Ltd. v. Caltex Trading and Transp. Corp., 146 F.R.D. 64, 72 (S.D.N.Y. 1993). In those same circumstances, the party challenging the award would not be successful if the arbitration agreement provided for a "documents-only" arbitration. In the latter situation, the parties' agreement to allow a decision in the absence of any oral hearing would affect the court's analysis in applying the grounds for challenge provided for in Section __, but would neither alter the nature of the ground itself, nor preclude a court from considering the ground altogether.

A more subtle question is the effect on the availability of the ground stated in Section ____, supra (award on matter beyond submission to arbitration), of a clear and unmistakable agreement by the parties to submit questions concerning the scope of the arbitration clause to the arbitrators. Generally, when applying the ground in Section ____, a court conducts de novo review of the tribunal's interpretation of the arbitration clause. See Mgmt. & Tech. Consultants S.A. v. Parsons-Jurden Int'l Corp., 820 F.2d 1531, 1534 (9th Cir. 1987). This result is consistent the essential function of courts to ensure that arbitral jurisdiction existed with respect to an award that is the subject of an action for post-award relief.

However, the parties can clearly and unmistakably agree to submit questions about the scope of the arbitration agreement to the arbitral tribunal. See § ____, supra. The parties' right to do so is a consequence of specific language of the Conventions. Since the parties draw up "the terms of the submission to arbitration" and determine the "matters submitted to arbitration," within the meaning of Article V(1)(c) of the New York Convention, the Convention expressly authorizes parties to submit questions of scope to the arbitral tribunal. In that situation, the court is not precluded by the parties' agreement from applying the ground in Section ___, as such, because the court is obliged to determine whether, in fact, the parties did clearly and unmistakably agree to submit questions of scope to the arbitral tribunal. Having determined that such an agreement exists, however, a court effectively adopts as its own the tribunal's interpretation of the scope of the arbitration agreement.

As noted in the Reporters' Note to Comment *a*, nothing in this Section affects the parties' freedom to enter into an agreement settling their dispute in whole or in part, despite the fact that the settlement will obviate the need for a court to consider the grounds for granting vacatur, or denying confirmation, recognition, or enforcement of the award. In any event, the strength or weakness of any such grounds will presumably have been taken into account by the parties in fashioning their settlement.

Illustration 1 is based on Tiong Huat Rubber Factory (SDB) BHD v. Wah-Chang Int'l Co., [1991] H.K.L.Y. 51 (Hong Kong Ct. App. 1991).

Illustration 2 is based on Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RATKA), 508 F.2d 969 (2d Cir. 1974), and Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948 (S.D. Ohio 1981).

Illustration 3 is a hypothetical variation on the facts of Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RATKA), 508 F.2d 969 (2d Cir. 1974) and Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948 (S.D. Ohio 1981).

§ 4-25. Waiver of Objections

(a) Except as provided in §§ 4-17 and 4-18, a party may at any time waive its right to invoke an objection that would justify a court vacating or denying confirmation, recognition, or enforcement of a Convention award after that party knew or should have known the basis for such objection.

(b) Except as provided in § 4-22, (__) and (__), a party may at any time waive its right to invoke an objection that would justify a court in denying recognition and enforcement of a non-Convention award after that party knew or should have known the basis for such objection.

(c) Waiver under paragraphs (a) and (b) may be the result of either express consent or a failure to raise an objection in a clear and timely manner.

(d) A court may vacate or deny confirmation, recognition, or enforcement of a Convention award based on an objection that was not raised by a party only to the extent that such an objection would constitute a ground under §§ 4-17 and 4-18.

(e) A court may deny recognition or enforcement of a non-Convention award based on an objection that was not raised by a party only to the extent that such an objection would constitute a ground under § 4-22, (b) (4) and (b)(5).

(f) A party ordinarily does not waive a particular objection merely by failing to bring a timely action to stay the arbitration or by failing to

seek to have the award set aside. However, a party waives an objection to the extent that it:

(1) participated in judicial proceedings to enforce the arbitration agreement, to stay the arbitration, or to set aside the award;

(2) knew or should have known at that time the relevant facts underlying an objection; and

(3) failed to raise the objection in any such proceedings.

Comments:

a. Generally. Under principles of party autonomy, parties are largely free to decide which rights or claims to assert, or to waive, in the course of a legal proceeding. There are, however, certain limitations on parties' freedom to decide when to assert such rights or claims. In order to preserve its objections to procedural aspects of the arbitration, a party must make its objection known to the arbitral tribunal in a clear and timely manner so as to permit correction or remediation of defects. Any other rule would undermine the efficiency and fairness of arbitral proceedings by leaving awards subject to undisclosed objections that might have been remedied if properly raised. Accordingly, procedural objections that are not raised in a clear and timely manner are almost always waived. The same may be true of certain non-procedural objections, such as the objection that an arbitration agreement is invalid or does not encompass the dispute in question. A waiver of an objection will be effective only if the party in

question knew or should have known of the circumstances on which the objection is based, and if the waiver is otherwise valid.

Allowing waiver of objections under this Section is consistent with the Restatement's prohibition on agreements to reduce or eliminate the grounds for vacating or denying confirmation, recognition or enforcement of awards, as discussed in § 4-24, supra. In the first place, unlike the factual predicate of the objections, the grounds themselves are legally prescribed by the Conventions or the FAA. More importantly, the fact that a party waives a specific objection does not mean that it has waived in its entirety the Convention or FAA ground under which the objection would have been considered. Nothing in the waiver of specified objections precludes a court from determining whether other objections are valid and, if so, whether they establish the presence of that same ground for post-award relief.

b. Timeliness of an objection. The timeliness of an objection depends on several factors, most particularly when the information upon which the objection is based first became known, or should have become known, to the complaining party. A party cannot not waive an objection if it did not have either actual or constructive knowledge of the relevant information. Other factors that may affect an assessment of the timeliness of an objection are the stage of the proceedings at which the objection is raised, the nature of the objection, and the extent to which the parties' agreement or the applicable law or arbitral rules provide specific timeframes for raising objections. Generally, agreements regarding the form and timeliness of objections, whether

through specific provisions of the arbitration agreement or through incorporation of arbitration rules, will be given effect. However, requirements of such agreements may, as a general matter, be waived if not raised in a clear and timely fashion.

c. Grounds raised sua sponte by court. A party's waiver of a ground for vacating or denying confirmation, recognition, or enforcement of a Convention award does not preclude a court in appropriate circumstances from raising on its own motion the grounds specified in §§ 4-17 & 4-18, supra. A party's waiver of a ground for denying recognition or enforcement of a non-Convention award does not preclude a court in appropriate circumstances from raising on its own motion the grounds specified in §§ 4-22(b)(4) & 4-22(b)(5), supra. In determining whether to address or determine an objection that was not properly raised by a party, a court may take into account the nature of the objection, its importance to national policies or to the integrity of the legal system, and the circumstances surrounding the party's failure to raise the objection.

d. Failure to seek set aside. Parties are not required to seek to have an award set aside in order to preserve an objection. This position is consistent with the absence in modern Conventions of an obligation on a party that it first obtain confirmation of an award at the seat of arbitration before seeking its recognition or enforcement elsewhere. Making recourse to courts at the seat of arbitration a general precondition to recognition or enforcement could lead to a proliferation of litigation and impair the efficiency of the international arbitration process. On the other hand, when the losing

party actually brings or otherwise participates as a party in a set-aside action, but in doing so fails to assert a ground despite the fact that the underlying facts relevant to that ground were known or should have been known to it at the time, that party will be deemed to have waived that particular ground for denying recognition or enforcement of the award. Occasionally, a party resisting recognition or enforcement of an award may raise an objection that it failed to invoke in an earlier set-aside proceeding. If a court finds that it would have been futile to raise the objection during the prior proceeding, a party's failure to do so will not constitute a waiver. The futility of raising an objection in set aside proceedings, however, does not excuse the party from its obligation to raise the objection on a timely basis before the arbitral tribunal.

e. Waiver in prior judicial proceedings. Prior to a post-award action, other judicial proceedings concerning the arbitration agreement or the arbitral proceedings or award may have taken place in which a party had the opportunity to raise objections to the agreement, proceedings or award. For example, an action may have been brought to compel or stay arbitration. Grounds for post-award relief are not generally waived merely by virtue of a party's failure to initiate such a proceeding. There are, however, some exceptions. One such exception relates to challenges based on evident partiality of an arbitrator. A party asserting such a ground is required to raise it at the first reasonable opportunity and in the context of the first available judicial setting after the relevant information first became known to that party. Similarly, regarding certain objections to jurisdiction, if all the facts relevant to a particular jurisdictional objection were known but a party nevertheless failed to raise the objection when it

reasonably could have done so, that party may be deemed in post-award action to have waived the objection. Most objections will be waived if the party raising the objection in support of post-award relief actually participated in the earlier judicial proceedings, such as an action to compel or stay the arbitration, but failed to assert its objection despite knowledge of the relevant facts.

Illustrations:

1. *A* commences a lawsuit against *B*. *B* seeks to have the suit dismissed because *A* and *B* have an arbitration agreement that *B* contends applies to the dispute. *A* resists the dismissal on the ground that the arbitration clause is invalid, but does not assert that the claims *A* asserts in the lawsuit are outside the scope of the arbitration clause. The court dismisses the lawsuit finding that the parties agreed to arbitrate the dispute. *A* is precluded from raising a challenge based on scope during the arbitral proceedings, or from raising the same objection during proceedings to confirm or vacate the award.

2. Same facts as *Illustration 1*. *A* has *not* waived its opportunity to raise an objection during the arbitration and later in enforcement proceedings on the ground that counterclaims that *B* asserts for the first time in the arbitral proceedings were outside the scope of the arbitration clause.

REPORTERS' NOTES

a. Generally. The requirement that a party clearly and timely raise objections that may be a basis for post-award relief is essential to the orderly functioning of arbitral proceedings and the enforceability of final awards. Accordingly, a party that does not raise its objection in a clear and timely manner waives it. See Fid. Fed. Bank v. Durga Ma Corp., 386 F.3d 1306, 1313 (9th Cir. 2004). The effect of waiver under this Section is distinct from the kind of agreement disallowed under Section ___, supra. Section ____ addresses attempts by the parties to reduce or eliminate the legally prescribed grounds available for defeating recognition or enforcement of awards. This Section merely acknowledges that parties may, within limits, waive specific objections to the arbitration agreement or the arbitral proceedings. Waiver of such objections does not affect the content or standards articulated in the Conventions or FAA Chapter One as grounds for vacating or denying confirmation, recognition or enforcement of awards, even if such waiver may affect how a court analyzes the applicability of a particular ground for granting or denying such post-award relief.

b. Timeliness of an objection. The timeliness of an objection depends on several factors, most particularly when the information upon which the objection is based first became known, or should have become known, to the complaining party and what has occurred in the interval between the time a party learned the relevant information and the time it asserted its objection. See AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Serv., Inc., 139 F.3d 980, 982 (2d Cir. 1998) ("Where a party has knowledge of facts possibly indicating bias or partiality on the part of an arbitrator he cannot remain silent and later object to the award of the arbitrators on that ground. His silence constitutes a waiver of the objection.") (quoting Ilios Shipping & Trading Corp. v. Am. Anthracite & Bituminous Coal Corp., 148 F. Supp. 698, 700 (S.D.N.Y. 1957), aff'd, 245 F.2d 873 (2d Cir. 1957) (per curiam).

In evaluating whether an objection is timely, the court's analysis in Health Services Management Corp. v. Hughes, 975 F.2d 1253, 1262 (7th Cir. 1992), is instructive. In that case, the court concluded that an objection to an arbitrator was not timely because the objecting party had remained silent when the facts pertaining to its objection were raised during a hearing. In rejecting the party's claim that a subsequent written objection, submitted less than three days later, was timely, the court looked specifically to the fact that "two days of the hearing had already occurred, resulting in several hundred pages of transcript[,] and more than two months had passed since counsel for the party originally learned of the relevant facts." Id. A party may also waive an objection by conduct, such as participating in the initiation of an arbitral proceeding, the constitution of the tribunal, or the proceedings on the merits without making any express objection regarding jurisdiction. See Teamsters Local Union No. 764 v. J.H. Merritt and Co., 770 F.2d 40, 42-43 (3d Cir. 1985); Fortune, Alsweet and Eldridge, Inc. v. Daniel, 724 F.2d 1355, 1357 (9th Cir. 1983); see also Exportkhelb v. Maistros Corp., 790 F. Supp. 70, 73 (S.D.N.Y. 1992) (failure to object in arbitration to the arbitrability of counterclaim waives objection); Am. Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pak., Ltd., 659 F. Supp. 426, 429 (S.D.N.Y. 1987) (signing terms of reference in ICC arbitration is waiver of objections to jurisdiction). Having objected in a timely manner, a party must not later assert arguments or engage in conduct that suggests that the party has abandoned the objection, or else the objection is waived. Compare Baar & Beards, Inc. v. Oleg Cassini, Inc., 282 N.E.2d 624, 625 (N.Y. 1972) (after raising objection regarding alleged arbitrator conflict, objecting party later waived that objection by expressly stating that the panel was "acceptable"); with China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 291 (3d Cir. 2003) (party that objects to jurisdiction based on alleged forgery of the underlying agreement does not waive objection by participating in the arbitration, particularly since it did so primarily to argue jurisdiction, to which it consistently objected).

While objections must be made in a timely fashion, there are no strict form requirements for how the objection must be made. Cf. Four Seasons Hotels & Resorts v. Consorcio Barr S.A., 377 F.3d 1164, 1170 (11th Cir. 2004) ("To be clear, it is not our position that Consorcio waived its argument because it did not sufficiently raise it below; rather . . . [we] conclude that Consorcio did not previously

raise the issue at all. Therefore, we decline to address it for the first time on appeal."). If the parties have an express agreement or the tribunal establishes precise rules about how objections are to be raised, those rules are generally applied in assessing whether a party has waived an objection.

c. Grounds raised sua sponte by court. A party's waiver of an objection does not preclude a court, in appropriate circumstances, from considering the basis for such objection on its own motion insofar as the grounds for denying recognition or enforcement set out in Sections ___ and ___, supra, are concerned. See Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974). In determining whether to raise an issue sua sponte, a court considers the nature of the challenge, its importance to national policies or to the integrity of the legal system, and the circumstances surrounding a party's failure to raise the objection at the recognition or enforcement stage.

d. Failure to seek set aside. Parties are not required to seek to have an award set aside in order to preserve an objection. This position is consistent with the New York and Panama Conventions' elimination of "double exequatur," which had, under the Geneva Protocol and Geneva Convention, required a party to first obtain confirmation of an award in the arbitral seat before seeking enforcement. See Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 335 F.3d 357, 366-367 (5th Cir. 2003) ("[O]ne of [the] main purposes [of the New York Convention] was to facilitate the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs."); Yusuf Ahmed Alghanim & Sons W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997) ("The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad.").

e. Waiver in other judicial proceedings. If a party fails to raise an objection during prior judicial proceedings in which it could, and reasonably should have, raised that objection, it will generally be regarded as having waived it. Cobec Brazilian Trading & Warehousing Corp. v. Isbrandtsen, 524 F. Supp. 7, 9 (S.D.N.Y. 1980) (objection to jurisdiction waived when not raised during proceedings to compel arbitration). A party is not, however, ordinarily obliged to initiate such a proceeding.

TOPIC 3.
CONDUCT OF POST-AWARD ACTIONS

§ 4-26. Subject Matter Jurisdiction in Post-Award Actions

(a) Federal courts have subject matter jurisdiction over actions to confirm or to vacate a U.S. Convention award and actions to enforce a foreign Convention award.

(b) Federal courts have subject matter jurisdiction over an action to enforce a non-Convention award to the extent that an independent basis of federal subject matter jurisdiction exists.

(c) Unless the parties have designated an exclusive forum for a post-award action:

(1) an action to confirm or vacate a U.S. Convention award may be brought in the federal court in the district within which the award was made or in any other federal court that has jurisdiction over the defendant; and

(2) an action to enforce a foreign award may be brought in any federal court that has jurisdiction over the defendant.

(d) A post-award action may also be brought in a competent state court.

(e) A state court action to confirm or vacate a U.S. Convention award or to enforce a foreign Convention award may be removed to federal court. A state court action to enforce a non-Convention award may be

removed to federal court to the extent that an independent basis of federal subject matter jurisdiction exists. A party may seek removal to federal court of a post-award action in state court pursuant either to the specific removal provisions of the Federal Arbitration Act or to other rules applicable to removal.

Comments:

a. Subject matter jurisdiction in actions for post-award relief under FAA Chapters Two and Three. Federal courts have subject matter jurisdiction over actions under FAA Chapters Two or Three either to confirm or to vacate a U.S. Convention award or to enforce a foreign Convention award. FAA Section 203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." Further, "[t]he district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." FAA Section 302 extends federal subject matter jurisdiction to cases arising under the Panama Convention.

On the question of the law applicable to post-award actions in relation to Convention awards, see Section 4-3, supra.

(i). Confirmation of U.S. Convention awards. A party seeking confirmation of a U.S. Convention award may apply in federal court for an order confirming the award under FAA Chapters Two and Three, as applicable. These chapters not only establish a cause of action for confirmation of awards, in Sections 207 and Section 302,

respectively, but also independently confer subject matter jurisdiction on federal courts to entertain such actions. With regard to the New York Convention, Section 203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." Accordingly, federal district courts have original jurisdiction over such actions, regardless of the amount in controversy. For Panama Convention awards, FAA Section 302 incorporates Section 203 by reference.

(ii). Vacatur of U.S. Convention awards. Federal courts have subject matter jurisdiction over actions to vacate as well as confirm U.S. Convention awards. FAA Sections 203 and 302 refer to subject matter jurisdiction over "[a]n action or proceeding falling under the Convention," without specifically mentioning vacatur. However, FAA Sections 208 and 307 provide that Chapter One of the FAA shall apply to the extent not in conflict with Chapters Two and Three. Among the provisions of FAA Chapter One thereby incorporated into Chapters Two and Three is Section 10 governing vacatur of awards. The grant of federal subject matter jurisdiction under FAA Section 203 and 302 thus extends to actions to vacate as well as to confirm U.S. Convention awards.

(iii). Confirmation or vacatur of foreign awards in United States courts. Confirmation and vacatur of awards are ordinarily the exclusive prerogative of the courts of the arbitral situs. See Section 4-2, supra. Accordingly, a foreign award, whether Convention or non-Convention, is generally not subject to confirmation or

vacatur in United States courts. The sole exception arises when the parties to an arbitration seated outside the United States have specifically chosen the law of arbitration of the United States or of a state to govern the arbitration. This possibility is opened up by Article V(1)(e) and 5(1)(e) of the New York and Panama Conventions, which indicate that a Convention award may be set aside not only by a court of the country in which the award was made, but also by a court of the country "under the law of which, that award was made." The latter term signifies the law of arbitration to which the parties subjected the proceeding. Thus, if the parties selected the law of arbitration of the United States or of a state to govern their arbitration, one or more courts of the United States will have subject matter jurisdiction, concurrent with the courts of the place of arbitration, to confirm or vacate the award.

(iv). Enforcement of foreign Convention awards. FAA Sections 203 and 302 give federal district courts original jurisdiction over actions to enforce a foreign Convention awards under FAA Sections 207 and 302, regardless of the amount in controversy. Thus, Chapters Two and Three of the FAA not only establish a cause of action for enforcement of foreign Convention awards, but independently confer subject matter jurisdiction on federal courts to entertain such actions, just as they do for confirmation and vacatur of U.S. Convention awards. See Comments *a(i)* and *(ii)* of this Section.

b. Subject matter jurisdiction in actions to enforce non-Convention awards. Under the Restatement, non-Convention awards may be recognized and enforced pursuant to the provisions of FAA Chapter One. See Section 4-3, supra. Since FAA

Chapter One does not create federal subject matter jurisdiction, an action to enforce a non-Convention award may only be brought in federal court if there is present an independent basis for federal subject matter jurisdiction, such as diversity of citizenship, admiralty, or federal question jurisdiction. In international commercial disputes, diversity jurisdiction will often, but by no means invariably, be available. Alternatively, federal question jurisdiction is established if the claim in dispute states a federal cause of action and would therefore give rise to federal jurisdiction if it were litigated in a U.S. court. In addition, a court may exercise supplemental jurisdiction over an action under FAA Chapter One if it has original jurisdiction over a separate claim that arises from the same nucleus of facts as the arbitration-related claim.

If federal subject matter jurisdiction cannot be established, an action to enforce a non-Convention award may be brought only in state court in accordance with the state's rules on the allocation of subject matter jurisdiction among its courts.

c. Party selection of forum for post-award relief. Parties are free to designate a forum for post-award relief, and their submission to the jurisdiction of that forum is presumptively binding. The effectiveness of their choice depends upon the usual principles governing the validity and enforceability of forum selection clauses under the law of the forum in which the question arises. A forum designation may be exclusive or non-exclusive, depending on the intention of the parties. When parties designate a forum, they commonly name a court of the place of arbitration, particularly for vacatur or confirmation purposes.

If the parties did not designate an exclusive forum for post-award relief, an action for such relief may be brought in any court, state or federal, having jurisdiction over the defendant under general rules governing judicial jurisdiction.

d. Venue. The Restatement articulates no particular position on venue for post-award actions. The FAA contains venue provisions that are, however, non-exclusive. Proper venue for actions for post-award relief thus consists of (a) any venue that the parties have designated for that purpose, (b) the United States district within which the award was made (in the case of confirmation or vacatur actions), or (c) any venue proper under the applicable venue statute – general or specific – of the court in which relief is sought.

e. Subject matter jurisdiction of state courts in post-award actions. Federal subject matter jurisdiction over actions for post-award relief in connection with Convention awards is not exclusive. Such actions may be brought in state court as well, either under the FAA or under state law that is compatible with the FAA. See Section 4-3, supra. Post-award actions in Convention cases brought in state court under the FAA are removable to federal court on federal question grounds. Post-award actions brought in state court under state law, like post-award actions in connection with non-Convention awards, are subject to removal to federal court only if there exists an independent basis for federal subject matter jurisdiction. See Comment *f* of this Section.

f. Removal to federal court of state court actions for post-award relief. The subject matter of actions to confirm or to vacate a U.S. Convention award, or to enforce a foreign Convention award, relates to an agreement or award falling under the Convention. Such actions thus may, if initially brought in state court, be removed to federal court in accordance with 9 U.S.C. § 205 or the general removal statute, 28 U.S.C. 1441. However, a state court action to enforce a non-Convention award may not be removed to federal court absent an independent basis of federal subject matter jurisdiction.

g. Authority to recognize. Although the Conventions specifically provide for both recognition and enforcement of arbitral awards, the Federal Arbitration Act provides no affirmative federal cause of action for recognition, as distinct from enforcement. When a party seeks recognition of an award, it is effectively seeking a declaration that an award is entitled to preclusive effect. See Sections 4-1, 4-9 and 4-10, supra. A request for recognition of an award is ordinarily raised as a defense to an action seeking to relitigate a claim or issue that was the subject of that award. For these purposes, if a court has subject matter jurisdiction sufficient to support the action in which the relitigation is sought, it also has authority to determine whether the award in question has claim or issue preclusive effect. Thus, although FAA Chapter One makes no reference to recognition, per se, it has been generally interpreted as also authorizing courts to recognize awards.

Recognition of an international arbitral award may also be sought in an appropriate action in any competent state court.

REPORTERS' NOTES

a. Subject matter jurisdiction in actions for post-award relief under FAA Chapters Two and Three.

(i). Confirmation of U.S. Convention awards. Section 207 of the FAA provides that actions to confirm may be brought in any court "having jurisdiction under this chapter." When Congress implemented the New York Convention through FAA Chapter Two, it expressly created federal subject matter jurisdiction with regard to Convention awards. FAA Section 203 provides for subject matter jurisdiction in federal court for an "action or proceeding falling under the Convention." One category of Convention awards consists of those awards that, while rendered in the U.S., have a reasonable relationship with a foreign country ("Convention awards made in the U.S." or "U.S. Convention awards"). 9 U.S.C. § 202. As Convention awards, their confirmation falls within the subject matter jurisdiction provided for by FAA Section 203. Thus, federal courts have subject matter jurisdiction over Section 207 actions to confirm U.S. Convention awards, without regard to amount in controversy. See Telenor Mobile Commc'ns. AS v. Storm L.L.C., 584 F.3d 396, 404 n.3 (2d Cir. 2009) (citing Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997), cert. denied, 522 U.S. 1111 (1998) quoting Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983)) (holding that the New York Convention governs a commercial arbitration between two foreign corporations); Lander Co. v. MMP Invs., Inc., 107 F.3d 476, 479 (7th Cir. 1997) (subject matter jurisdiction available under FAA Chapter Two in action to enforce a Convention award made in the United States).

The analysis is no different under FAA Chapter Three. FAA Section 302 makes §§ 201, 203 and 207 equally applicable to awards subject to the Panama Convention. Accordingly, federal district courts have original jurisdiction over actions to confirm Panama Convention awards, regardless of the amount in controversy.

(ii). Vacatur of U.S. Convention awards. FAA Section 203 provides that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States." Further, "[t]he district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." The Restatement takes the position that an action to vacate a U.S. Convention award constitutes "[a]n action or proceeding falling under the Convention," within the meaning of Section 203, and thus may "be deemed to arise under the laws and treaties of the United States." As discussed in detail in the Reporters' Note *c* to Section 4-3, supra, the Restatement takes the view that FAA Chapters Two and Three authorize vacatur as well as confirmation of U.S. Convention awards. Accordingly, an action to vacate a U.S. Convention award falls under the Convention, and federal courts have subject matter jurisdiction under FAA Section 203.

The analysis is no different under FAA Chapter Three. FAA Section 307 parallels Section 208 by making the provisions of Chapter One applicable to proceedings under FAA Chapter Three unless in conflict with it. The provision for vacatur in FAA Section 10 may therefore be read into Chapter Three, and vacatur of a Panama Convention award may be sought in federal court.

(iii). Vacatur of foreign awards in United States courts. Vacatur of an arbitral award is a prerogative of the courts of the arbitral situs. Ordinarily only a competent court of the situs may entertain an action to that effect. Thus neither federal nor state courts have subject matter jurisdiction to vacate an award rendered outside the U.S. See M & C Corp. v. Erwin Behr GmbH & Co., 87 F.3d 844, 848-49 (6th Cir. 1996) ("A motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose procedural law was specifically invoked." (emphasis omitted)); Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y

Comercial, 745 F. Supp. 172 (S.D.N.Y. 1990) (dismissing petition to vacate foreign arbitral award for lack of subject matter jurisdiction where New York substantive law was applied but arbitral seat was abroad); see also § 4-2, supra.

The sole circumstance in which a U.S. court may entertain an action to confirm or vacate a foreign award is when the parties, while selecting a non-U.S. arbitral situs, expressly agreed that the arbitration should be governed by U.S procedural law, federal or state. See, e.g., International Standard Elec. Corp., 745 F. Supp. at 177 ("That a Court has jurisdiction to set aside a foreign award based upon the use of its domestic, substantive law in the foreign arbitration defies the logic both of the Convention debates and of the final text, and ignores the nature of the international arbitral system."). Article V(1)(e) of the New York Convention and Article 5(1)(e) of the Panama Convention underscore this point, by referring to the possibility of an award being "set aside or suspended by a competent authority of the country in which, *or under the law of which*, that award was made" (emphasis added). In that event, both the competent authorities of the arbitral situs and those of the jurisdiction whose arbitration law was selected by the parties may entertain an action to vacate. There is no reason why the same rule should not apply to the vacatur of foreign non-Convention awards.

(iv). Enforcement of foreign Convention awards. Arbitral awards rendered outside the United States may be recognized or enforced in the U.S., either under FAA Chapters Two or Three for Convention awards or under FAA Chapter One for non-Convention awards. See Section 4-3, supra. Although FAA Section 207 refers to "an order confirming the award," the term "confirming" in this context is understood to mean "enforcing" (FAA Chapter Two is the legislation by which the U.S. implemented into federal law the New York Convention dealing with "the recognition and *enforcement* of foreign arbitral awards" (emphasis added)).

When Congress implemented the New York Convention through FAA Chapter Two, it expressly created federal subject matter jurisdiction over suits to enforce Convention awards. Section 203 provides for subject matter jurisdiction in federal court for an "action or proceeding falling under the Convention." 9 U.S.C. § 203. Accordingly, federal subject matter jurisdiction extends to the enforcement of foreign Convention awards as well as Convention awards made in the United States. See Reporters' note *a (i)* of this Section.

Section 302 performs the same function for Panama Convention awards that § 203 performs for New York Convention awards. There is accordingly no need to demonstrate any other basis of federal jurisdiction, such as general federal-question or diversity jurisdiction, in an action brought under Chapter Three.

The Restatement takes the position that actions to enforce a Convention award made outside the U.S. may not be brought under FAA Chapter One. See Section 4-3, supra. Since FAA Chapter One is unavailable for these purposes, no question arises as to whether an independent basis of jurisdiction exists to support federal jurisdiction in actions to enforce foreign convention awards. FAA Chapters Two and Three expressly create federal subject matter jurisdiction.

b. Subject matter jurisdiction in actions to enforce non-Convention awards. As noted above (see § 4-3, Reporters' note *b*, supra), a good deal of debate surrounds the question of the law applicable to actions to enforce foreign arbitral awards that are not subject to the New York or Panama Conventions. Such awards include, among others, awards that do not satisfy the reciprocity requirement under the Conventions, as ratified by the United States. The Restatement adopts the view that the enforcement of such awards is governed by FAA Chapter One.

FAA Chapter One, unlike FAA Chapters Two and Three, presents the peculiarity of creating a cause of action without establishing federal subject matter jurisdiction. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1983). Accordingly, a party seeking to enforce a non-Convention award in federal court needs to demonstrate an independent basis for federal subject matter jurisdiction. If it cannot, it must proceed in state court.

Federal subject matter jurisdiction may readily be established on the basis of the diversity of the parties. Federal subject matter jurisdiction is also present if the dispute before the arbitral tribunal is one that would state a federal question if brought in federal court.

In Vaden v. Discover Bank, 556 U.S. 49 (2009), the Supreme Court ruled that an action to compel arbitration under FAA Section 4 may be brought in federal court under federal question jurisdiction if the underlying claim states a federal cause of action. See also Windsor Nursing Ctr. Partners of Corpus Christi, Ltd. v. Yesian, 2009 U.S. Dist. LEXIS 25795 (S.D. Tex. Mar. 30, 2009) (looking to underlying claim in order to determine if court has jurisdiction over motion to compel arbitration); Carlson v. Raymour & Flanigan Furniture Co., 2011 U.S. Dist. LEXIS 31161, at *16-*20 (W.D.N.Y. 2011) (evaluating jurisdiction by examining underlying claim). If the FAA permits a federal court to "look through" to the underlying claim to establish federal question jurisdiction to entertain an action to compel arbitration, it will likely be held to allow a federal court to "look through" to the underlying claim in actions to confirm. At least one federal court has already done so. Kirby Morgan Dive Sys. v. Hydrospace Ltd., 2010 U.S. Dist. LEXIS 9657, at *8-*9 (C.D. Cal. 2010) (drawing an analogy between § 4 and § 9 to find jurisdiction to confirm an arbitral award by looking through to the underlying federal claims); see also Bittner v. RBC Capital Mkts., 331 Fed. Appx. 869, 871 (2d Cir. 2009) (unpublished) (entertaining the idea that the "look through" doctrine could be extended to vacatur). Based on *Vaden*, a federal court would likely also "look through" a complaint to enforce a maritime law award which did not on its face clearly appear to be an admiralty matter.

Maritime law disputes represent another category of cases over which federal courts enjoy original jurisdiction. 28 U.S.C. § 1333. A federal court thus has jurisdiction to entertain an action to enforce an arbitral award in admiralty, just as it has jurisdiction to entertain an action to compel arbitration of a maritime cause of action or to vacate or confirm a maritime award. See 9 U.S.C. §§ 4 & 8. Such is the breadth of the federal courts' maritime law jurisdiction.

Even without an independent basis for federal court jurisdiction, an action to confirm a non-Convention award under FAA Chapter One could conceivably be heard in federal court on the basis of the court's supplemental jurisdiction. However, the claim must be so related to a separate claim over which the court has original jurisdiction that the two claims "form part of the same case or controversy." 28 U.S.C. § 1367(a). Courts have found this statutory requirement satisfied when the claim over which the court has original jurisdiction and the claim sought to be brought under supplemental jurisdiction arise from "a common nucleus of operative facts." Ammerman v. Sween, 54 F.3d 423, 424 (7th Cir. 1995) (citing United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 1130 (1966) (superseded by 28 U.S.C. § 1367)) (describing general requirements for supplemental jurisdiction). Thus, if a party establishes original jurisdiction through a federal cause of action outside of the FAA, and the court finds supplemental jurisdiction over a related state law contract claim, the federal court may entertain the confirmation action as well. See, e.g., 2M Group Inc. v. Solstice Management, L.L.C., 2009 U.S. Dist. LEXIS 6668, at *5–*7, n.1 (N.D. Cal. Jan. 22, 2009) (extending supplemental jurisdiction to a confirmation action after federal-law claims had been dismissed); Walters v. Chase Manhattan Bank, 2008 U.S. Dist. LEXIS 60675, at *4–*5 (E.D. Wash. Aug. 6, 2008) (retaining supplemental jurisdiction over a confirmation action brought as a counterclaim to two federal claims and breach of contract claim that were removed from state court and subsequently dismissed).

If independent federal subject matter jurisdiction cannot be established, an action to confirm a non-Convention award under FAA Chapter One may only be brought in a competent state court.

c. Party selection of forum for post-award relief. Parties may select fora on a pre-dispute basis for post-award relief, and the selection may be either exclusive or non-exclusive, depending on the intention of the parties. The courts generally tend to favor interpretation of such clauses as exclusive, particularly when the forum is selected for confirmation or vacatur purposes. Thus if the prevailing party seeks confirmation in a court other than that specified in the parties' agreement, that court will likely be regarded as lacking jurisdiction to hear the action. See Jackson v. Ky. River Mills, 65 F. Supp. 601 (E.D. Ky. 1946) (where contract of the parties clearly indicated that the arbitration was to be held at

a location different from the jurisdiction for enforcement of the award and hence there was no manifest consent to jurisdiction in the location of the arbitration). The effectiveness of a forum selection clause depends upon the usual principles governing the validity and enforceability of forum selection clauses under the law of the forum in which the question arises.

d. Venue. Venue rules differ according to whether confirmation or vacatur of a U.S. Convention award, on the one hand, or enforcement of a foreign Convention award, on the other, is sought.

(i). Venue in confirmation and vacatur actions. FAA Section 9 provides that, absent a forum selection clause for these purposes, a confirmation action may be brought in the U.S. court for the district within which the award was made. Designation of the court of the place of arbitration is best understood as based on implied consent. See Lucent Techs., Inc. v. Tatung Co., 2003 WL 402539, at *1 (S.D.N.Y. 2003). Cf. Farr & Co. v. Cia. Intercontinental de Navegacion de Cuba, 243 F.2d 342 (2d Cir. 1957) (in action to appoint an arbitrator party is deemed to consent to jurisdiction of courts of the place where they agreed to arbitrate). Section 9 by its terms thus privileges consent as a basis for personal jurisdiction, although it gives priority to express consent, in the form of a forum selection clause, over implied consent to the jurisdiction of the courts of the place of arbitration.

The wording of Section 9 would suggest that, absent an agreement designating another court, confirmation may be sought exclusively in the courts of the place of arbitration. Congress, however, has also enacted a general venue statute, 28 U.S.C. § 1391. U.S. courts were at one time divided over the question whether the statutory venue provisions in the FAA were exclusive. A number of courts read them as such. E.g. Central Valley Typographical Union, No. 46 v. McClatchy Newspapers, 762 F.2d 741, 744 (9th Cir. 1985); U. S. ex rel. Chi. Bridge & Iron Co. v. ETS-Hokin Corp., 397 F.2d 935, 939 (9th Cir. 1968); Tesoro Petroleum Corp. v. Asamera (South Sumatra), Ltd., 798 F. Supp. 400 (W.D. Tex. 1992); Enserch Int'l Exploration, Inc., v. Attock Oil Co., 656 F. Supp. 1162 (N.D. Tex. 1987). Most courts, however, have interpreted Section 9 as permissive rather than mandatory. Thus, if the parties have not specified a court for confirmation of an award, the prevailing party may, but need not, seek confirmation in a court of the arbitral situs. Confirmation may also be sought in any court in the U.S. that has personal jurisdiction over the defendant. Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 192 (4th Cir. 1998) (where parties specified Philadelphia as the situs of arbitration but did not select a forum for confirmation, the arbitration agreement did not preclude another court from exercising jurisdiction); see also Motion Picture Laboratory Technicians Local 780, I.A.T.S.E. v. McGregor & Werner, Inc., 804 F.2d 16, 18-19 (2d Cir. 1986); Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698 (2d Cir. 1985), cert. denied, 475 U.S. 1067, reh'g denied, 475 U.S. 1151 (1986).

The Supreme Court finally resolved the issue in Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 198, 204 (2000), holding that actions under the FAA may be brought not only in a court of the place of arbitration, but also in any jurisdiction proper under the general venue statute, and the Restatement reflects this position. See also D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 105 (2d Cir. 2006) (reading the FAA's venue provision as permissive, finding venue proper under both 9 U.S.C. § 9 and 28 U.S.C. 1391(a)). This position accords with the general presumption in U.S. law that statutory venue provisions are deemed to be non-exclusive, unless otherwise provided. Thus, while FAA Chapter One (9 U.S.C. §§ 9, 10) designates as proper venue for confirmation or vacatur the court named in the entry-of-judgment clause (or failing any such stipulation, in a court of the jurisdiction where the award was made), such venue is not exclusive.

There is nothing in FAA Chapters Two and Three to the contrary. Thus, while FAA Section 204 provides for venue in any federal district 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." This provision, too, is not exclusive. Courts have permitted parties to invoke relied other venue provisions. See Am. Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pak., 1986 U.S. Dist. LEXIS 28551, at *12-*13 (S.D.N.Y. March 5, 1986) (venue proper under both 9 U.S.C. § 204 and 28 U.S.C. § 1391(f)(1)); Ipitrade Int'l, S.A. v. Fed. Rep. of Nig., 465 F.

Supp. 824, 826 (D.D.C. 1978) (venue proper under both 9 U.S.C. § 204 and 28 U.S.C. § 1391(f)(4)). Section 302 extends Section 204's venue provision to the confirmation of Panama Convention awards.

Venue in actions to vacate U.S. Convention awards is governed by the same principles. Once again, the enumeration of venues in Section 204 is not considered to be exhaustive. See Abbott Labs. v. Baxter Int'l, Inc., 2002 U.S. Dist. LEXIS 5475, at *16 (N.D. Ill. Mar 27, 2002) (consolidating confirmation and vacatur actions and finding venue proper under 28 U.S.C. § 1391(b), 9 U.S.C. § 204, and 15 U.S.C. § 22).

Accordingly, actions to confirm or vacate a Convention award made in the U.S. may be brought in any jurisdiction proper under the general venue statute, 28 U.S.C. §1391.

A federal court may transfer an action to confirm or vacate a U.S. Convention award pursuant to 28 U.S.C. § 1404(a). That section provides that, for the convenience of parties and witnesses and in the interest of justice, a district court may transfer any civil action to any other district or division in which the action could have been brought. As such, it represents a statutory recognition of the common law forum non conveniens doctrine as between federal district courts. Griffin Indus. v. Petrojam, Ltd., 58 F. Supp. 2d 212, 215 (S.D.N.Y. 1999) (discussing 28 U.S.C. 1404(a) as a statutory recognition of forum non conveniens in a vacatur action and confirmation cross-motion); Wilshire Credit Corp. v. Barrett Capital Mgmt. Corp., 976 F. Supp. 174, 180 (W.D. N.Y. 1997) (providing detailed discussion of factors for change of venue); See also Gottdiener, 462 F.3d at 106-07 (analyzing grounds for transfer of venue in a confirmation case).

It is possible for parties to bring actions to confirm and to vacate the same arbitral award in different venues. In this event, the "first-to-file rule" generally applies, so that the court in which the later motion was filed will normally grant a motion to transfer to the other district. See Cortez Byrd Chips, 529 U.S. at 198; Smart v. Sunshine Potato Flakes, LLC, 307 F.3d 684, 687 (8th Cir. 2002) (discussing principles of deference to the court of first filing); Sutter Corp. v. P&P Industries, Inc., 125 F.3d 914, 1220 (5th Cir. 1997) (stating that "first-filed" is not a rule but a relevant factor, though less determinative in deferring to a pending suit in state court). This rule generally applies "absent the showing of balance of convenience in favor of the second action." Capitol Records, Inc. v. Optical Recording Corp., 810 F. Supp. 1350, 1353 (S.D.N.Y. 1992) (quoting Remington Prods. Corp. v. Am. Aerovap, Inc., 192 F.2d 872, 873 (2d Cir. 1951)). In other words, the first-to-file rule does not necessarily "supersede the inquiry into the balance of convenience required under §1404." River Road Int'l, L.P. v. Josephthal Lyon & Ross Inc., 871 F. Supp. 210, 214-15 (S.D.N.Y. 1995) (citing Rolls-Royce Motors, Inc. v. Charles Schmitt & Co., 657 F. Supp. 1040, 1061 (S.D.N.Y. 1987)); see also Griffin Indus. v. Petrojam, Ltd., 58 F. Supp. 2d 212, 216 (S.D.N.Y. 1999) (discussing circumstances warranting exceptions to the first-filed doctrine).

At least one court has suggested that, even though the FAA venue provisions are not exclusive, the venues specifically designated in §§ 9 and 10 should be given priority over the venue indicated by the first-to-file rule, where they are different. Johnson v. Pfizer, Inc., 2004 U.S. Dist. LEXIS 25217, at *13 (D. Kan. Dec. 10, 2004) ("[I]t would be logical to modify application of the first-to-file rule in situations dealing with arbitration awards so that the decision of who should make the initial determination of the proper venue and jurisdiction for any cases would be made by the district court specifically mentioned in the FAA -- the federal district court where the arbitration award was made."). The court in that case would limit the application of the first-to-file rule to instances in which neither party files a case in a district designated by the FAA.

(ii). Venue in enforcement actions. In keeping with the general presumption in U.S. law, statutory venue provisions are deemed to be nonexclusive, unless otherwise provided. Thus, while FAA Chapter One (9 U.S.C. § 9) designates as proper venue the court named in the entry-of-judgment clause (or failing any such stipulation, in a court of the jurisdiction where the award was made), such venue is not exclusive. Cortez Byrd Chips, Inc., 529 U.S. at 197 (actions under the FAA may also be brought in any jurisdiction proper under the general venue statute, 28 U.S.C. § 1391); see also Gottdiener, 462 F.3d at 105 (applying permissive reading of the FAA's venue provision). The same principle applies to venue for

the enforcement of awards under Chapter Two of the FAA. Thus, while 9 U.S.C. § 204 provides for venue in any federal district court "in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought," this provision, too, is not exclusive. See Mechanised Constr. of Pak., Ltd., 1986 U.S. Dist. LEXIS 28551, at *1, *12-*13 (finding venue proper under both 9 U.S.C. § 204 and 28 U.S.C. § 1391(f)(1)); Ipitrade Int'l, S.A. v. Fed. Republic of Nig., 465 F. Supp. 824, 826 (D.D.C. 1978) (finding venue proper under both 9 U.S.C. § 204 and 28 U.S.C. § 1391(f)(4)). Section 204's venue provision is extended by § 302 to the enforcement of Panama Convention awards. 9 U.S.C. § 302.

e. Subject matter Jurisdiction of state courts in post-award actions. The FAA applies to actions in state as well as federal court. Southland Corp. v. Keating, 465 U.S. 1 (1984) (holding the FAA applicable to states and a conflicting California law in violation of the supremacy clause); Moses H. Cone Mem'l Hosp., 460 U.S. at 24 (applying FAA to state court action). Suits to confirm or vacate U.S. Convention awards under FAA Chapters Two or Three, both of which create federal subject matter jurisdiction, may nevertheless be brought in state court, since federal jurisdiction over such actions is not exclusive.

The same is true for suits to enforce foreign Convention awards under FAA Chapters Two and Three. McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1208 n.12 (5th Cir. 1991) (Congress intended to "grant federal courts concurrent jurisdiction over Convention cases and defendants a right to remove state-filed Convention cases to federal court."); see also LaFarge Coppee v. Venezolana De Cementos, S.A.C.A., 31 F.3d 70, 72-73 (2d Cir. 1994) (denying removal to federal court of a claim involving an agreement governed by the Convention, because the action had already gone to trial in New York state court); In re Amoco Petroleum Additives Co., 964 F.2d 706, 711-13 (7th Cir. 1992) (remanding to state court an action arising under an agreement governed by the Convention).

f. Removal to federal court of state court actions for post-award relief.

(i). Removal of post-award actions in connection with Convention awards. FAA Sections 205 and 302 (incorporating Section 205 by reference) provide, respectively, for removal of actions under FAA Chapters Two and Three from state court to federal court at the defendant's request. All that need be shown to justify removal is that Chapter Two or Three is applicable to the case. (Either applies when "the subject matter of [the] action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention." 9 U.S.C. §§ 205, 302.) See Dale Metals Corp. v. Kiwa Chem. Indus. Co.,, 442 F. Supp. 78, 81 n.1 (S.D.N.Y 1977) ("nothing could be plainer than the language of 9 U.S.C. § 205 . . . [which] provides that in cases involving arbitration agreements, 'the defendants may, at any time before the trial thereof, remove' to federal court."). Sections 205 and 302 provide that removal need not be to the court of the district where the state court is sitting, but may also be to the district court that "embrac[es] the place where the action or proceeding is pending." The defendant may request removal "at any time before the trial thereof." 9 U.S.C. § 205. Thus, the 30-day time limit usually applicable in removal cases (28 U.S.C. § 1446(b)) does not apply to cases involving Convention awards. See Dale Metals Corp., 442 F. Supp. at 81 n.1, supra; Banco De Santander Cent. Hispano, S.A. v. Consalvi Int'l Inc., 425 F. Supp. 2d 421, 426 (S.D.N.Y. 2006) (contrasting removal under Section 205 "at any time before the trial" with the 30 day limit under the general removal provision). The ground for removal must appear in the petition for removal, though it need not appear on the face of the complaint. Banco de Santander, 245 F. Supp at 426 (Section 205 creates a statutory exception to the "well-pleaded complaint rule"). No further removal procedures are provided. Other matters relating to removal are accordingly governed by "[t]he procedure for removal of causes otherwise provided by law." 9 U.S.C. § 205.

The Restatement provides that post-award actions in connection with Convention awards may be brought only under Chapters Two and Three of the FAA, and not under Chapter One. See Section 4-3, supra. This greatly facilitates the removal of such actions from state to federal court. In fact, if the prevailing party were entitled to proceed under FAA Chapter One, and elected to do so, significant removal complications would ensue. The problem arises from the fact that, by definition, actions under FAA Chapter One do not state a federal question claim sufficient to justify removal, primarily since FAA

Chapter One does not itself create federal subject matter jurisdiction. Moreover, federal subject matter jurisdiction is not ordinarily satisfied merely because the plaintiff, who brought the action under state law, might have brought it instead under a different cause of action provided by federal law. Caterpillar, Inc. v. Williams, 482 U.S. 386, 392 (1987) ("presence or absence of federal-question jurisdiction is governed by the 'well-pleaded complaint rule,'" according to which federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint); see also Vaden, 556 U.S. 49 (federal jurisdiction available under a "look through" theory available only if the dispute between the parties as a whole, "as they have framed it," could have originally been brought in federal court). But see Rivet v. Regions Bank, 522 U.S. 470, 475 (1998) (plaintiff may not defeat removal where federal law completely preempts the state law claim asserted).

Although admiralty constitutes a basis of original federal court jurisdiction, independent of diversity and federal question, see Reporters' Note *f* of this Section, removal of such cases from state to federal court is another matter. In Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959), the Supreme Court rejected the idea that admiralty cases are removable to federal court under 28 U.S.C. § 1441 as a federal cause of action. See also U.S. Express Lines. Ltd. v. Higgins, 281 F.3d 383, 390 (3d Cir. 2002). Nor has Congress acted separately to authorize removal of admiralty cases. Accordingly, an action to enforce an admiralty award may not be removed from state to federal court, absent diversity or a cause of action falling with federal question jurisdiction.

There is a case, however, to be made for permitting removal of state law confirmation actions brought under FAA Chapter One, even in the absence of an independent basis of federal subject matter jurisdiction. In the first place, FAA Chapters Two and Three expressly contemplate actions having a direct counterpart in FAA Chapter One—indeed, they use the FAA Chapter One language of "confirmation" rather than the term "enforcement" found in the Conventions themselves. Moreover, the language of FAA Section 205 can be read to support this outcome. That section permits removal "where the subject matter of an action or proceeding pending in a State court relates to an . . . award falling under the Convention." A U.S. Convention award by definition "fall[s] under the Convention," and an FAA Chapter One action in state court does "relate" to it. See CanWest Global Commc'ns v. Mirkaei Tikshoret Ltd., 2006 U.S. Dist LEXIS 63835, at *1, *4 (S.D.N.Y. Sept. 7, 2006) (Chapter One action to confirm U.S. Convention award is removable under 9 U.S.C. § 205).

Admittedly, a textual complication arises from the narrowness of Section 203, which only recognizes federal jurisdiction over "an action or proceeding falling under the Convention." Arguably, a Chapter One confirmation action is not such an action or proceeding, since it falls not "under [a] Convention" but under FAA Chapter One. In other words, removal under Section 205 appears to be tied to the award, while federal jurisdiction under Section 203 appears to be tied to the action, so that the scope of removal may be broader than the scope of the underlying federal jurisdiction. See Ingaseosas Int'l Co. v. Aconcagua Investing Ltd., 2011 U.S. Dist. LEXIS 13064, at *13-*14 (S.D. Fla. Feb. 10, 2011) (analyzing the disagreement among courts as to whether, regarding a motion to vacate, removal jurisdiction under Section 205 is broader than original jurisdiction under Section 203); Compare Banco de Santander Central Hispano, S.A. v. Consalvi Int'l, Inc., 425 F. Supp. 2d 421, 426-434 (S.D.N.Y. 2006) (federal court has jurisdiction under Section 205 over a motion to vacate an arbitral award) with Va. Sur. Co. v. Certain Underwriters at Lloyd's, London, 671 F. Supp. 2d 996, 998-99 (N.D. Ill. 2009) (federal court's jurisdiction under Section 205 is circumscribed by the same boundaries as Section 207, limiting original jurisdiction under Section 203).

However, the apparent tension between Section 203 and 205 is best resolved in favor of Section 205. First, Section 203's jurisdictional language is not necessarily to be interpreted narrowly. While an FAA Chapter One confirmation action is not strictly an action brought under the Convention, Section 203 does not in fact require that the action be "brought under the Convention." It requires only that the action "fall under" the Convention. That is a looser standard, and represents an interpretation to be preferred, as it avoids an inconsistency between Sections 203 and 205 – an inconsistency arising from the peculiarity that an action is subject to removal to federal court when it could not have been brought in federal court in the first place. Second, Section 205, not Section 203, is the provision of the FAA that

specifically addresses removal. Third, Section 205, as a removal statute, is worded far more broadly ("where subject matter . . . relates to . . . ") than other removal statutes, notably the general removal statute, Section 1441, which refers to removal of "any civil action brought in a State court." See Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513 (3d Cir. June 2, 2009) (district court has subject matter jurisdiction under 9 U.S.C. § 203 to determine a removed action that relates to a commercial arbitration agreement within the scope of the Convention in an action to compel arbitration); Beiser v. Weyler, 284 F.3d 665, 669 (5th Cir. 2002) (the "relates to" language of Section 205 is broad enough so that "whenever an arbitration agreement falling under the Convention could conceivably affect the outcome of the plaintiff's case, the agreement 'relates to' the plaintiff's suit"); Caringal v. Karteria Shipping, Ltd., 108 F. Supp. 2d 651, 653 (E.D. La. 2000) (Section 205 is clearly broader than the general removal statute since it only requires that the removed action be "related to" an arbitration agreement or award under the Convention, whereas under Section 1441, the removed case must itself fall under a district court's diversity or federal question jurisdiction).

The decision of the U.S. Supreme Court in Vaden, 556 U.S. 49, does not require a different result. The Court there rejected the idea of "looking through" to the underlying dispute in the arbitration in order to establish federal jurisdiction, if doing so would require the court, in place of looking at the "whole controversy between the parties," to limit itself to discrete aspects or fragments of it. An action to enforce a U.S. Convention award under FAA Chapter Two represents the same "whole controversy" that underlies an action to confirm such an award under FAA Chapter One.

(ii). Removal of post-award actions in connection with non-Convention awards. An action that has been brought in state court to enforce a non-Convention award under FAA Chapter One may not be removed to federal court absent an independent basis for federal subject-matter jurisdiction, such as diversity of citizenship or federal question jurisdiction. If federal jurisdiction is established, removal is governed by the usual procedures applicable to removals from state to federal court.

(iii). Law applicable to post-award actions under the FAA after removal. If an action to confirm, vacate, or enforce a Convention award is brought in state court under FAA Chapters Two or Three, its removal to federal court will of course occasion no change in applicable law.

Matters would become considerably more complicated if such actions could also be brought under FAA Chapter One, which is not the case. See Section 4-3, supra. Because such an action would have been instituted under FAA Chapter One, but removed because the award falls under the applicable Convention, as implemented by Chapter Two or Three, a choice-of-law question arises. It might be argued that, once removed, the action should be governed by the standards of Chapter Two and, more particularly, that the award should be subject to the grounds for denying enforcement set out in the Conventions; the removal after all was justified by the fact that the state court confirmation action could be analogized to an enforcement action under FAA Chapter Two or Three.

On the other hand, the general rule is that removal of an action to federal court does not entail a change in the governing law. At least when a state court action is removed to federal court on diversity grounds, the federal court applies the same law that the state court would have applied had the case remained there. Erie R.R., Co. v. Tompkins, 304 U.S. 64, 78 (1938). Thus, in an action to confirm a domestic FAA award under Chapter One, removal to federal court on diversity grounds would not bring about any change in the applicable law. By this standard, FAA Chapter One and its defenses to confirmation should continue to apply after the action is removed without simultaneous application of defenses under the applicable Convention.

(iv). Law applicable to post-award action actions under state law after removal. It is conceivable that a post-award action might be maintained under state rather than federal law, as the Restatement conditionally permits (see Section 4-3, supra), but still be removable to federal court, for example, by virtue of diversity of citizenship. FAA § 205 authorizes removal of such an action to federal court, before which state law, having been chosen by the plaintiff, would continue to govern.

(v). Waivability of the right of removal. A question has arisen as to whether a right of removal is waivable, and courts have held that it is. However, in a leading case, McDermott Int'l, Inc. , 944 F.2d 1199, the court insisted that any such waiver be express, lest the right of access to the federal courts in Convention cases be too easily forfeited and Convention cases fall too readily to state courts. Id. at 1209-1212. See also Pioneer Natural Resources, U.S.A., Inc. v. Zurich Am. Ins. Co., 2009 U.S. Dist. LEXIS 83413, at *24 (M.D. La. Jan. 6, 2009) ("defendants may . . . waive the removal privilege under Section 205."); Huntsman Corp. v. Int'l Risk Ins. Co., 2008 U.S. Dist. LEXIS 74397, at *71-*72, n.17 (S.D. Tex. Sept. 26, 2008) (citing Beiser v. Wyler, 284 F.3d 665, 672 (5th Cir. 2002) ("[w]aiver of the right to remove under the Convention's removal provision is very strictly construed")). Accord Ario v. Underwriting Members of Syndicate 53 at Lloyds, 618 F.3d 277, 289 (3d Cir. 2010) (citing Suter v. Munich Reinsurance Co., 223 F.3d 150, 158 (3d Cir. 2000)) ("there can be no waiver of a right to remove under the [9 U.S.C. § 205] in the absence of clear and unambiguous language requiring such a waiver."). Compare Ensco Int'l Inc. v. Certain Underwriters at Lloyd's, 579 F.3d 442, 448-49 (5th Cir. 2009) (words "exclusive jurisdiction" in an insurance policy were sufficient to express, clear, and unambiguous to be a waiver of § 205 rights). But see Travelers Ins. Co. v. Keeling, 1993 U.S. Dist. LEXIS 491, at *16 (S.D.N.Y. Jan. 19, 1993), app. dism'd, 996 F.2d 1485 (2d Cir. 1993) (finding in that case that "requiring . . . express waivers of the Convention's removal rights would be ludicrous" because the reinsurance agreements and coverage ended prior to the Convention's existence); Menorah Ins. Co. v. INX Reinsurance Corp., 72 F.3d 218 (1st Cir. 1995) (no basis for removal under 9 U.S.C. § 205 where party waived its right to arbitration by refusing to submit to arbitration and by delaying arbitration to the prejudice of appellee).

g. Authority to recognize. Recognition of an arbitral award by a court entails giving the award preclusive effect as to claims finally determined in the award, see Section 4-9, supra, and potentially also to issues finally determined in the award, see Section 4-10, supra, if a party to the award should seek at a later point in time to relitigate such a claim in a U.S. court, the court does not need independent subject matter jurisdiction in order specifically to recognize the award, i.e., to give the award preclusive effect and preclude relitigation. The court does of course need subject-matter jurisdiction in order to entertain the relitigation action in the first place. The court then is bound to recognize the award unless one of the prescribed grounds for denying recognition is established. See, e.g., Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 590 (7th Cir. 2001) (claims before the court barred by having been previously adjudicated in arbitration where no Convention defenses to recognition are established); Engel v. Refco, Inc., 746 N.Y.S. 2d 826, 832-833, 840-841 (N.Y. Sup. Ct. 2002) (arbitral award conclusive unless ground for vacatur is established).

The Restatement proceeds on the assumption that a party prevailing in an arbitration has no need for a cause of action for the recognition, qua recognition, of the award. Recognition is properly sought on the occasion, and within the framework, of a later action in which a party seeks to relitigate one or more of the claims or issues decided in the arbitration is sought to be relitigated. The situation is slightly different when the losing party brings an action for a declaratory judgment to the effect that the award is not entitled to recognition. The losing party may well have an interest in knowing, in advance of an enforcement action by the prevailing party, that the award is not deserving of recognition or enforcement. However, there is doubt about whether the courts even have subject matter jurisdiction under FAA Chapter Two to entertain an action for purely declaratory relief. Gerling Global Reinsurance Corp. v. Sompo Japan Ins. Co., 348 F. Supp. 2d 102, 105 (S.D.N.Y. 2004) (FAA Section Two does not provide subject-matter jurisdiction for purely declaratory relief even as to an arbitration that the court has jurisdiction to compel or as to an award that it has jurisdiction to enforce).

Even if courts will not maintain an action for purely declaratory relief to the effect that an award is entitled to recognition or enforcement, they may conceivably be asked, conversely, to issue an order enjoining the award's enforcement. See Symetra Life Ins. Co. v. Rapid Settlements, Ltd., 599 F. Supp. 2d 809, 817, 837-838 (S.D. Tex. 2008) (court issued an injunction barring the party that prevailed in an arbitration from confirming the domestic FAA award on the ground that that party had used arbitration to circumvent state-structured settlement protection acts). However, any such action is likely to encounter objections based on the ripeness doctrine. Cf. Yahoo! Inc. v. La Ligue Contre Le Racisme et

L'Antisemitisme, 433 F.3d 1199, 1211-1215 (9th Cir. 2006) (action for a declaration that a French judgment is entitled neither to recognition nor enforcement dismissed as unripe). More importantly, the attempt might even be rejected as a collateral attack on the award itself, which under the New York Convention may only be brought in the place of arbitration. Gulf Petro Trading Co., v. Nigerian Nat'l Petroleum Corp, 512 F.3d 742, 753 (5th Cir. 2008) (action under RICO and state-law theories challenging the conduct of an arbitration dismissed on the ground that the action was an indirect attack on the award and could only have been brought in a court of the place of arbitration).

§ 4-27. Personal Jurisdiction in Post-Award Actions

(a) The adequacy of jurisdiction over the defendant in a post-award action is subject to the generally applicable statutory and constitutional standards governing the exercise of such jurisdiction.

(b) Unless forum law provides otherwise, jurisdiction over the defendant in a post-award action may be based on the presence of the defendant's property within the court's jurisdiction, whether or not the property bears any relationship to the underlying dispute. Whether this exercise of jurisdiction requires the attachment of such property is determined by the forum's rules governing quasi-in-rem jurisdiction. If jurisdiction over the defendant is based solely on the presence of property within the court's jurisdiction, the resulting judgment may be entered only up to the value of that property, or any bond posted in substitution thereof.

Comments:

a. Statutory and constitutional considerations. Any exercise of jurisdiction over the defendant in an action for post-award relief is subject to generally applicable constitutional and statutory standards.

b. Consent to jurisdiction. Consent ordinarily satisfies both constitutional and statutory standards for the exercise of personal jurisdiction. Parties commonly signify their consent to judicial jurisdiction through a contractual forum selection clause.

They are generally free in their designation of a forum for post-award relief, and their designation is presumptively binding. See Comment *c* to Section 4-16, supra.

c. Quasi-in-rem jurisdiction. Confirmation and vacatur of U.S. Convention awards are ordinarily the exclusive prerogative of the courts of the arbitral situs. See Section 4-16, supra. Since the parties in principle will have consented to arbitration at that situs, personal jurisdiction over them in that forum is generally not an issue. However, in some circumstances, quasi-in-rem jurisdiction may be the only available basis of personal jurisdiction in an action to enforce a foreign Convention award. In principle, quasi-in-rem jurisdiction is an adequate jurisdictional basis for the enforcement of such awards. While the property upon which jurisdiction is based in such a case need bear no relationship to the underlying dispute, the value of the resulting judgment cannot exceed the value of the property in question, or of any bond posted in substitution for it. Whether the property serving as the basis for the exercise of quasi-in-rem jurisdiction must be attached is determined by the forum's rules governing the exercise of quasi-in-rem jurisdiction.

REPORTERS' NOTES

a. Statutory and constitutional considerations. A post-award action requires personal jurisdiction over the defendant as measured by applicable statutory and constitutional standards governing a U.S. court's exercise of personal jurisdiction. The plaintiff may invoke whatever statutory bases of jurisdiction the chosen forum allows (be it in personam, in rem, or quasi-in-rem), provided their use under the circumstances also comports with due process standards. See Reporters' Note f.

(i). Personal jurisdiction under the Federal Rules. Personal jurisdiction in post-award actions in federal court is generally subject to Rule 81 of the Federal Rules of Civil Procedure, which in turn points to the general federal rules on personal jurisdiction found in Rule 4, including the relevant state or federal long-arm statutes, subject of course to the constraints of due process. Defendants in such actions may raise a defense based on the absence of personal jurisdiction. See, e.g., Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 47 F. App'x 73, 75-77 (3d Cir. 2002); Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1126-1127 (9th Cir. 2002); Base Metal

Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208, 215-216 (4th Cir. 2002); Opal Finance Ltd. v. Agrenco Madeira Comercio Internacional, LDA, 2010 WL 476711, 1 (S.D.N.Y. 2010) (the mere fact of a Convention award rendered against a party does not confer personal jurisdiction over that party). For further discussion, see Gary B. Born, International Commercial Arbitration: Commentary and Materials 884, 885-886 (2d ed. 2001).

Since an actions for post-award relief in connection with a Convention award constitutes a federal cause of action, a court may, in proper circumstances, base jurisdiction over the defendant on an aggregation of state contacts as permitted by Rule 4(k)(2) of the Federal Rules of Civil Procedure.

(ii). Due process requirements for personal jurisdiction. Actions to confirm or vacate U.S. Convention awards are also subject to general constitutional due process requirements under the Fifth and Fourteenth Amendments, along the lines articulated in Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945). Absent consent, an exercise of jurisdiction will not satisfy due process standards if minimum contacts between the defendant and the forum are lacking or if the exercise is otherwise unfair or unreasonable. Glencore Grain Rotterdam B.V., 284 F.3d 1114, 1122 (9th Cir. 2002) (in a suit for enforcement "[s]ome basis must be shown, whether arising from the respondent's residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power," quoting Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S. A., 622 F. Supp. 25, 27 (S.D.N.Y. 1985)). In determining whether the requirement of minimum contacts is met, account is not taken only of the arbitration but also of the underlying transaction. Sole Resort, S.A. de C.V. v. Allure Resorts Mgmt., LLC, 450 F.3d 100 (2d Cir. 2006) (contacts underlying the contract providing for arbitration have the requisite relationship even though the arbitration had its seat elsewhere).

(iii). Notice and service of process. Neither Chapter Two nor Chapter Three of the FAA contains provisions on service of process. Pursuant to FAA §§ 208 and 302, respectively, reference is made back to 9 U.S.C. § 9, which, however, provides little guidance. Proceeding pragmatically, courts treat §§ 208 and 302 as incorporating Rule 4 of the Federal Rules of Civil Procedure. See, e.g., Scandinavian Reinsurance. Co. v. St. Paul Fire & Marine Ins. Co., No. 09-9531, 2010 U.S. Dist. LEXIS 15952, at *26 (S.D.N.Y. Feb. 23, 2010); Marine Trading Ltd. v. Naviera Commercial Naylamp S.A., 879 F. Supp. 389, 392 (S.D.N.Y. 1995); Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1277 (2d Cir. 1971).

Section 9 of the FAA specifically addresses notice and service of process in confirmation actions as follows:

> Notice of the application [for confirmation of the award] 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.

Some courts have held that Section 9 only authorizes service within a judicial district of the United States. See Marine Trading Ltd. v. Naviera Commercial Naylamp S.A., 879 F. Supp. 389, 391 (S.D.N.Y. 1995) (finding however that while Section 9 itself only authorizes service in the United States, foreign parties to an arbitration agreement subject to the Convention contemplated jurisdiction in New York and waived any objection to extraterritorial service); Kirby Morgan Dive Sys., supra. Under this view, Section 9 would be unavailable for obtaining jurisdiction over a foreign defendant. However, other courts read of Section 9's service requirement as permitting any manner of service consistent with Rule 4 of the Federal Rules of Civil Procedure. Reed & Martin, Inc. v. Westinghouse Electric Corp., 439 F.2d 1268, 1277 (2d Cir. 1971) ("The phrase 'in like manner as other process of the court' found in § 9 of the Arbitration Act refers to Fed. R. Civ. P. 4 on the accomplishment of appropriate service…."). Under this view, Section 9 authorizes the exercise of jurisdiction over a defendant located in a foreign country,

provided the defendant has been properly served pursuant to Rule 4(f) of the Federal Rules of Civil Procedure. The Restatement does not take a position on this particular issue.

A number of courts have questioned the exclusivity of this provision. In Hancor, Inc. v. R&R Eng'g Prods., 381 F. Supp. 2d 12, 15 (D.P.R. 2005), for example, the defendant challenged the adequacy of service inasmuch as it was not performed by a U.S. marshal, as provided in FAA Section 9. Quoting Intercarbon Bermuda, Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 67 n.3 (S.D.N.Y. 1993) (quoting in turn from *Changes in Federal Summons Service Under Amended Rule 4 of the Federal Rules of Civil Procedure*, 96 F.R.D. 81, 94 (1983)), the court stated:

> Section [9] is an anachronism not only because it cannot account for the internationalization of arbitration law subsequent to its enactment, but also because it cannot account for the subsequent abandonment of the United States marshals as routine process servers . . . The 'ostensibly principal purpose' of the amendments [to the Federal Rules of Civil Procedure] was to 'take the marshals out of summons service almost entirely.' In these circumstances, Section [9] cannot be taken as the proper standard for service of process.

Essentially, the court interpreted the Section 9 language "in like manner as other process of the court" as referring to Rule 4 of the Federal Rules of Civil Procedure and the various means it provides for accomplishing service. Of course, due process also requires that service be "reasonably calculated to apprise [respondent] of the suit." Int'l Shoe Co. v. Washington, 326 U.S. 310, 320 (1945).

Service in actions to vacate an award is governed by FAA Section 12:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney. . . If the adverse party is a resident of the district within which the award was made, such service shall be made. . . 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.

There is no reason to suppose that FAA Section 12 enjoys any greater exclusivity for service in vacatur actions than Section 9 enjoys for service in confirmation actions. See P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 25 n.2 (1st Cir. 2005) (FAA requires service on nonresidents in a vacatur action "in like manner as other process of the court," notably as provided in Rule 4 of the Federal Rules of Civil Procedure). Rule 4's full panoply of means of service should again be available.

The same principles govern service of process in confirmation or vacatur actions brought under FAA Chapters Two or Three. As a general matter, FAA Sections 208 and 307 make the provisions of Chapter One applicable in actions under FAA Chapters Two and Three, provided they are not in conflict with those chapters. Sections 9 and 12 are not in conflict with FAA Chapters Two or Three, as the latter are silent on service of process.

(iv). Jurisdictional discovery. Faced with a motion to dismiss for lack of personal jurisdiction, a plaintiff may seek discovery for purposes of establishing the same. See Lehigh Valley Indus., Inc. v. Birenbaum, 527 F.2d 87, 94 (2d Cir. 1975). A court has "considerable procedural leeway" in determining whether to allow jurisdictional discovery, ordinarily doing so only when the plaintiff can demonstrate a prima facie case for jurisdiction. See Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981). Otherwise, the court is entitled to deny jurisdictional discovery and decide the motion to dismiss on the pleadings. In Cargnani v. Pewag Austria G.m.b.H., No.05-0133, 2007 U.S. Dist. LEXIS 8210 (E.D. Cal. Feb. 2, 2007), for example, the court considered plaintiff's claim of jurisdiction to be "based on mere assertion" and unlikely to be illuminated through discovery. Id. at *36; see also Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic, 582 F.3d 393, 402 (2d Cir. 2009); Best Van Lines, Inc. v. Walker, 490 F.3d 239, 255 (2d Cir. 2007); Jazini v. Nissan Motor Co., 148 F.3d 181, 186 (2d Cir. 1998). A

denial of jurisdictional discovery is reviewable on an abuse-of-discretion standard. In Base Metal Trading Ltd. v. OISC "Novokuznetsky Aluminum Factory," 283 F.3d 208, 216 (4th Cir. 2002), the court saw no reason to overturn the district court's conclusion that, in requesting jurisdictional discovery, the plaintiff was conducting a "fishing expedition." See also Frontera Res. Azerbaijan, 582 F.3d at 401; Budde v. Ling-Temco-Vought, Inc., 511 F.2d 1033, 1035 (10th Cir. 1975).

b. Consent to jurisdiction. Statutory personal jurisdiction is commonly satisfied by virtue of the defendant's consent to be sued. Consent is express if the parties explicitly agreed on a forum for confirmation or enforcement of an award. See D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 100 (2d Cir. 2006) (investors executed agreements consenting to jurisdiction in the state of New York for the purpose of enforcing an arbitral award); Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co., No. 09-9531, 2010 U.S. Dist. LEXIS 15952, at *32 (S.D.N.Y. Feb. 23, 2010) (court enjoys personal jurisdiction in vacatur action due to the parties' having agreed to arbitrate in that jurisdiction and having accepted that the resulting award could be enforced there); Marine Trading Ltd. v. Navarra Commercial Nay lamp S.A., 879 F. Supp. 389 (S.D.N.Y. 1995) (by signing agreement providing that parties would resolve disputes by arbitration in New York and for court enforcement of the award, party consented to personal jurisdiction in New York); see also Reed & Martin, Inc. v. Westinghouse Elec. Corp., 439 F.2d 1268, 1276-77 (2d. Cir. 1971) (parties manifested consent to jurisdiction by agreeing that judgment on the award may be entered in any court of competent jurisdiction); Dominium Austin Partners, L.L.C. v. Emerson, 248 F.3d 720 (8th Cir. 2001) (forum selection clause providing that all arbitration hearings would be held in Minnesota constituted consent to personal jurisdiction to compel arbitration in Minnesota). Consent to the jurisdiction of a court may be given either before or after a dispute has arisen. Obviously, a party that has consented to the jurisdiction of a court for confirmation purposes cannot defeat that court's exercise of jurisdiction merely by having failed to appear in the arbitration. Kirby Morgan Dive Sys. v. Hydrospace, 2010 U.S. Dist. LEXIS 9657 (C.D. Cal. Jan. 13, 2010) (finding that a party's refusal to participate in the arbitration does not impair the Court's authority to enforce the award against him).

Courts have also found implied consent to jurisdiction in confirmation actions in a broad range of circumstances. Thus, they have inferred from the parties' express selection of a court for an action to confirm an award their consent to the jurisdiction of that same court for an action to vacate the award. See D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 103-04 (2d Cir. 2006) ("it is irrational to consent to jurisdiction in a court for purposes of confirming an award but not for purposes of vacating all or part of it"). They have predicated implied consent to jurisdiction in the place of arbitration on the arbitration agreement's providing that the award shall be final and binding. See Kallen v. Dist. 1199, 574 F.2d 723 (2d Cir. 1978) (finding federal jurisdiction to confirm award despite absence of any express agreement between the parties). Implied consent to jurisdiction in actions to confirm an award has also been found in the parties' adoption of institutional rules that themselves presume consent to jurisdiction. See Weststar Assoc., Inc. v. Tin Metals Co., 752 F.2d 5, 7 (1st Cir. Mass. 1985) ("Tin consented to the jurisdiction of the district court by agreeing to settle any disputes arising out of the contract according to the AAA Rules, which, … provide that a party shall be deemed to have consented to the enforcement of the award in any state or federal court having jurisdiction thereof…."); Le Jacq Pub. Inc. v. American Soc'y of Contemporary Medicine, etc., 1989 U.S. Dist. LEXIS 3706 (S.D.N.Y. Apr. 5, 1989) (inferring defendant's consent to jurisdiction from its agreement to settle any disputes arising out of the contract according to the AAA Rules).

Even the mere agreement to arbitrate in a given jurisdiction, without a separate submission to the courts of the jurisdiction in an action to confirm or enforce the award, constitutes in itself a sufficient basis for the exercise of personal jurisdiction. Victory Transp. Inc. v. Comisaria Transportes, 336 F.2d 354, 364 (2d Cir. 1964) ("[i]mplicit in the agreement to arbitrate is consent to enforcement of the agreement."). By the same token, the courts of the place selected by the parties as the place of arbitration have jurisdiction to compel arbitration. Doctor's Assocs., Inc. v. Stuart, 85 F.3d 975, 979 (2d Cir. 1996) (unless court of state where parties agreed to arbitrate has jurisdiction to compel arbitration, the agreement to arbitrate would be a nullity).

A U.S. court does not acquire statutory personal jurisdiction over a party to an arbitral proceeding merely because the arbitration was conducted on the territory of a State party to a convention to which the United States is also a party. Of course, a court remains free to predicate jurisdiction on consent where the parties entered into an agreement selecting that court as a forum for the enforcement of an award. D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 104 (2d Cir. 2006); see also Suter v. Munich Reinsurance Co., 223 F.3d 150, 156 (3d Cir. 2000) ("[B]oth the forum selection clause and the arbitration provision could be given effect: because arbitration awards are not self-enforcing, the forum selection clause could be read as dictating 'the location of any action to enforce the award.'") (quoting Patten Sec. Corp. v. Diamond Greyhound & Genetics, Inc., 819 F.2d 400, 407 (3d Cir. 1987)).

c. Quasi-in-rem jurisdiction. Actions to confirm or vacate U.S. Convention awards are commonly brought in a court of the place of arbitration. By virtue of the parties' having selected the arbitral situs, courts of the situs will almost invariably enjoy personal jurisdiction over the defendant. As a result, parties do not often have recourse to quasi-in-rem jurisdiction in confirmation or vacatur actions.

By contrast, quasi-in-rem jurisdiction may prove very useful in actions to enforce an award outside of the arbitral situs, since the place where assets of the award debtor are found may not otherwise have an adequate basis for an exercise of jurisdiction to enforce an award.

The exercise of quasi-in-rem jurisdiction in federal court is governed by Federal Rule of Civil Procedure 4(n)(2), which effectively borrows the law of the state where the federal court sits, subject of course to dictates of due process. (On the general interplay between state quasi-in-rem jurisdiction law and due process considerations, see Intermeat, Inc. v. Am. Poultry Inc., 575 F.2d 1017, 1022 (2d Cir. 1978)).

There is no reason in principle why the presence of property belonging to the defendant should not establish an adequate basis for the exercise of quasi-in-rem jurisdiction in actions to confirm or enforce an award. The Supreme Court suggested in footnote 36 to its decision in Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977), that a court's exercise of quasi-in-rem jurisdiction unsupported by minimum contacts would not offend due process if the only purpose of the litigation is to enforce a liability imposed by an adjudicatory body that itself had proper jurisdiction to hear the underlying claim. The Court there held that:

> [o]nce it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter. Id.

In making this observation, the Court was contemplating the enforcement of foreign country judgments rather than foreign arbitral awards, but its rationale would apply equally well to the latter. See International Commercial Disputes Committee of the Association of the Bar of the City of New York, Lack of Jurisdiction and Forum non conveniens as Defenses to the Enforcement of Foreign Arbitral Awards, 15 Am. Rev. Int'l Arb. 407, 417-418 (2004); Aristides Diaz-Pedrosa, Shaffer's Footnote 36, 109 W. Va. L. Rev. 17, 37-40 (2006).

However, the courts of appeals are not fully in agreement over the availability of quasi-in-rem jurisdiction for purposes of enforcing arbitral awards. The Fourth Circuit found that the "mere presence of seized property in Maryland provides no basis for asserting jurisdiction when there is no relationship between the property and the action." Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory", 283 F.3d 208, 211 (4th Cir. 2002). On the other hand, the Ninth Circuit considered an exercise of quasi-in-rem jurisdiction over a defendant's assets to be constitutionally adequate, even where the property bore no relation to the underlying dispute, provided the plaintiff was able to identify the assets and demonstrate that they belong to the defendant. Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1127 (9th Cir. 2002); see also Cargnani v. Pewag Austria G.m.b.H., No. 05-0133, 2007 U.S. Dist. LEXIS 8210, at *33-34 (E.D. Cal. Feb. 5, 2007).

In principle, quasi-in-rem jurisdiction can only support a claim up to the value of the property on the presence of which personal jurisdiction is based. See CME Media Enters. B.V. v. Zelezny, No. 01-1733, 2001 U.S. Dist. LEXIS 13888, at *11, *15-16 (S.D.N.Y. Sept. 10, 2001) (in an action to enforce a foreign award, the court determined that it could confirm the award only to the extent there were assets in the jurisdiction); Freeman v. Alderson, 119 U.S. 185, 188 (1886) (court cannot determine the validity of any demand beyond that which is satisfied by the property). For further discussion, see Born, supra, at 2400-2403 (2009); Harold L. Korn, The Development of Judicial Jurisdiction in the United States: Part I, 65 Brook. L. Rev. 935, 951 (1999); Suzanne T. Marquard, Quasi in Rem on the Heels of Shaffer v. Heitner: If International Shoe Fits . . ., 46 Fordham L. Rev. 459 (1977). This is also the rule in a number of states. See 3 Wis. Prac., Civil Procedure § 104.4 (4th ed.); Martin v. Wheatley, 62 F. Supp. 104 (W.D. Ark. 1945). For a limited departure from this rule in admiralty cases, see Central Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 364 (2d Cir. 1995), holding that in an in rem action based upon the attachment of a vessel, the judgment rendered may, by way of exception to the general rule governing in rem actions, exceed the value of the ship.

Moreover, in some jurisdictions, once property within the court's jurisdiction has been attached, the defendant must post bond in order to obtain its release. In that event, the property will ordinarily be valued at that time and in the amount of the bond. See Pennoyer v. Neff, 95 U.S. 714, 720 (1877); 7A Moore's Fed. Prac. P. E.16[2] at E-779 (2d ed. 1995) ("an *in rem* action is an action against the arrested *res* itself and any judgment is thus limited to the value thereof or the value of the bond or stipulation substituted for the *res* to obtain its release.").

A number of jurisdictions appear to provide for the possibility of subsequent attachments after quasi-in-rem jurisdiction has been established by the initial seizure of property. See Vt. R. Civ. P. 4.1 & Comm.; Me. R. Civ. P. 4A(f) & Comm. (subsequent attachment allowed on showing that property already attached is insufficient to satisfy a judgment). In this way, the value of the attached property is effectively increased, as is the upper limit on the value of an eventual judgment. In Rorick v. Devon Syndicate, 307 U.S. 299 (1939), the Supreme Court ruled that a federal court could make additional attachments after removal of an action from state to federal court, if state procedural law so allowed.

Quasi-in-rem jurisdiction can operate as a serious trap for the unwary. In some jurisdictions, a party subjects itself to a court's in personam jurisdiction merely by appearing personally to defend a quasi-in-rem action on the merits. In that event, the court's jurisdiction expands to the outer limit of personal jurisdiction. See United States v. Balanovski, 236 F.2d 298 (2d Cir. 1956); 4B Fed. Prac. & Proc. Civ. § 1122 (3d ed.) ("If the defendant makes a general appearance in a quasi-in-rem action or attempts to make a limited appearance but it is not allowed to do so, he subjects himself to a personal judgment for the entire amount of the plaintiff's claim.").

The notion of property belonging to the defendant, for quasi-in-rem jurisdiction purposes, is expansive. It comprises intangible as well as tangible property, including debts owed by third parties to the losing party. Quasi-in-rem jurisdiction will be available at the place determined by law to be the situs of the debt. See IFC Interconsult, AG v. Safeguard Int'l Partners, LLC, 438 F.3d 298, 304, 320 (3d Cir. 2006) (prevailing party may garnish funds contractually owed to the award debtor by a third party to satisfy arbitral award). However, in order to garnish a third-party debt, the award creditor must establish in personam jurisdiction over the garnishee. FG Hemisphere Assocs., LLC v. République du Congo, 455 F.3d 575, 585 (5th Cir. 2006) (citing *In re* T.B. Westex Foods, Inc. v. FDIC, 950 F.2d 1187, 1192 n.7 (5th Cir. 1992)) ("a garnishment proceeding 'is operative *in personam* against the garnishee to prevent him from paying the debt to the garnishment debtor and is operative *in rem* upon the property of the defendant debtor in the hands of the garnishee.'").

Some state and federal courts require attachment of the property before allowing a plaintiff to proceed on a claim based on quasi-in-rem jurisdiction, a rule that stems from the Supreme Court decision in Pennoyer v. Neff, 95 U.S. 714 (1878). See Land, Air & Sea Transp. v. El Nasr Mining Co., No. 06-13482, 2008 U.S. Dist. LEXIS 20052, at *5 (S.D.N.Y. Mar. 4, 2008); Cargnani v. Pewag Austria G.m.b.H.,

No. 05-0133, 2007 U.S. Dist. LEXIS 8210, at *35 (E.D. Cal. Feb. 2, 2007); see also Linda J. Silberman, Shaffer v. Heitner: The End of an Era, 53 N.Y.U. L. Rev. 33, 45-47 (1978). However, in actions to enforce a foreign award, federal courts have commonly resisted borrowing that approach, allowing claims based on quasi-in-rem jurisdiction to proceed without prior attachment of the property. Thus, the exercise of quasi-in-rem jurisdiction ordinarily requires the identification of assets within the territory of the court's jurisdiction, but not attachment of those assets. Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic, 479 F. Supp. 2d 376, 387-388 (S.D.N.Y. 2007) ("[Q]uasi in rem jurisdiction may be exercised to attach property to collect a debt based on a claim already adjudicated in a forum where there was personal jurisdiction over the defendant"); see also Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1054 (N.D. Cal. 1977). The Restatement takes the position that there is no warrant for establishing special rules on the establishment of quasi-in-rem jurisdiction in actions to enforce international arbitral awards. The necessity of attachment in order to perfect quasi-in-rem jurisdiction therefore depends on the rules generally applicable within the forum for the establishment of quasi-in-rem jurisdiction. Likewise governed by forum law are such questions as whether and, if so, how property coming into the jurisdiction following issuance of a quasi-in-rem judgment becomes available for satisfaction of the judgment beyond the value of the property upon which quasi-in-rem jurisdiction was initially based.

By definition, quasi-in-rem jurisdiction is based on the presence of at least some assets within the jurisdiction. The question has arisen as to whether and, if so, under what circumstances a court may order a party that is subject to its jurisdiction to transfer assets into the jurisdiction from elsewhere so that those assets may be deemed present, and possibly attached, for purposes of establishing quasi-in-rem jurisdiction. If the court has sufficient personal jurisdiction over a defendant to issue such a "turnover" or "delivery" order, the plaintiff will not ordinarily have need for it since in personam jurisdiction already exists. But repatriation can be especially useful where the property on the basis of which quasi-in-rem jurisdiction would be established is a debt owed to the absent defendant by a third party who is within the court's jurisdiction. A recent example is Koehler v. Bank of Bermuda, Ltd., 12 N.Y.3d 533, 911 N.E.2d 825, 883 N.Y.S.2d 763 (Ct. App. NY 2009) (bank over which court has personal jurisdiction may be ordered to deliver to court out-of-state stock certificates owned by defendant judgment debtor, or their cash equivalent). Conceivably, a court could issue such an order even when assets of the defendants are already found within the jurisdiction, in order to increase the value of property located within the jurisdiction and thereby also increase the value of any resulting judgment based on the exercise of quasi-in-rem jurisdiction. On the availability of orders to repatriate property for quasi-in-rem jurisdiction purposes, the Restatement likewise borrows the relevant forum law.

§ 4-28. Sovereign Immunity and Act of State in Post-Award Actions

(a) A post-award action against a foreign State or an agency or instrumentality of a foreign State is not subject, either in state or federal court, to a defense of sovereign immunity as to any claim to which an exception to immunity under the Foreign Sovereign Immunities Act applies.

(b) Execution against property of a foreign State or an agency or instrumentality of a foreign State in an action to confirm a U.S. Convention award or enforce a foreign award is proper to the extent that the property against which execution is sought is not protected from execution under the Foreign Sovereign Immunities Act.

(c) The relief sought in a post-award action may not be refused on the basis of the Act of State doctrine.

Comments:

a. Foreign sovereign immunity from suit. The availability of a sovereign immunity defense to an action for post-award relief in state or federal court is governed by the Foreign Sovereign Immunities Act of 1976 ("FSIA"), as amended. A foreign State, or agency or instrumentality thereof, is presumptively immune from suit in state and federal court, and an action may proceed against such a defendant only to the extent that one or more of the FSIA's statutory exceptions to immunity apply and the exercise of jurisdiction comports with any applicable requirements of constitutional due process. To the extent that the foreign State, agency, or

instrumentality is not immune, the FSIA expressly confers original subject matter jurisdiction upon federal courts, as well as personal jurisdiction over the defendant.

Currently the FSIA's arbitration exception to immunity (28 U.S.C. § 1610 (a)(6)) renders a foreign State, or its agency or instrumentality not immune to an action for post-award relief by virtue of having agreed to arbitrate. This statutory exception specifically contemplates actions to confirm U.S. Convention awards and actions to enforce foreign Convention awards. The FSIA does not specifically mention vacatur as among the actions to which the arbitration exception applies. But, given the extremely close affinity between confirmation and vacatur and the fact that, through cross-motions, both are often sought in the same case, the exception should be read as covering both actions to vacate and to confirm. The arbitration exception by its terms requires a nexus between the arbitration, the arbitration agreement, or the underlying dispute, on the one hand, and the United States, on the other.

Even prior to the amendment introducing the arbitration exception, sovereign immunity could often be overcome on the basis of the FSIA's commercial activity or waiver exceptions. Those exceptions would ordinarily apply to vacatur actions, even if, contrary to the Restatement position, the arbitration exception did not.

b. Foreign sovereign immunity from execution. The FSIA contains separate provisions concerning sovereign immunity from execution upon judgments and from pre-judgment attachments as security for satisfaction of an eventual judgment. Even if it enjoys no immunity from suit, a foreign State, like its agencies or instrumentalities,

will enjoy immunity from execution upon its property unless one or more of the FSIA's statutory exceptions to immunity from execution is also established. Ordinarily, the FSIA's arbitration exception to immunity from attachment will come into play. However, the FSIA also renders certain types of property — including diplomatic and military property, as well as money held by a foreign central bank for its own account —categorically immune from execution.

While immunity from execution may be a factor in actions to confirm a U.S. Convention award or to enforce a foreign Convention award, it is irrelevant to vacatur actions, since such actions, even if successful, do not require execution.

c. *The Act of State doctrine.* Section 15 of the FAA specifically excludes application of the common-law doctrine of Act of State in actions to confirm a U.S. Convention award. Such an exclusion would also presumably apply to an action to vacate. Because enforcement of non-Convention awards is governed by FAA Chapter One (see Section 4-3, supra), the exclusion applies to them as well.

Though Section 15 is found in FAA Chapter One, it is equally applicable to awards governed by FAA Chapters Two and Three through incorporation by FAA Sections 208 and 307.

REPORTERS' NOTES

a. Foreign sovereign immunity from suit. The standards for determining the immunity from suit of sovereign defendants in post-award actions are no different than in any other lawsuit. See, e.g., U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., 241 F.3d 135, 151-153 (2d Cir. 2001); Mar. Int'l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1105 n.18 (D.C. Cir. 1982). Under the FSIA generally, unless one or more exceptions to sovereign immunity is established, a court, whether

state or federal, lacks both subject matter jurisdiction and personal jurisdiction in an action against a State or its agency or instrumentality. See 28 U.S.C. § 1330(a) (subject matter jurisdiction); id. § 1330(b) (personal jurisdiction); see also Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 485 n.5 (1983); Cargill Int'l. S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1016-1018 (2d Cir. 1993); Birch Shipping Corp. v. Embassy of United Republic of Tanz., 507 F. Supp. 311, 312 (D.D.C. 1980). The FAA itself does not establish federal question subject matter jurisdiction. See, e.g., Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 611 (1992) ("FSIA …. provides the 'sole basis' for obtaining jurisdiction over a foreign sovereign in the United States."); Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 367 (S.D.N.Y. 2005) (FSIA is exclusive basis of subject-matter jurisdiction over a sovereign in actions governed by the FAA). Under the FSIA, foreign States and their instrumentalities enjoy immunity from suit in U.S. courts, unless and only to the extent that one or more of the FSIA's statutory exceptions to immunity is present. See, e.g., Saudi Arabia v. Nelson, 507 U.S. 349, 351 (1993); Republic of Arg., 504 U.S. at 610-611; Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 87 (D.C. Cir. 2002). For general discussion of the FSIA and sovereign immunity in U.S. courts, see Gary B. Born & Peter B. Rutledge, International Civil Litigation in U.S. Courts 219-344 (2007).

While foreign sovereigns and foreign sovereign entities are presumptively immune from jurisdiction in a U.S. court, whether state or federal, the FSIA provides a number of specific exceptions to this general principle. The legislative history reveals that Congress intended the FSIA's implicit waiver exception in 28 U.S.C. § 1605(a)(1) to embrace agreements to arbitrate. See H.R. Rep. 94-1487 at 18 (1976) ("With respect to implicit waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract").

(i). Subject matter jurisdiction in post-award actions against a foreign sovereign. Prior to the FSIA amendment that introduced the so-called "arbitration exception," the most commonly invoked exceptions to immunity in the arbitration setting were the implied waiver and the commercial activity exceptions (28 U.S.C. §§ 1605(a)(1), 1605(a)(2)), each of which has special requirements. The waiver exception was especially prevalent. See, e.g., M.B.L. Int'l Contractors, Inc. v. Republic of Trin. & Tobago, 725 F. Supp. 52, 54 (D.D.C. 1989); Verlinden B.V. v. Cent. Bank of Nig., 488 F. Supp. 1284, 1300 (S.D.N.Y. 1980) (aff'd, 647 F.2d 320) (rev'd on other grounds, 461 U.S. 480 (1983)); Ipitrade Int'l S.A. v. Fed. Republic of Nig., 465 F. Supp. 824, 826 (D.D.C. 1978). For general discussion of the FSIA and the waiver exception in the arbitration context, see Born & Rutledge, supra at 330-331.

The 1988 amendments to the FSIA sought to deal with confirmation and enforcement of arbitral awards more specifically, granting the federal courts subject matter jurisdiction to confirm or enforce an award against a foreign State, or its agency or instrumentality made pursuant to an agreement to arbitrate, provided the arbitration takes place in the United States, is governed by an international treaty (such as the New York or Panama Conventions), or addresses a claim that could otherwise have been brought in court under the FSIA itself. This grant of subject matter jurisdiction is accompanied by a deprivation of sovereign immunity against such actions. 28 U.S.C §§ 1605(a)(6)(A) & (B). See, e.g., TMR Energy, Ltd. v. State Prop. Fund of Ukraine, 411 F.3d 296, 299 (D.C. Cir. 2005); Creighton Ltd. v. Gov't of Qatar, 181 F.3d 118, 121 (D.C. Cir. 1999); Cargill Int'l S.A., 991 F.2d 1012, 1017 (2d Cir. 1993); Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co. v. Navimpex Centrala Navala, 989 F.2d 572, 578 (2d Cir. 1993). The New York and Panama Conventions are "exactly the sort of treat[ies] Congress intended to include in the arbitration exception." Cargill, 991 F.2d at 1018.

Convention awards made in the U.S. by definition satisfy the proviso. See Int'l Insurance Co. v. Caja Nacional de Ahorro y Seguro, 293 F.3d 392, 397 (7th Cir. 2002); In re Arbitration Between: Trans Chem. Ltd. and China Nat'l Mach. Imp. and Exp. Corp., 978 F. Supp. 266, 291 (S.D.Tex.1997) (aff'd, 161 F.3d 314 (5th Cir.1998)); Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 230 F. Supp. 2d 362, 367 (S.D.N.Y. 2002).

Within the arbitration exception, § 1605(a)(6)(C) provides a further avenue to establishing subject matter jurisdiction and overcoming the presumption of immunity. The defendant entity lacks

immunity against an action to enforce an international arbitral award if "the underlying claim, save for the agreement to arbitrate, could have been brought in a U.S. court under this section or section 1607." This provision ensures that if a U.S. court would have had subject matter jurisdiction to adjudicate the claim or counterclaim decided by the arbitral tribunal, then immunity is unavailable to the entity in an action to confirm or enforce the arbitral award. See Agrocomplect, AD v. Republic of Iraq, 524 F. Supp. 2d 16, 23 n.9 (D.D.C. 2007) (raising § 1605(a)(6)(c) as an alternative ground for non-immunity).

Although § 1605 (a)(6) refers specifically to confirmation, it plainly covers enforcement as well. Even in enacting FAA Chapters Two and Three, Congress used the term "confirm" to denote not only actions to confirm U.S. Convention awards, but also actions to enforce foreign Convention awards, almost as if the terms confirmation and enforcement were interchangeable.

While the FSIA's arbitration exception specifically addresses jurisdiction in actions to confirm and, by analogy, to enforce international arbitral awards against foreign States and their agencies or instrument, it does not mention actions to vacate. HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122, 1127 n.7 (C.D. Cal. 1999). It is true that if a foreign State initiates an action to confirm an award in its favor against a private party, the latter would be allowed to seek vacatur of the award under the FSIA's counterclaim exception. However, the State may choose not to seek confirmation action, as it has no obligation to do so. It is doubtful that Congress meant to allow a private party to defeat confirmation of an award in favor of a foreign sovereign, but to disallow it from having the award, for the very same reason, vacated. Moreover, Congress would have had no reason to shelter from vacatur arbitral awards in favor of foreign States (particularly from vacatur actions brought by U.S, nationals), while exposing to vacatur arbitral awards rendered in favor of private parties (particularly U.S. nationals) and against foreign States.

Even if the arbitration exception to sovereign immunity were unavailable in vacatur actions against foreign States, those States would almost invariably be subject to the waiver and/or commercial act exceptions to sovereign immunity. An agreement to arbitrate will readily be read as implying consent to appear in an action arising out of the award. See Matter of the Arbitration Between: Trans Chem. Ltd. & China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 291, n.119 (S.D. Tex.1997) (aff'd sub nom. Trans Chem. Ltd. v. China Nat. Mach. Imp. and Exp. Corp., 161 F.3d 314 (5th Cir. 1998) (foreign State impliedly waives sovereign immunity by contracting to arbitrate in the U.S)); Autotech Techs. LP v. Integral Research & Dev. Corp., 499 F.3d 737, 740 (7th Cir. 2007) (in an appeal from a contempt judgment, the state instrumentality waived its sovereign immunity by agreeing in its original contract to arbitrate in the United States and subjecting the contract to Illinois law); Calzadilla v. Banco Latino Internacional, 413 F.3d 1285, 1287 (11th Cir. 2005) (applying the FSIA in a tort context but observing that an agreement to arbitrate in the United States is a traditional example of an implied waiver of immunity); In re Rep. of Phil., 309 F.3d 1143 (9th Cir. 2002) (citing to Joseph v. Consulate General of Nig., 830 F.2d 1018, 1022 (9th Cir. 1987), which interpreted the FSIA in an action to recover property and similarly noting the historical interpretation of arbitration agreement as implied waiver); Rodriguez v. Transnave Inc., 8 F.3d 284, 287 (5th Cir. 1993) (analyzing a claim of implied waiver in a Jones Act personal injury case and again noting an arbitration agreement to be an initial justification for implied wavier).

The implied waiver and commercial activity exceptions may be useful, as alternatives to 28 U.S.C. § 1605(a)(6)'s arbitration exception, in cases in which the State or its agency or instrumentality denies being a party to any arbitration agreement. The implied waiver exception has the added advantage that it obviates any argument that the arbitration arose in a non-commercial context, such as management of a State's natural resources.

(ii). Personal jurisdiction in post-award actions against a foreign sovereign. The FSIA grants personal jurisdiction over a foreign State or its agency or instrumentality in any circumstance in which subject matter jurisdiction under the FSIA is established and proper service has been effected. 28 U.S.C. § 1330(b). While the adequacy of personal jurisdiction in U.S. law is generally determined in accordance with both statutory and constitutional standards, a threshold question has arisen as to whether foreign

States are persons within the meaning of the Due Process Clauses of the Fifth and Fourteenth Amendments, i.e., whether they are entitled to invoke the traditional constitutional constraints on the exercise of personal jurisdiction. Some courts have held that foreign States are indeed persons within the meaning of the Due Process Clause. See, e.g., Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion de Costa Rica, 614 F.2d 1247, 1251–52 (9th Cir. 1980) (considering the question of a foreign sovereign's contacts with the forum state in order to bring a contract case); Purdy Co. v. Argentina, 333 F.2d 95, 98 (7th Cir. 1964) (finding service of process insufficient to satisfy personal jurisdiction under the FSIA in the context of a contract dispute). Other courts have been reticent in this regard. The United States Court of Appeals for the District of Columbia Circuit had taken the position that foreign States enjoy some, but not all, that the Due Process Clause has to offer. See Creighton Ltd., 181 F.3d at 124–25 (requiring a sufficient showing of minimum contacts with the forum in order to bring an action to enforce an arbitration award against a foreign sovereign state, although neither party contested the issue). It subsequently ruled in two separate cases that a foreign State and its instrumentalities are not "persons" within the meaning of the Fifth Amendment and thus are not entitled to invoke minimum contacts due process. See TMR Energy, 411 F.3d at 303 (in action to enforce an arbitration award, "district court properly asserted personal jurisdiction over the [defendant] based solely upon the requirements of the FSIA"); Price, 294 F.3d at 96 ("we hold that foreign states are not 'persons' protected by the Fifth Amendment" in a case seeking to hold Libya responsible for acts of torture and hostage-taking).

More recently, the Second Circuit in Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic, 582 F.3d 393 (2d Cir. 2009), rallied to the position of the D.C. Circuit on this issue, squarely overruling its prior decision in Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313–15 (2d Cir. 1981), to the effect that foreign States enjoy due process rights for jurisdictional purposes in a action to enforce an arbitral award brought under the FSIA. Consequently, at least two circuits now apply only the textual requirements of 28 U.S.C. § 1330(b) and find personal jurisdiction satisfied whenever subject matter jurisdiction is present.

Even if foreign States were entitled to raise due process objections to jurisdiction in these cases, they would be highly unlikely to succeed. In the great majority of post-award actions, personal jurisdiction is predicated upon consent, express or implied. Where consent to jurisdiction is genuine, the requirement of minimum contacts is generally deemed to be satisfied and the exercise of jurisdiction cannot generally be said to be unfair or unreasonable. Satisfying due process could be more difficult where the arbitration exception is concerned. Demonstrating minimum or continuous and systematic contacts may require adducing a set of facts distinct from those needed to establish the arbitration exception. See U.S. Titan, Inc., 241 F.3d at 151, 152-153 (compelling a state-owned company to arbitrate after finding subject-matter jurisdiction under the arbitration exception, plus purposeful availment).

As a practical matter, if the commercial activity exception to sovereign immunity under the FSIA is established, the constitutional requirement of minimum contacts will ordinarily also be fulfilled. See, e.g., Hanil Bank v. Pt. Bank Negara Indon., 148 F.3d 127, 134 (2d Cir. 1998); Rein v. Socialist People's Libyan Arab Jamahiriya, 162 F.3d 748, 760 (2d Cir. 1998) ("The facts of *Hanil Bank* fit within the commercial activities exception, the court found, because they concerned the non-payment of a letter of credit that was to be paid in U.S. dollars into a bank account in New York City (citation omitted). Once the court made that determination in *Hanil Bank*, it necessarily had also decided that the defendant had minimum contacts with the United States sufficient to establish personal jurisdiction over it in an American forum without violating the requirements of due process."). This is because the commercial activity exception itself requires a nexus with the United States, and that nexus, once established for purposes of the statutory exception, ordinarily also establishes sufficient contacts for due-process purposes. There is language in the legislative history of the FSIA to support the view that satisfaction of the due process requirements is inherent in satisfaction of any of the FSIA's statutory exceptions to sovereign immunity. See Stacie I. Strong, Enforcement of Arbitral Awards Against Foreign States or State Agencies, 26 Nw. J. Int'l L. & Bus. 335, 340 (2006) (citing H.R. Rep. No. 94-1487 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6612, as quoted in Libyan Am. Oil Co., 482 F. Supp. at 1177; H.R. Rep. 94-1487, at

8, reprinted in 1976 U.S.C.C.A.N. at 6606, as quoted in S & Davis Int'l, Inc. v. Rep. of Yemen, 218 F.3d 1292, 1301 (11th Cir. 2000)).

(iii). Jurisdiction in post-award actions by a foreign sovereign. If it is the foreign sovereign or sovereign entity that brings the post-award action, the immunity question does not arise. The plaintiff State will have consented to personal jurisdiction by virtue of having brought the action. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (sovereign agency's filing of a cross-motion in an action to enforce a reinsurance agreement functioned as a waiver of any due process concerns for the sake of personal jurisdiction). Both subject matter and personal jurisdiction will be evaluated under the forum's usual standards applicable outside the sovereign immunity context.

(iv). Sovereign immunity of the U.S. federal government. It is rare for the U.S. government to seek post-award relief against an international arbitral award. But it may well find itself a defendant in a post-award action. The U.S. government is presumptively immune from suit in U.S. courts, state and federal alike, unless immunity is waived by statute or otherwise. See, e.g., The Tucker Act, 28 U.S.C. § 1491; Suits in Admiralty Act, 46 U.S.C. § 741 et seq.; Public Vessels Act, 46 U.S.C. § 781 et seq.; Federal Tort Claims Act, 28 U.S.C. § 2671 et seq. Of course, a waiver of sovereign immunity does not in itself establish subject matter jurisdiction. United States v. Park Place Assocs., 563 F.3d 907, 923–24 (9th Cir. 2009); see also Hughes v. United States, 953 F.2d 531, 539 n. 5 (9th Cir .1992) (general federal question jurisdictional statutes does not operate to waive the government's sovereign immunity in a tax dispute); Geurkink Farms, Inc. v. United States, 452 F.2d 643, 644 (7th Cir. 1971) (in a tax refund dispute, § 1340 "is merely a general grant of jurisdiction to district courts to entertain actions of a certain class . . . . It is not a waiver of governmental immunity from suit or a consent to be sued"). Both the Tucker Act and the Federal Tort Claims Act include independent grants of jurisdiction; thus, in these cases, the subject matter jurisdiction hurdle will be overcome if the immunity hurdle is overcome.

Implied waiver of immunity on the part of the U.S. government may be difficult to establish in practice. A party asserting a claim against the United States has the burden of "demonstrating an unequivocal waiver of immunity." Cunningham v. United States, 786 F.2d 1445, 1446 (9th Cir. 1986) (a worker injured on the job bringing suit against OSHA for failure to properly oversee the worksite in question). In United States v. Park Place Associates., supra, a private party seeking confirmation of an award rendered in its favor failed to overcome the federal government's immunity from suit, despite a series of plausible arguments, including the government's having assented to a contract containing an arbitration clause and having moved as plaintiff to vacate the same award that its opponent was seeking to confirm. 563 F.3d at 929.

(v). International organization immunity. Since 1945, the United States has statutorily recognized the immunity of international organizations deemed by the President to be beneficiaries of the International Organization Immunity Act (IOIA). 28 U.S.C. § 288 et seq. These organizations are considered immune to judicial process to the same extent as foreign governments, absent a waiver of immunity. 28 U.S.C. § 288a(b). Courts have interpreted the language of the IOIA as a shorthand incorporation of the immunity of foreign sovereigns under the FSIA. Oss Nokalva, Inc. v. European Space Agency, 617 F.3d 756, 762–63 (3d Cir. 2010) ("the IOIA confers the same immunity . . . on international organizations as foreign governments receive under U.S. law, which is the restrictive immunity now codified in the FSIA" in a contract dispute).

In considering whether an international organization has waived its immunity to a particular claim, courts typically begin by looking to the language of the organization's charter for indications of waiver, as well as to the Executive Order granting the group statutory international organization status. Osseiran v. Int'l Fin. Corp., 552 F.3d 836, 840 (D.C. Cir. 2009) (finding sweeping language in the IFC's charter and the presidential order limiting immunity to the language of the charter to waive immunity broadly in suits for promissory estoppel and breach of confidentiality). Although there is as yet no case law addressing application of the protections of the IOIA (and the corresponding Executive Order) in the post-award context, courts have suggested that participation in an arbitration itself or including an

arbitration agreement in the underlying contract would be relevant in determining whether an organization retains its immunity. In re Kaiser Group Int'l, Inc., 730 F. Supp. 2d 247, 252 (D.D.C. 2010) (finding the World Bank to have retained its immunity, noting that "[f]urther, the [Bank] has not been involved in any of the underlying disputes, litigation, or arbitration."); Bro Tech Corp. v. Eur. Bank for Reconstruction and Dev., 2000 WL 1751094, *4(E.D. Pa. 2000) (defining the inquiry as "whether the existence of arbitration clauses in the EBRD's agreements with the Plaintiffs waived immunity, and, if so, to what extent.").

b. Foreign sovereign immunity from execution. Under the FSIA, foreign States and their agencies or instrumentalities enjoy presumptive immunity not only from suit, but also from execution upon a judgment. See 28 U.S.C. § 1609; see also Autotech Techs. LP v. Integral Research & Dev. Corp., 499 F.3d 737, 749 (7th Cir. 2007) (in an attempt to execute on funds due as the result of a contempt order, the private party must satisfy the requirements of the FSIA's execution provisions); Letelier v. Rep. of Chile, 748 F.2d 790, 793 (2d Cir.1984) (in a suit attempting to hold the Chilean government liable for a murder committed in the United States, the court noted that "under [the FSIA] § 1609 foreign states are immune from execution upon judgments obtained against them, unless an exception set forth in §§ 1610 or 1611 of the FSIA applies;"). Thus, the fact that a party seeking confirmation or enforcement of an award has overcome the sovereign entity's immunity from suit, and even won a judgment, does not mean that execution on that judgment will automatically be available. It may still face a claim of immunity from execution, due to the fact that the statutory exceptions to a sovereign's immunity from execution under 28 U.S.C. § 1610 do not exactly mirror the FSIA's exceptions to immunity from suit.

Immunity from execution is a non-issue in vacatur actions, since such an action, even if successful, does not produce a judgment requiring execution as such. However, a party that prevails in an action to confirm or enforce a U.S. Convention award against a foreign sovereign entity may seek to execute on the judgment.

The most pertinent exception to immunity from execution arises when the judgment "is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement." 28 U.S.C. § 1610(a)(6). This provision will solve the execution immunity problem in most instances. On the other hand, the FSIA still shields certain narrow categories of property—such as property of a central bank held for its own account or property of a military character—from execution altogether. 28 U.S.C. § 1611.

The FSIA's immunity from execution is coupled with an immunity from attachment (28 U.S.C. § 1609), which is likewise subject to exceptions. Regarding prejudgment attachment in particular, 28 U.S.C. § 1610(d) subjects the property of a foreign State or instrumentality to prejudgment attachment only if "the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver." In any case, prejudgment attachment is permissible only if "[its] purpose . . . is to secure satisfaction of a judgment that has been or may ultimately be entered against [it], and not to obtain jurisdiction." 28 U.S.C. § 1610(d)(2); see also Autotech Techs., 499 F.3d at 745; (noting the FSIA's specific treatment and protection of sovereign property in execution of a contempt judgment); FG Hemisphere Assoc. v. République du Congo, 455 F.3d 575, 584 (5th Cir. 2006) (applying the FSIA's execution provisions in an action to enforce a garnishment decision); Letelier v. Republic of Chile, 748 F.2d 790, 793 (2d Cir. 1984) ("[U]nder [FSIA] § 1609, foreign states are immune from execution upon judgments obtained against them, unless an exception set forth in §§ 1610 or 1611 of the FSIA applies.").

The immunity from attachment expressed in the FSIA arguably calls into question the availability of quasi-in-rem jurisdiction as a basis for asserting jurisdiction to confirm or enforce arbitral awards against sovereign entities. See § 27(b), supra. However, the prohibition should present no problem if establishing an exception to immunity under the FSIA also necessarily implies satisfaction of a minimum contacts requirement. Once the requirements of the arbitration exception to sovereign

immunity and the requirements of due process (if applicable to foreign States) are met, personal jurisdiction would, on that account alone, be established and property would not need to be attached "to obtain jurisdiction."

c. The Act of State doctrine. The judge-made, federal common law Act of State doctrine shields the official acts of foreign States taken on their own territory from scrutiny by U.S. courts as to their validity. As a general matter, the doctrine is commonly applied in cases in which neither a foreign State nor any of its agencies or instrumentalities is a party. See, e.g., W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp. Int'l, 493 U.S. 400 (1990); Gross v. German Found. Indus. Initiative, 456 F.3d 363 (3d Cir. 2006). Chapter One of the FAA expressly excludes application of the Act of State doctrine as a barrier to an action to confirm an award. 9 U.S.C. § 15 ("Enforcement of arbitral agreements, confirmation of arbitral awards, and the execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine."). By virtue of FAA Sections 208 and 307, the Act of State doctrine is likewise excluded in post-award actions under FAA Chapters Two and Three. Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 366 (S.D.N.Y. 2005) (in an action to enforce an arbitration agreement, Act of State presents no barrier) (applying the Chapter One Act of State provision with equal force in actions brought under Chapters Two and Three).

In any case, courts have found that in the summary proceeding of an enforcement action, no official act of a foreign government is being challenged. See Liber. E. Timber Corp. v. Republic of Liber., 650 F. Supp. 73, 77 (S.D.N.Y. 1986) (in an action to stay arbitration, 9 U.S.C. § 15 is incorporated into FAA Chapter Two by virtue of 9 U.S.C. § 208).

Section 15 does not expressly mention vacatur actions as among the actions to which the Act of State doctrine is inapplicable. The issue apparently has not yet arisen in litigation. Given the identity between the grounds for defeating confirmation of an award and the grounds for winning vacatur of it, it would make little sense to consider the Act of State doctrine as off-limits in the former, but not in the latter. In this circumstance, it is reasonable to treat confirmation and vacatur as fully mirror-image. If Congress disfavored Act of State considerations interfering with confirmation actions, it is difficult to see on what policy grounds it would nevertheless have wanted to preserve the doctrine in vacatur actions.

Application of the Political Question doctrine, with which the Act of State doctrine is loosely associated, is not specifically addressed by 9 U.S.C. § 15. One might reasonably suppose that it should be no more a barrier to a post-award action than sovereign immunity. But Congress may not statutorily confer jurisdiction on Article III federal courts to resolve "political questions." See, e.g., Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972) ("Congress may not confer jurisdiction on Art. III federal courts to . . . resolve 'political questions' . . . because suits of this character are inconsistent with the judicial function under Art. III."); 767 Third Ave. Assocs. v. Consulate Gen. of Yugoslavia, 218 F.3d 152, 164 (2d Cir. 2000) (same); see also Gary B. Born, International Civil Litigation in United States Courts 764 (4th ed. 2007). But see Charles Alan Wright, Arthur Miller, Edward H. Cooper & Richard D. Freer, 13C Federal Practice and Procedure § 3534.3 (3rd ed. 2008) (questioning the extent to which the Political-Question Doctrine is rooted in Article III). Accordingly, due to the Political Question doctrine's constitutional underpinnings, its application cannot be categorically excluded. However, there do not appear to be any reported cases involving post-award relief in which the doctrine has been applied or even advanced. Nor is it easy to imagine situations in which it could seriously be advanced. Moreover, the Supreme Court has in recent years shown a general reluctance to apply the doctrine. See generally Rachel Barkow, More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy, 102 Colum. L. Rev. 237 (2002).

§ 4-29. Forum Non Conveniens in Post-Award Actions

(a) An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on forum non conveniens grounds.

(b) An action to vacate a U.S. Convention award may, in exceptional circumstances, be subject to stay or dismissal on forum non conveniens grounds in favor of a foreign court that also has authority to vacate the award, in accordance with the standards generally applicable to forum non conveniens motions in the court where confirmation is sought.

(c) An action to enforce a non-Convention award may, in exceptional circumstances, be subject to stay or dismissal on forum non conveniens grounds in favor of a foreign court, in accordance with the standards generally applicable to forum non conveniens motions in the court where enforcement is sought.

Comments:

a. Generally. As traditionally understood, the doctrine of forum non conveniens permits a court in its discretion to stay or dismiss an action it is otherwise competent to entertain if there exists an alternative forum available to the plaintiff that is a manifestly more convenient forum to hear the case and that is capable of affording the plaintiff an adequate remedy. Actions for post-award relief are ordinarily summary in nature and do not entail significant fact-finding. See Section 4-33, infra. Thus, they are generally poor candidates for forum non conveniens treatment. In very exceptional

cases, the defendant in a post-award action may maintain that the conditions for a forum non conveniens stay or dismissal are met.

b. Forum non conveniens in actions to confirm or enforce Convention awards. An action for confirmation or enforcement under the New York and Panama Conventions as implemented by FAA Chapters Two and Three is not subject to stay or dismissal on forum non conveniens grounds, whether brought in state or federal court. Stay or dismissal of an action to confirm or enforce a Convention award based on forum non conveniens would run afoul of the Conventions' requirement that, absent a specific Convention defense to enforcement, Contracting States confirm and enforce such awards. See Section 4-11, supra.

c. Forum non conveniens in actions to vacate Convention awards. The Conventions do not compel courts of Convention States to entertain actions to annul local awards, much less prescribe vacatur standards. Accordingly, dismissal of an action to vacate a U.S. Convention award on forum non conveniens grounds cannot be categorically excluded on the basis of U.S. treaty obligations. However, the circumstances justifying application of forum non conveniens will hardly ever be present in the context of an action to vacate a U.S. Convention award. Such actions, by their nature, seldom present major inconveniences. More importantly, there will almost always be no alternative forum, because courts of the place of arbitration ordinarily have exclusive competence to entertain vacatur actions. Concurrent competence would exist only in that extremely rare instance in which the parties

selected a foreign arbitration law to govern an arbitration seated in the United States or in which they selected U.S. arbitration law to govern an arbitration seated outside the United States. In either case, a U.S. court would have concurrent jurisdiction to vacate the award and could conceivably apply the forum non conveniens doctrine so as to permit the action to be heard instead in the alternative court, if manifestly more convenient.

d. Forum non conveniens in actions to enforce non-Convention awards. Given the absence of an international obligation on the part of U.S. courts to enforce non-Convention awards, a stay or dismissal on forum non conveniens grounds is not categorically foreclosed. The availability of the forum non conveniens doctrine in actions to enforce non-Convention awards is subject to the standards that are generally applicable to motions for forum non conveniens stays or dismissals in the court where enforcement is sought.

e. Lis pendens in actions for post-award relief. According to the doctrine of lis pendens, the court before which an action is brought may decline to exercise jurisdiction if the same or substantially similar claim between the same parties is already pending before another court. Nothing should prevent application of lis pendens in post-award actions where the two courts in question belong to the same jurisdiction and both are competent to entertain the action.

The prospect of international lis pendens – i.e. a court's refusal to exercise competence in deference to an action already begun in a court of another country –

should not ordinarily arise in confirmation and vacatur actions, since in principle only courts of the situs are competent to confirm or vacate a local award. The only confirmation or vacatur scenario in which the issue may arise is the extremely rare one in which the parties chose an arbitration law other than the law of the situs to govern the arbitral proceeding. In that unusual scenario, the courts of two jurisdictions have authority to confirm or vacate the same award.

However, lis pendens may arise in the enforcement context, since there are in principle a multitude of jurisdictions in which a party prevailing in an arbitration has the right to seek recognition or enforcement of the award.

The party prevailing in an arbitration may have perfectly defensible reasons for seeking enforcement in more than one jurisdiction. For example, an enforcement action within a given jurisdiction may fail on grounds that are peculiar to that jurisdiction. More important, there can be no guarantee that the action, even if successful, will result in execution upon assets sufficient to satisfy the entire award, so that enforcement in a second, or third, jurisdiction may be necessary to afford full compensation. The Restatement accordingly takes the position that a stay or dismissal on lis pendens grounds is inappropriate in an action for the enforcement of a foreign arbitral award. The same reasoning applies in the rare case, referred to above, in which courts of two different countries are competent to confirm an award due to the fact that the award was made in one country but under the arbitration law of another.

Moreover, if confirmation may be sought in both fora, it follows that an action for vacatur should be available in both fora as well.

REPORTERS' NOTES

a. Generally. Under the widely-accepted forum non conveniens doctrine, an otherwise competent court may decline to exercise jurisdiction over a claim if there exists a manifestly more convenient alternative forum that is available to the claimant and able to afford an adequate remedy.

Within the U.S. federal system, the function of forum non conveniens is performed by the federal transfer of venue provision, 28 U.S.C. § 1404(a). Forum non conveniens is also generally available at the state court level, both within a given state court system and between state court systems. For example, subject to an exclusive forum selection clause to the contrary, an action to vacate a U.S. Convention award may in principle be brought in any court in the United States, state or federal, that has proper statutory and constitutional jurisdiction over the defendant. Any such action may presumably be stayed or dismissed on forum non conveniens grounds to another competent court that is manifestly more convenient. Nothing in the New York or Panama Conventions interferes with the operation of forum non conveniens within a single legal system. From an international point of view, the United States is a unitary entity. As long as a competent U.S. court is made available to entertain an action to confirm a U.S. Convention award, the U.S. is respectful of its treaty obligation. The Restatement provisions on venue (Section 4-15, Comment d) reflect this liberality.

Given the international character of the awards subject to the Restatement, the most frequent and interesting forum non conveniens scenarios are the international rather than interstate ones. This section is chiefly concerned with the scenario in which the defendant seeks a stay or dismissal in favor of the exercise of jurisdiction by a foreign court.

Application of forum non conveniens to actions for post-award relief raises certain problems based on the language of the New York and Panama Conventions (for Convention awards) and even FAA Chapter One (for non-Convention awards). According to the FAA Section 207, applicable to post-award actions in regard to Convention awards, "[t]he 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." FAA Chapter One, in Section 9, similarly provides that courts "must" grant confirmation or enforcement, absent an FAA Chapter One ground for vacatur of the award. Since inconvenience of the forum is neither a Convention ground nor an FAA Chapter One ground for granting or denying post-award relief, neither a refusal nor a deferral of post-award relief (at least insofar as confirmation and enforcement are concerned) would appear to be justifiable on the basis of forum non conveniens. The difficulties associated with this textual language are discussed more fully in Reporters' Notes *b* and *d* of this Section.

As a practical matter, the prospects for international forum non conveniens motions in post-award actions are not great. Actions of this sort seldom raise serious disputed issues of fact or significant convenience considerations. As stated in Section 4-22, infra, post-award actions generally are summary proceedings, requiring no witness testimony or introduction of other evidence. See World Missions Ministries, Inc. v. Gen. Steel Corp., 2006 U.S. Dist. LEXIS 56166 (D. Md. July 28, 2006) (declining to consider procedural maneuvers the court considers extraneous to the confirmation motion); see also Melton v. Oy Nautor Ab, 161 F.3d 13 (9th Cir. 1998) (in an appeal from the district court's dismissal of an enforcement action for an award rendered in Finland, applying forum non conveniens factors in the counterfactual situation that the motion were applicable in the case); Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nig., 697 F. Supp. 2d 46, 57–58 (D.D.C. 2010) (holding, in an action to enforce an award rendered in the U.K. under Nigerian law, that even if a viable alternative forum were available, private interest and public policy would both weigh against dismissal); Sony Ericsson Mobile Commc'ns AB v.

Delta Elecs. (Thailand) Pub. Co., 2009 WL 1874063, at *2 (N.D.Cal. 2009) (in an enforcement action for an award rendered in Sweden, declining to dismiss for forum non conveniens in response ongoing litigation in Thailand, as the New York Convention contemplates concurrent and even simultaneous enforcement actions in multiple jurisdictions); Satyam Computer Serv.s v. Venture Global Eng'g, LLC, 2006 WL 6495377, at *7 (E.D.Mich. 2006) (refusing to dismiss the case on forum non conveniens grounds in an action to enforce an award rendered in London by applying the standard *Gulf Oil* balancing test to determine applicability of the motion). The likelihood of a successful forum non conveniens motion is even slighter in the context of actions to confirm U.S. Convention awards, as the arbitration itself will ordinarily have occurred in the U.S. and the award rendered there.

b. Forum non conveniens in actions to confirm or enforce Convention awards. In considering the potential impact of the Conventions on the practice of forum non conveniens, it is for several reasons necessary to distinguish among actions to confirm, vacate and enforce Convention awards. (Forum non conveniens in vacatur actions is dealt with in Reporters' Note *c* of this Section).

(i). Availability of forum non conveniens in actions to confirm U.S. Convention awards. Stay or dismissal of an action by an otherwise competent court on forum non conveniens grounds presupposes a showing not only of substantial inconvenience, but also of the availability of a competent alternative forum capable of affording an adequate remedy. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254–55 (1981) (applying the forum non conveniens analysis in a tort case for wrongful death from an airplane crash in Scotland); Iragorri v. United Technol. Corp., 274 F.3d 65, 73 (2d Cir. 2001) (discussing the proper application of forum non conveniens factors in a tort action for wrongful death stemming from an accident in Colombia).

The Restatement takes the position that the conventions do not leave room for the stay or dismissal of actions to confirm a U.S. Convention award. Convention awards are entitled to confirmation under the Conventions and the FAA chapters that implement them, unless one of the grounds enumerated in the Conventions for denying confirmation is established. Inconvenience is not among those grounds. More important, it would not be consistent with U.S. treaty obligations, under the Conventions and the U.S. implementing legislation, for a court to refuse to entertain an action to confirm on a fundamentally discretionary ground such as forum non conveniens.

It remains to mention the rare "concurrent primary jurisdiction" scenario, in which an award was made in the U.S. but under the arbitration law of another jurisdiction, or an award was made outside the U.S. but under the arbitration law of the United States or a state of the U.S. See Section 4-16, supra. It may be argued that international forum non conveniens has no place in this setting, since the U.S. assumed an international legal obligation to confirm U.S. Convention awards unless a Convention ground for denying confirmation is present. Arguably, declining to exercise jurisdiction on convenience grounds would be inconsistent with that obligation. On the other hand, for a court to grant a forum non conveniens motion is not to deny the possibility of relief, but rather to defer to another court's superior ability to entertain the matter. If the U.S. court in a concurrent jurisdiction situation is the seat of arbitration, it should prefer a stay over a dismissal on forum non conveniens grounds of the action. As a court of the arbitral situs, the U.S. court should favor the course that would simplify its later consideration of the confirmation action in the event it subsequently decides that forum non conveniens was improvidently granted. Preference for a stay over a dismissal also comports with the spirit of Article VI of the New York Convention and Article 6 of the Panama Convention, which authorize a court to adjourn a proceeding for confirmation or enforcement of an award if an application to set aside the award is then pending before a court competent to grant that relief.

All in all, the prospects of a defendant invoking international forum non conveniens in an action to confirm an award in a court of the place of arbitration or in a court of a country whose law of arbitration the parties expressly adopted in their agreement are slim in the extreme. However, the possibility of a defendant invoking international forum non conveniens in an action to enforce a foreign Convention award cannot be so lightly dismissed. See Reporters' Note *b (ii)*.

(ii). Availability of forum non conveniens in actions to enforce foreign Convention awards. The question of the applicability of forum non conveniens to actions to enforce arbitral awards has only occasionally arisen, most likely because, as in the confirmation and vacatur context, such actions typically require very little if any fact-finding or legal analysis, and thus very little inconvenience.

Although the case law is limited, the dominant view among U.S. courts is that motions for stay or dismissal of actions to enforce U.S. Convention awards are permissible. Article III of the New York Convention requires Contracting States to confirm Convention words, unless a Convention ground for denying confirmation is present, but permits them to do so "in accordance with the rules of procedure of the territory where the award is relied upon." To the extent that forum non conveniens represents a "rule of procedure," as the Supreme Court held in American Dredging Co. v. Miller, 510 U.S. 443, 453 (1994) (case involving an injured seaman seeking damages under maritime law), Article III appears to embrace it. On this basis, the Court of Appeals for the Second Circuit held in Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukr., 311 F.3d 488, 495 (2d Cir. 2002), that application of forum non conveniens is not foreclosed by the Convention. To the same effect, see TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 930, (D.C. Cir. 2007) (affirming the district court's dismissal of an enforcement action, including a motion for forum non conveniens in the alternative); Higgins v. SPX Corp., 2006 WL 1008677, at *3 n.5 (W.D. Mich. 2006) (staying a case pending resolution of ongoing litigation abroad, rather than granting stay or dismissal on forum non conveniens grounds); P&P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 870 n.6 (10th Cir. 1999) (in confirmation action under Chapter One, reasons for transfer, including forum non conveniens, may apply).

In Monegasque de Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002), the court held forum non conveniens to be a procedural issue. Accordingly, it ruled that Article III of the New York Convention, which invites courts to apply their usual procedural rules to actions to enforce Convention awards, permitted its use even in Convention cases. Id. at 496. Consistent with *Monde Re*, the U.S. District Court for the Southern District of New York more recently dismissed an enforcement action on forum non conveniens grounds in CHS Europe S.A. v. El Attal, 2010 U.S. Dist. LEXIS 76619 (S.D.N.Y., July 22, 2010). Other courts have on rare occasion refused to enforce an arbitral award after conducting a standard forum non conveniens analysis without specific reference to Article III of the Convention. See TermoRio S.A. v. Electrificadora del Atlantico S.A., 421 F. Supp. 2d 87, 103-104 (D.D.C. 2006) (dismissing an action to enforce an award rendered in Colombia on forum non conveniens grounds as an alternative to refusal to enforce because the award had been set aside by the Colombian courts). But see TermoRio S.A. v. Electranta S.P., 487 F.3d 928, 932 (D.C. Cir. 2007) (affirming dismissal because of set-aside judgment in the situs, pursuant to New York Convention Article V(1)(e), but not speaking to the district court's alternative dismissal of the action based on forum non conveniens). The majority of courts that have entertained the forum non conveniens question in actions to enforce international arbitral awards have simply assumed, without deciding, that the doctrine is available in such cases, and have proceeded to find the requirements for a stay or dismissal on forum non conveniens grounds not to have been established. See, e.g., Cont'l Transfert Technique Ltd. v. Fed. Gov't of Nig., 698 F. Supp. 2d 46 (D.D.C. 2010); Venture Global Eng'g, LLC v. Satyam Computer Servs., 233 Fed. Appx. 517, 520-522 (6th Cir. 2007) (fully considering the doctrine, but ultimately declining to refuse enforcement on the basis of forum non conveniens); TMR Energy, LTD. v. State Fund of Ukr., 411 F.3d 296, 304 (2d. Cir. 2005); Higgins v. SPX Corp., 2006 U.S. Dist. LEXIS 20771, at *10-*13 (W.D. Mich. Apr. 18, 2006); Cf. Hosaka v. United Airlines, Inc., 305 F.3d 989, 993 (9th Cir. 2002) (although the Warsaw Convention provides for the application of national procedural law, its explicit reference to available fora eliminated "the discretionary power of the federal courts to dismiss an action for forum non conveniens").

However, courts that have ruled on forum non conveniens may have had other bases for dismissal of the action. For example, the Second Circuit in Monde Re arguably could have reached the same result without relying on the forum non conveniens doctrine, but rather by questioning the proper status of the parties. The court observed that the Ukraine, one of the two defendants, did not participate in the arbitration and that neither Monegasque nor Naftogaz was a party to the main contract. Monde

Re, 311 F.3d 488, 492 (2d Cir. 2002). In other words, a ruling on the forum non conveniens issue may not even have been essential to the case's outcome. Similarly, in the *CHS Europe* case, the forum non conveniens doctrine does not appear to be the only ground for dismissal. The decision in *CHS Europe* reflects at least some doubt about whether personal jurisdiction was present. The arbitration agreement also contained an exclusive forum selection clause designating the courts of the United Kingdom. Although the clause expressly excluded actions to enforce arbitral awards, it nevertheless strongly influenced the court's analysis. CHS Europe, S.A., 2010 U.S. Dist. LEXIS 76619, at *5-6 (S.D.N.Y., July 22, 2010).

InMelton v. Oy Nautor Ab, 1996 U.S. Dist. LEXIS 22869 (N.D. Cal. Dec. 12, 1996), the district court had granted dismissal of an action to enforce a New York Convention award on the ground that the courts of Finland, where the arbitration took place, were better equipped to deal with the relevant questions of Finnish law and had a greater interest than the courts of California in hearing the action. Id. at *7-*10. On appeal, the Ninth Circuit was invited to announce what would amount to a per se bar to forum non conveniens dismissal in the enforcement of New York Convention awards, based on the argument that the venue provision of the FAA, 9 U.S.C. § 204, precludes such a dismissal. Melton v. Oy Nautor Ab, 1998 U.S. App. LEXIS 22100 (9th Cir. Sept. 4, 1998). The Court declined to do so, ruling that the district court had not abused its discretion in determining that the standards for dismissal on forum non conveniens grounds were met. Id. at *2, *4. The court essentially agreed with the lower court that the courts of the arbitral seat have a greater interest in adjudicating a confirmation motion than do courts of a foreign State where enforcement is sought.

The reasoning of the Court of Appeals in *Melton* is questionable. Taken to its logical extreme, it would have the effect of eliminating the possibility of enforcing a foreign award not yet reduced to judgment in a court of the place of arbitration, and thus disrupt the allocation of competences between primary and secondary jurisdictions established by the Conventions. The court also suggested in passing that an action to enforce a foreign arbitral award might properly be stayed or dismissed on forum non conveniens grounds if the party seeking enforcement failed to seek confirmation of the award in a court of the place of arbitration. Significantly, the appellant in *Melton* had for the first time on appeal argued that the Convention precluded application of forum non conveniens, and the Court deemed that argument to have been waived, expressing no opinion as to how the Convention should be interpreted with regard to this issue. 1998 U.S. App. LEXIS 22100, at *2-*3; see also TMR Energy Ltd. v. State Property Fund of Ukr., 411 F.3d 296, 304 n. (D.C. Cir. 2005) (because the Court affirms the district court's refusal to dismiss on forum non conveniens grounds, the Court "do[es] not consider TMR's alternative contention that, contrary to the Second Circuit's decision in [*Monegasque*], the doctrine has no place in an action to enforce an arbitration award.").

The dissent in *Melton* took a more nuanced position. Melton, 1998 U.S. App. LEXIS 22100, at *5 (Tashima, J., dissenting). The dissent found that the party moving for dismissal under forum non conveniens had not shown that an adequate forum existed and concluded that the majority had improperly balanced the public and private interests in that case, chiefly by overlooking the fact that enforcement actions take the form, not of trials, but of summary proceedings. Significantly, the dissent also expressed some doubt as to the pertinence of forum non conveniens to enforcement actions, remarking that it would be "unwise to apply forum non conveniens to an action to enforce a foreign arbitration award under the Convention, in the absence of any law that forum non conveniens applies to cases arising under the Convention." Id.

Although Article III of the New York Convention arguably permits courts to apply forum non conveniens to actions to enforce Convention awards, that interpretation is not consistent with the purpose or larger structure of the Convention. Among the main purposes of the Conventions was to promote direct enforcement of foreign arbitral awards in Contracting States, thus avoiding the necessity of first reducing the award to judgment in the State of rendition and then bringing the resulting judgment to an overseas court for enforcement. "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was 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." Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974). Considering that the Convention grounds for refusing to enforce a Convention award are meant to be exclusive, it would be incompatible with Convention obligations for a court of a Contracting State to employ inconvenience as an additional basis for dismissing an action for enforcement of an award that is otherwise entitled, as a matter of treaty obligation, to enforcement.

Moreover, Article III makes application of national procedural law subject to "the conditions laid down in the . . . articles [following Article III]." These articles include Article IV's limited technical requirements for enforcement and Article V's limited grounds for non-enforcement. Construing Article III to permit the courts of a Contracting State to apply a national procedural device to defeat maintenance of an enforcement action would be inconsistent with the understanding that both the requirements for enforcement and the grounds for non-enforcement of Convention awards set out in the relevant Convention are exclusive, and that awards satisfying those requirements, and not falling within one of the stated grounds, are entitled to enforcement in the courts of the other Contracting States.

In any event, forum non conveniens is not a purely procedural rule. Unlike rules governing such matters as submission of the complaint and answer, the availability of pre-trial discovery, or the admissibility of evidence, forum non conveniens does not address how litigation shall proceed, but whether it shall proceed. In other words it regulates access to the courts. To that extent, application of the forum non conveniens doctrine to actions to enforce Convention awards would be inconsistent with U.S. treaty obligations committing the U.S. to entertain otherwise properly brought actions to enforce Convention awards. In addition, civil law jurisdictions generally do not embrace the forum non conveniens doctrine. Availability of the doctrine would thus undermine the goal of unifying grounds for denying recognition and enforcement under the Conventions, and could result in unfair surprise to foreign parties would otherwise anticipate being able to enforce Convention awards in the United States.

For these reasons, while recognizing that courts have traditionally been willing to entertain motions to dismiss enforcement proceedings based on forum non conveniens (while rarely granting them), the Restatement takes the position that the doctrine is not available in actions to enforce Convention awards.

c. Forum non conveniens in actions to vacate Convention awards. The Conventions themselves impose no obligation on courts of Contracting States to entertain vacatur actions, much less grant them. The availability of forum non conveniens in vacatur actions is therefore determined without regard to the Conventions.

According to 9 U.S.C. § 10, "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." (The one exception stems from Article V(1)(e) of the New York Convention and Article 5(1)(e) of the Panama Convention, impliedly authorizing vacatur by a court of the place whose law of arbitration was expressly selected by the parties even though the arbitration was conducted and the award was made elsewhere). However, Section 10, like most statutory venue provisions in U.S. law, is understood as non-exclusive, unless otherwise provided. See Section 4-26, Reporters' Note f, supra; Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 197 (2000) (actions under the FAA may also be brought in any jurisdiction proper under the general venue statute, 28 U.S.C. § 1391, in a confirmation action for a domestic award); D.H. Blair & Co. v. Gottdiener, 462 F.3d 95, 105 (2d Cir. 2006) (reading the FAA's venue provision as permissive in an action to confirm a domestic award, citing Cortez Byrd Chips). Accordingly, subject to an exclusive forum selection clause to the contrary, an action to vacate a U.S. Convention award may in principle be brought in any court in the United States, state or federal, that has proper statutory and constitutional jurisdiction over the defendant. There is also no reason to doubt that an action to vacate a U.S. Convention award is subject, in a proper case, to a forum non conveniens stay, dismissal or transfer as between state courts or as between federal courts.

By contrast, the forum non conveniens doctrine should generally have no application to vacatur actions. Courts other than those of the place of arbitration generally lack competence to vacate an

award. The prospect of a forum non conveniens motion to stay or dismiss a vacatur action in favor of a foreign court will not arise.

The only occasion in which it might arise is the rare circumstance in which the parties to an arbitration sited in the U.S. expressly selected the law of arbitration of another country or in which the parties to an arbitration sited abroad expressly selected the law of arbitration of the United States or a U.S. state. Such "concurrent jurisdiction" situations can arise because, according to the Conventions (arts. V(1)(e) and 5(1)(e) of the New York and Panama Conventions, respectively), vacatur may properly be sought in "the country in which, or under the law of which, that award was made." See Section 4-16, supra. Thus, both courts of the place of arbitration and courts under whose law of arbitration the award was rendered are competent to vacate the award. It is conceivable, though unlikely, that a court of the place of arbitration in the U.S. would consider the courts of the country whose arbitration law the parties selected to be a manifestly more convenient forum for vacatur purposes. Conversely, if a party to an arbitration sited abroad were to ask a U.S. court to vacate the resulting award on the ground that the parties selected U.S. law to govern the arbitration, the U.S. court could conceivably decline to hear the action on forum non conveniens grounds, in deference to the courts of the arbitral situs. If a court chooses to do so, it should ordinarily prefer relief in the form of a stay rather than a dismissal, particularly if it is the court of the situs.

If the U.S. court in a concurrent jurisdiction situation is the seat of arbitration, it should prefer a stay over a dismissal on forum non conveniens grounds of the action. Just as with confirmation (see Reporters' Note *b (i),* supra), the U.S. court, as court of the arbitral situs, should favor the course that would simplify its later consideration of the vacatur action in the event it subsequently decides that forum non conveniens was improvidently granted.

d. Forum non conveniens in actions to enforce non-Convention awards. There is no reason to suppose that motions based on forum non conveniens would be any more prevalent in the enforcement of non-Convention than Convention awards, but the possibility cannot be excluded that the defendant in an action to enforce a non-Convention award will invoke the doctrine. The question then arises whether forum non conveniens should be excluded in the enforcement of non-Convention awards as well, even if that result is not dictated by the U.S.'s international treaty obligations.

There are good arguments for excluding forum non conveniens in the context of non-Convention awards as well. First, Chapter One of the FAA mandates confirmation of awards unless a ground for vacatur is established; since forum non conveniens is not specified in Chapter One as a vacatur ground, it is arguably unavailable for defeating an enforcement action. Moreover, it is not easy to imagine instances in which the inconvenience of enforcing an arbitral award against local assets of the award debtor would be great enough to justify depriving the award creditor of access to a court where such assets are located.

The Restatement does not, however, categorically exclude the possibility of a stay or dismissal on forum non conveniens grounds in actions to enforce non-Convention awards. It rejects the argument that FAA Chapter One's enumeration of grounds for vacatur precludes application of the forum non conveniens doctrine; forum non conveniens is less properly regarded as a ground for refusal to confirm an award than simply as part of the background of generally applicable domestic rules against which FAA Chapter One should be read. The Restatement's rejection of forum non conveniens in the enforcement of Convention awards is not predicated on the view that allowing forum non conveniens would add a ground to the Conventions' limitative grounds for denying enforcement, but rather on the view that, absent a ground for non-enforcement, the Conventions make enforcement mandatory, and not merely permissive. Enforcement of non-Convention awards under FAA Chapter One is not subject to any such international obligation. While fully recognizing the difficulty of establishing the requirements of forum non conveniens in an action seeking nothing more than enforcement of a non-Convention award, the Restatement does not exclude the possibility that such a situation might arise. For example, if an award debtor has sufficient assets in a number of different jurisdictions, a court could conceivably regard itself as a manifestly less convenient forum for enforcement if the award debtor's ownership of

the assets located within its territory is subject to serious dispute, as might well be the case. The Restatement accordingly takes the view that application of the forum non conveniens doctrine is not wholly off-limits in actions to enforce non-Convention awards.

To the very limited extent that it may be available, the forum non conveniens doctrine and the standards applicable to it are properly governed by the law of forum in which such action is brought, irrespective of whether the case is before a state or federal court. Cf. P&P Indus., Inc. v. Sutter Corp., 179 F.3d 861, 870 n.6 (10th Cir. 1999) (noting that, in an action under Chapter One, "[o]ther reasons for transfer, including . . . common law doctrines such as forum non conveniens, may also apply."). That said, while no convention stands in the way of application of the forum non conveniens doctrine in actions to enforce non-Convention awards, forum non conveniens motions should rarely be granted to prevent enforcement of a non-Convention award that is otherwise enforceable. Courts generally are not, and should not be, receptive to attempts by a defeated party to influence, much less to dictate, the selection of the forum for execution of the award. By agreeing to arbitrate, the party resisting enforcement may be regarded as having forfeited the right to advance the private factors relating to its convenience that are ordinarily considered in the forum non conveniens analysis. In the absence of the private factors, the public factors in the forum non conveniens analysis would generally weigh in favor of enforcement since actions to enforce are summary proceedings, and thus do not consume significant judicial resources.

e. Lis pendens in actions for post-award relief. Closely related to forum non conveniens, but distinctive, is the doctrine of lis pendens, according to which the court before which an action is brought may decline to exercise jurisdiction if substantially the same claim is already pending before another court. Notwithstanding the affinity between forum non conveniens and lis pendens, the two situations do not call for identical treatment in the international arbitration context.

Application of lis pendens may be entirely appropriate where two courts within the same competent jurisdiction are competent to entertain the post-award action.

More problematic is *international* lis pendens, that is, when a court of one country is asked to decline jurisdiction because an action for the same post-award relief is already pending in a court of another country. International lis pendens is ordinarily a non-issue in confirmation and vacatur actions since in principle only the courts of a single jurisdiction – the situs – are competent to confirm or vacate a local award. (The only confirmation or vacatur scenario in which the issue may arise is that extremely rare one in which the parties chose a law other than the law of the situs to govern the arbitral proceeding, so that the courts of two jurisdictions have authority to confirm or vacate the same award.)

Lis pendens may arise in the enforcement context, however. The party prevailing in an arbitration may be justified in seeking enforcement in multiple jurisdictions. An enforcement action may fail within one jurisdiction because, under the law of that jurisdiction, the underlying claim is non-arbitrable or because enforcement of the award would violate public policy. Yet enforcement may be possible elsewhere. Beyond that, an enforcement action in one jurisdiction, even if successful, may not fully compensate the prevailing party because the value of the award exceeds the value of the local assets belonging to the losing party. Accordingly, a stay or dismissal on lis pendens grounds will ordinarily not be appropriate in an action for the enforcement of a foreign arbitral award. Whether the award is a Convention or non-Convention award makes no difference in this regard. (If the prevailing party, following judgment in the foreign enforcement action, brings a further enforcement action in the United States, the effects of the foreign judgment are determined in accordance with Section 4-8 of the Restatement.)

The position of the Restatement is in accord with the weight of academic authority. See Grigera Naon, Choice of Law Problems in International Commercial Arbitration, 289 Recueil des cours 9 (2001); see also ILA International Commercial Arbitration Committee, Final Report on Lis Pendens and Arbitration (72nd conference, Toronto, 2006); Gelsinger & Levy (ICC Ct. Bull. Spec. Supp. 2003).

§ 4-30. Proper Plaintiff

(a) Any person that participates in an arbitral proceeding as a party by asserting or defending against a claim is a proper plaintiff in a post-award action. In addition, any person that the arbitral tribunal determines to be a party to an arbitral proceeding is a proper plaintiff in a post-award action, even if the person did not participate in the arbitral proceeding.

(b) A court may, in exceptional circumstances, determine that a person not a party to an arbitral proceeding is a proper plaintiff in a post-award action if it satisfies one of the grounds on which a non-party is permitted to enforce the arbitration agreement under Section 2-___,[31] **unless the court, in its discretion, declines to recognize the person as a proper plaintiff because:**

(1) determining the status of the non-party in the post-award action would unduly complicate that action, or

(2) the non-party could and reasonably should have participated in the arbitration but failed to do so.

[31] Cross-reference to Section to be drafted on ability of non-signatories to enforce arbitration agreements.

Comments:

a. Generally. This Section identifies those persons that are proper plaintiffs in a post-award action. A person that is a proper plaintiff may seek to confirm, enforce, or vacate the award in court, as long as the other requirements for bringing a post-award action are met.

b. Party to the arbitral proceeding. A person that participates in an arbitral proceeding as a party without objection by any other party has standing to bring a post-award action. The other parties waive any objection they might otherwise have had to its status as a party. Likewise, a person that participates in the arbitral proceeding as a party by asserting or defending against claims or counterclaims has standing to bring a post-award action, even if the other parties object to its status as a party. If the arbitral tribunal overrules those objections, the tribunal has concluded that the person is a party. If it accepts the objections, the person should be able to challenge the award concluding it is not a party. Moreover, as long as the arbitral tribunal determines that a person is a proper party to an arbitral proceeding, that person is a proper plaintiff in a post-award action even if the person does not participate in the proceeding.

c. Non-party to the arbitral proceeding. In addition, a person that is not a party to the arbitral proceeding may, in exceptional circumstances, be a proper plaintiff in a post-award action. The bases upon which a non-party to the proceeding may be a

proper plaintiff are generally the same as those set out in Section ___,[32] supra, dealing with the enforcement of an arbitration agreement by a non-signatory. For example, a non-party is a proper plaintiff in an action to confirm or enforce an award if a party to the arbitration assigned to the non-party its right to recover on the award. However, the court should consider whether the issue of the non-party's standing can be resolved without unduly complicating the post-award proceeding and whether the non-party could and should have participated in the arbitral proceeding as a party and its reasons for not doing so.

d. *De novo review of arbitral findings.* In many cases, an arbitral tribunal will already have determined whether a non-signatory to an arbitration agreement is bound by the agreement. Whether or not that person appeared in the arbitral proceeding, a court, when requested to confirm or enforce the resulting award in favor of that person or to vacate an award against it, generally determines that issue de novo.

REPORTERS' NOTES

a. Generally. The FAA clearly contemplates that a party to an arbitration may seek to confirm, enforce, or vacate the resulting award. FAA Chapters Two and Three state that "any party to the arbitration may apply . . . for an order confirming the award." 9 U.S.C. §§ 207, 302. Likewise, Chapter One of the FAA provides that "any party to the arbitration may apply to the court . . . for an order confirming the award," id. § 9, and that under proper circumstances a court may vacate an award "upon the application of any party to the arbitration," id. § 10(a). In addition, this Section provides that a non-party to the arbitral proceedings may, in exceptional circumstances, be a proper plaintiff in a post-award action.

b. Party to the arbitral proceeding. A person, either a natural person or a legal person, that participates in an arbitration as a party—by asserting or defending against claims or counterclaims—is a proper plaintiff in a post-award action. Participating in some other status, such as testifying as a witness, is insufficient to make a person a proper plaintiff. If the person participates as a party without

[32] Cross-reference to Section to be drafted on ability of non-signatories to enforce arbitration agreements.

objection by any other party, those other parties waive any objection to its status as a proper plaintiff. See § 4-25, supra. To the extent that the other parties do object, they preserve their right to oppose post-award relief on an appropriate basis. But if the arbitral tribunal has overruled those objections and permitted the party to participate in the arbitral proceeding, that party remains a proper plaintiff. And if the tribunal accepts those objections, the person is a proper plaintiff in an action to challenge the tribunal's award on that ground. When only one party (of multiple parties) objects to a party's participation in the arbitration, the objecting party preserves its right to oppose post-award relief on an appropriate basis, while the parties that fail to object do not.

c. Non-party to the arbitral proceeding. In exceptional circumstances, a party that does not participate in the arbitration may nevertheless be a proper plaintiff in a post-award action. Courts have on occasion permitted a non-party to seek vacatur, confirmation, or enforcement of an award when it satisfies one of the grounds for a non-signatory to enforce an arbitration agreement as set out in Section 2-__,[33] supra. But cf. Copeland's Cheesecake Bistro of Bossier City, L.L.C. v. Great Am. Ins. Co., 2010 U.S. Dist. LEXIS 64407, at *3 (W.D. La. June 24, 2010) (holding that non-party lacks standing to seek confirmation of award under FAA Section 10). Important additional considerations include: (1) whether the status of the non-party can be evaluated without unduly complicating the post-award action; and (2) whether the non-party reasonably could and should have participated in the arbitral proceeding.

Regarding the first consideration, and as discussed in more detail in the Reporters' Note to Comment *c*, Section 4-31, infra, courts will adjudicate the status of a non-party in a post-award action only if that adjudication will not unduly complicate the proceeding. Regarding the second consideration, a relevant factor would be why the non-party did not participate in the arbitral proceeding. A party should not be able to sit back and wait for the outcome of the arbitral proceeding and then seek to confirm, enforce, or vacate the award—without justification for its non-participation in the proceeding. Cf. Techcapital Corp. v. Amoco Corp., 2001 U.S. Dist. LEXIS 2822, at *10-11 (S.D.N.Y. Mar. 19, 2001) (in an action to confirm or vacate award under FAA Section 10, court permits non-signatories to intervene in action after considering the reasons why they did not seek to intervene in arbitration).

A non-party seeking to enforce an award bears the burden of proving that it is a proper plaintiff. Cf., Leatt Corp. v. Innovative Safety Tech., LLC, 2010 U.S. Dist. LEXIS 71362, at *15 (S.D. Cal. July 15, 2010) (party seeking to enforce award against non-party bears burden of proof).

d. De novo review of arbitral findings. A court generally determines de novo whether a non-party is a proper plaintiff. See § 4-7, supra.

[33] Cross-reference to Section to be drafted on ability of non-signatories to enforce arbitration agreements.

§ 4-31. Proper Defendant

(a) Any person that participates in an arbitral proceeding as a party by asserting or defending against a claim is a proper defendant in a post-award action. In addition, any person that the arbitral tribunal determines to be a party to an arbitral proceeding is a proper defendant in a post-award action, even if the person did not participate in the arbitral proceeding.

(b) A court may, in exceptional circumstances, determine that a person not a party to an arbitral proceeding is a proper defendant in a post-award action if it satisfies one of the grounds on which a non-party would be bound to the arbitration agreement under Section 2-___,[34] unless the court, in its discretion, declines to recognize the person as a proper defendant because:

(1) determining the status of the non-party in the post-award action would unduly complicate that action, or

(2) the non-party was improperly excluded from participating in the arbitration.

[34] Cross-reference to Section to be drafted on ability of non-signatories to enforce arbitration agreements.

Comments:

a. Generally. This Section identifies those persons that are proper defendants in a post-award action. A person that is a proper defendant is subject to having the award confirmed or enforced against it, unless it proves the existence of a ground for vacating or denying enforcement of the award. Conversely, a person that is a proper defendant in a vacatur action is subject to having an award in its favor vacated if another party to the arbitration proves the existence of a ground for vacating the award.

b. Party to the arbitral proceeding. A person that participates in an arbitral proceeding as a party without objecting waives any objection to its being named as a defendant in a post-award action. If the arbitral tribunal determines that a person is a proper party to an arbitral proceeding, that person is a proper defendant in a post-award action even if the person does not participate in the proceeding, but its right to seek vacatur or oppose confirmation or enforcement of the resulting award is preserved. If the arbitral tribunal determines that the person is not a proper party to the arbitral proceeding, it is nonetheless a proper defendant; the other parties should be able to challenge the award to that effect in court.

c. Non-party to the arbitral proceeding. In addition, a person that is not a party to the arbitral proceeding may, in exceptional circumstances, be a proper defendant in a post-award action. The bases upon which a non-party to the proceeding may be a

proper defendant are generally the same as those set out in Section 2-___,[35] supra, dealing with the enforcement of an arbitration agreement against a non-signatory. However, the court should consider whether the issue of the non-party's status can be resolved without unduly complicating the post-award proceeding and whether the non-party was unreasonably and unfairly excluded from participating in the arbitration.

d. *De novo review of arbitral findings.* In many cases, an arbitral tribunal will already have determined whether a non-signatory to an arbitration agreement is bound by the agreement. Whether or not that person appeared in the arbitral proceeding, a court, when requested to confirm or enforce the resulting award against that person or to vacate an award in its favor, generally determines that issue de novo.

REPORTERS' NOTES

a. Generally. The FAA addresses only briefly the question of the proper defendants in an action to enforce an arbitral award. Chapters Two and Three provide that an award may be confirmed, recognized, or enforced against "any other party to the arbitration," 9 U.S.C. §§ 207, 302, while Chapter One refers only to the "adverse party" to the party seeking an order confirming the award, without identifying that party, id. § 9. Under this Section, as under Section 4-30, supra, a non-party to the arbitral proceeding may in exceptional circumstances also be a proper defendant in a post-award action.

b. Party to the arbitral proceeding. A person, either a natural person or a legal person, that participates in an arbitration as a party—by asserting or defending against claims or counterclaims—is a proper defendant in a post-award action. Participating in some other status, such as testifying as a witness, is insufficient to make a person a proper defendant. If a person participates as a party without objection on its part, it waives any objection to its status as a proper defendant, see § 4-25, supra, as well as any challenge to an award on that ground. Cf. Gvozdenovic v. United Air Lines, Inc., 933 F.2d 1100, 1105 (2d Cir.) (in labor arbitration, finding that a party had a "clear intent to arbitrate the dispute" as manifested by its "active and voluntary participation in the arbitration" and the fact it never objected to arbitration or refused to arbitrate), cert. denied, 502 U.S. 910 (1991). A party that objects to arbitral jurisdiction in the arbitral proceeding preserves its right to assert such objection in challenging the award, but will nonetheless be a proper defendant in a post-award action. If a party makes a limited

[35] Cross-reference to Section to be drafted on ability of non-signatories to enforce arbitration agreements.

appearance in the arbitral proceeding solely for the purpose of objecting to jurisdiction, it preserves its objection, but it will be a proper defendant in a post-award action if the arbitral tribunal determines that it has jurisdiction over it. Finally, a signatory to an arbitration agreement that refuses to participate in the arbitral proceedings may in appropriate circumstances be considered to be a party to the proceedings, just as a named defendant that fully defaults in litigation may nevertheless ultimately be found to be a party to the litigation. See In re Transrol Navegacao S.A., 782 F. Supp. 848, 851 (S.D.N.Y. 1991) (award entered against party that did not attend arbitral proceeding; court found agreement to arbitrate based on conduct in subsequent litigation); see also Gary B. Born, International Commercial Arbitration 1866-1867 (2009) ("Leading institutional rules also uniformly provide that arbitral proceedings may go forward without the defaulting party's presence and result in a default award."). Subject to Section 4-25, supra, however, the non-participating party may still be able to raise defenses against confirmation, recognition, or enforcement of any resulting award.

c. Non-party to the arbitral proceeding. The language of FAA § 207 might be read as requiring that to be a proper defendant in a post-award action, the person must have been a party to the arbitral proceeding. 9 U.S.C. § 207. In fact, on occasion courts have held a non-party to the arbitral proceeding to be a proper defendant in a post-award action. For example, in Productos Mercantiles e Industriales, S.A v. Faberge USA, Inc., 23 F.3d 41 (2d Cir. 1994), the claimant (Prome) obtained an arbitral award against Faberge, Inc. Prome then sought to enforce the award under the Panama Convention against Unilever United States, Inc., which it alleged was Faberge's successor under an acquisition agreement. Unilever, having refused to consent to becoming a party, opposed enforcement on the ground that it was not a party to the arbitral proceeding. The court of appeals held that the district court could determine in the enforcement proceeding whether Unilever was a successor to Faberge's obligations, and thus a proper defendant, even though Unilever was not a party to the arbitral proceeding. Id. at 47.

As in the case of non-parties as proper plaintiffs, see Section 4-30, supra, the grounds on which non-parties to the arbitral proceeding may be proper defendants in post-award actions parallel the grounds on which non-signatories may be held bound by the arbitration agreement. See § 2-___,[36] supra. In addition, courts consider whether bringing a non-party into a post-award action at that late stage would unduly complicate the action. Thus, in an action seeking to confirm an arbitral award under FAA Section 9, the Second Circuit declined to conduct an "alter ego" analysis, explaining that "[i]t would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported 'alter ego.'" Orion Shipping & Trading Co. v. E. States Petroleum Corp., 312 F.2d 299, 301 (2d Cir.), cert. denied, 373 U.S. 949 (1963); see also Glencore AG v. Bharat Aluminum Co., 2010 U.S. Dist. LEXIS 116051, at *20 (S.D.N.Y. Nov. 1, 2010) (refusing to enforce foreign Convention award against parent company of losing party in arbitration) ("An action to confirm a foreign arbitral award is not the proper occasion to assert an alter ego theory for liability . . . . To consider 'a potentially voluminous record' detailing the relationship between a party bound by an arbitration award and its alleged alter ego 'would unduly complicate and protract the proceeding.'") (quoting *Orion Shipping*); Cargill Inc. v. Clark Farm #2, L.L.C., 2010 U.S. Dist. LEXIS 53455, at *2 (M.D. La. June 1, 2010) (refusing to pierce corporate veil in confirmation action) (following *Orion Shipping*).

Considerations relevant to the potential increase in complexity of the post-award action include the availability of witnesses, the need to gather evidence abroad, language issues in presenting evidence, and the like. But courts have been willing to consider whether a non-party is a proper defendant when the determination "will not . . . require the court to engage in extensive factfinding." Productos Mercantiles e Industriales, 23 F.3d at 46-47 (successor under acquisition agreement); Orlogin, Inc. v. U.S. Watch Co., 1990 U.S. Dist. LEXIS 7794, at *17-18 (S.D.N.Y. June 25, 1990) (successor under merger agreement); see also Leatt Corp. v. Innovative Safety Tech., LLC, 2010 U.S. Dist. LEXIS 71362, at *15 (S.D.

[36] Cross-reference to Section to be drafted on binding non-signatories to arbitration agreements.

Cal. July 15, 2010) (holding that plaintiff had alleged sufficient facts that defendant could be bound by award under agency theory to survive motion to dismiss); Quanqing (Changshu) Cloth-Making Co. v. Pilgrim Worldwide Trading, Inc., 2010 U.S. Dist. LEXIS 64515, at *7-10 (D.N.J. June 29, 2010) (considering whether award could be confirmed against non-signatory under New York Convention, but concluding that non-signatory was not bound under equitable estoppel theory).

In addition, courts will consider whether and to what extent it is fair and reasonable to bind a non-party to the outcome of arbitral proceedings, even though it did not participate in the proceedings as a party and may not have had the opportunity to do so. See Cecil's, Inc. v. Morris Mech. Enters., Inc., 735 F.2d 437, 440 (11th Cir. 1984) (action to confirm award against non-party) (finding that "there is no contention that [the non-party] was intentionally and completely excluded from participating in the defense at arbitration. [The non-party] was aware of its potential liability and chose to stand aside while [the party] defended."); cf. Carolyn B. Lamm & Jocelyn A. Aqua, Defining the Party—Who Is a Proper Party in an International Arbitration Before the American Arbitration Association and Other International Institutions, 34 Geo. Wash. Int'l L. Rev. 711, 740 (2003) ("[A] non-signatory's lack of notice of arbitral proceedings to which it is later bound is one of the fundamental grounds for denying enforcement of an award under the New York Convention."). See generally Comment *d* to § 4-13, supra (discussing notice requirement).

The party seeking to enforce an award against a non-party bears the burden of proving that the non-party is a proper defendant. E.g., Leatt Corp., 2010 U.S. Dist. LEXIS 71362, at *15.

d. De novo review of arbitral findings. A court generally reviews de novo whether a non-party is a proper defendant. See § 4-7, supra.

§ 4-32. Statute of Limitations

(a) The limitations period applicable to a post-award action under federal law and the rules pertaining to its application are governed by federal law, irrespective of whether the action is brought in federal or state court.

(b) The limitations period applicable to a post-award action under state law and the rules pertaining to its application are governed by state law to the extent that they are not preempted by federal law.

(c) The limitations period applicable to a post-award action on an award begins to run on the date the award is issued. A party bringing a post-award action in connection with a partial award may do so within the prescribed limitations period following issuance of either the partial or the final award.

(d) A cross-motion to confirm or to vacate a U.S. Convention award is subject to the same statute of limitations as would apply if the motion were brought independently.

(e) A party opposing confirmation of an award may raise defenses to confirmation, even if the limitations period for seeking vacatur of the award on those grounds has passed.

(f) The applicable limitations period may be tolled by agreement of the parties, except to the extent that the applicable law provides

otherwise. It may also be tolled on any other ground recognized under the law designated in paragraphs (a) and (b).

(g) A defense based on an applicable limitations period may be waived, except to the extent that the applicable law provides otherwise.

Comments:

a. Limitations period on actions in federal court for post-award relief under federal law. Actions for post-award relief under federal law in federal court are subject to the statute of limitations provided for by federal law. The limitations period applicable to actions for post-award relief can vary with the type of post-award relief sought.

(i). Limitations period on actions to confirm U.S. Convention awards. The New York and Panama Conventions do not themselves subject a confirmation action to a limitations period. An action to confirm a U.S. Convention award under the Federal Arbitration Act is subject to the three-year limitations period specified in Sections 207 and 302 of the FAA. This limitation period begins to run when the award is made.

(ii). Limitations period on actions to vacate U.S. Convention awards. An action to vacate a U.S. Convention award is subject to the three-month limitations period specified in Section 12 of the FAA. This limitation period begins to run at the time of filing or delivery of the award, as provided in FAA Section 12.

(iii). Limitations period on actions to enforce foreign Convention awards. As noted, while the Conventions do not by their terms subject enforcement of awards to a limitations period, Chapters Two and Three of the FAA do so. An action to enforce a foreign Convention award is subject to the three-year limitations period specified in Sections 207 and 302 of the FAA. This limitation period begins to run when the award is made.

(iv). Limitations period on actions to enforce non-Convention awards. An action to enforce a non-Convention award is subject to the one-year limitations period specified in Section 9 of the FAA. This limitation period begins to run when the award is made.

b. Limitations period on actions in state court for post-award relief under federal law. Due to the close link between a claim for post-award relief under federal law and the limitations period attached to it, the limitations periods specified in Comment *a* are also applicable if the action is brought under federal law in state court. This position serves the strong federal interest in uniformity within the federal law regimes governing post-award relief in U.S. courts.

Nothing prevents a party from seeking post-award relief in state court under state law, whether statutory or common law in form. In principle, any such action is subject to the statute of limitations, if any, provided by state law.

c. Limitations period applicable to post-award actions in connection with partial awards. A partial award, as defined in Section 1-1(v), supra, disposes of some, but not

all, of the matters in dispute in an arbitration. A party should be able to seek confirmation, vacatur, or enforcement of a partial award without waiting until the arbitration is fully concluded and a final award is rendered. Having an early determination of the validity of a partial award is likely to promote efficiency in subsequent phases of the arbitration, principally by narrowing and better defining the issues that remain to be decided.

Subjecting a partial award to post-award actions may nevertheless also produce inefficiencies. An action to that effect would often need to be brought before issuance of the final award, resulting in multiple post-award actions arising out of the same dispute. Among other things, such multiplicity will often require courts to assess the preclusive effects of earlier rulings, introducing added complexity into the courts' work and encumbering the process. Moreover, requiring such actions to be brought within the limitations period following issuance of a partial award may cause unfair surprise to a party that assumes that the limitations period on confirming, vacating, or enforcing a partial award begins to run only from issuance of the final award. At the same time, a party aware of this risk may feel constrained to bring the action within a period running from issuance of the partial award for fear of losing the right to seek post-award relief in connection with the partial award at a later time.

To avoid potential inefficiencies while still protecting the parties' reasonable expectations concerning limitation periods, the Restatement takes that position that a party may bring an action to confirm, vacate, or enforce a partial award either upon

issuance of that award or upon issuance of the final award in which it is effectively incorporated. In either case, the action must be brought within the limitations period running from the date of issuance of the award—partial or final—that is the subject of the action. This approach will permit early resolution of a challenge to a partial award, without rendering post-award relief in connection with that partial award time-barred if relief is sought only after the final award is rendered.

d. Limitations period applicable to cross-motions. An action to confirm a U.S. Convention award is commonly met with a cross-motion to vacate the award. Likewise, an action to vacate such an award is commonly met with a cross-motion to confirm. The limitations period applicable to such cross-motions should not differ from the period that would have applied if the actions were brought independently.

e. Limitations period for defeating confirmation. Although actions to confirm and actions to vacate under the FAA are subject to different statutes of limitation, they are in many ways mirror-image actions. An award otherwise eligible for confirmation must be confirmed unless one or more of the grounds for vacatur of that award is established. Thus, the substantive grounds that will defeat confirmation of an award are the same ones that will justify vacatur of the award. Even so, a party need not be considered as having forfeited its defenses to confirmation merely because it has allowed the time for seeking vacatur of the award to elapse. The Restatement takes the position that, while a party loses the right to seek vacatur of an award once the vacatur limitations period has passed, it is not foreclosed from raising the corresponding

grounds in defense against confirmation of the award. Any other rule would encourage a party seeking confirmation of an award to wait to bring the action until after the shorter vacatur limitations period has passed, at which point the defendant would find itself with no substantive defenses. It would also lay a trap for the unwary, since the losing party in an arbitration could reasonably believe that the established defenses to confirmation are available for as long as a confirmation action may be brought.

f. Tolling and waiver. The limitations period applicable to actions for post-award relief is not subject to any special rules regarding tolling or waiver. Parties are permitted, however, to agree that the limitations period is tolled, unless the applicable law provides otherwise. The applicable law may also provide other generally applicable bases for tolling the limitations period. Waiver of a defense based on the applicable limitations period may be either express or implied. For a fuller discussion of waiver, see Section 4-25, supra.

REPORTERS' NOTES

a. Limitations period on actions in federal court for post-award relief under federal law.

(i). Limitations period on actions to confirm U.S. Convention awards. A party seeking confirmation of a U.S. Convention award under the FAA must proceed under FAA Chapters Two or Three, as applicable. See § 4-3 supra. FAA Chapters Two and Three set forth a three-year statute of limitations for such an action. See 9 U.S.C. §§ 207, 302; Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1290-91 (11th Cir. 2004).

The three-year limit adopted by FAA Chapters Two and Three, 9 U.S.C. §§ 207, 302, is liberal in comparison with the one-year period specified in FAA § 9, although the circuits are split on whether FAA § 9's time limit is mandatory. See FIA Card Servs., N.A. v. Gachiengu, 571 F. Supp. 2d 799, 803-804 (S.D. Tex. 2008) (describing circuit split). By comparison, the three-year time specified in FAA § 207 is plainly a mandatory limitations period that bars untimely actions to enforce Convention awards. See Transp. Wiking Trader Schiffarhtsgesellschaft MBH v. Navimpex Centrala Navala, 989 F.2d 572, 581 (2d Cir. 1993) (dismissing action to enforce Convention as time-barred under FAA § 207).

(ii). Limitations period on actions to vacate U.S. Convention awards. The Restatement takes the position that the law applicable to actions to vacate a U.S. Convention award is FAA Chapters Two or

Three, as applicable. See § 4-3, supra. This is because those chapters incorporate the provisions of FAA Chapter One to the extent they are not inconsistent with the provisions of FAA Chapters Two or Three. See FAA §§ 208 and 307. Chapter One's provision for a vacatur cause of action is not inconsistent with FAA Chapters Two or Three, as neither of the latter chapters addresses vacatur specifically. Because FAA Chapters Two and Three do not set forth a vacatur statute of limitations, FAA Chapter One supplies the limitation period for actions to vacate U.S. Convention awards. The limitations period applicable to such action is accordingly three months, as set forth in 9 U.S.C. § 12.

(iii). Limitations period on actions to enforce foreign Convention awards. A party seeking enforcement of a foreign Convention award under the FAA must proceed under FAA Chapters Two or Three, as applicable. See § 4-3, supra. FAA Chapters Two and Three set forth a three-year statute of limitations for such an action. See 9 U.S.C. §§ 207, 302. Thus the same limitations period applies to the confirmation of U.S. and foreign Convention awards. See Reporters' Note *a(i)* of this Section.

(iv). Limitations period on actions to enforce non-Convention awards. An action to enforce a non-Convention award, being governed by FAA Chapter One (see Section 4-3, supra), is subject to the FAA Chapter One limitations period of one year.

b. Limitations period on actions in state court for post-award relief under federal law. An action for post-award relief under the FAA may also be brought in state court, since federal court jurisdiction over such actions is not exclusive. There is admittedly some ambiguity as to whether procedural provisions of the FAA apply by their terms only to federal courts. See Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 27 n.34 (1983) ("[FAA] § 3 refers ambiguously to a suit 'in any of the courts of the United States'").

However, a statute of limitations may be so bound up in a substantive right as to be part and parcel of that right. Cf. RMS Tech., Inc. v. TDY Indus. Inc., 64 Fed. Appx. 853, 857 (4th Cir. 2003) (in the context of the Uniform Commercial Code's statute of limitations); Boggs v. Adams, 45 F.3d 1056, 1060 n.8, 1061-1062 (7th Cir. 1995) (in the context of the Illinois Childhood Sexual Abuse Act). Application to Convention awards of the limitations period prescribed by state arbitration statutes would lead to a loss of uniformity due to the considerable variation among state law limitations periods. See Rev. Unif. Arb. Act, § 22, cmt. 2, 7 U.L.A. 73 (2005) ("The Drafting Committee considered but rejected the language in FAA Section 9 that limits a motion to confirm an award to a one-year period of time. The consensus of the Drafting Committee was that the general statute of limitations in a State for the filing and execution on a judgment should apply."). Despite the mitigating influence of the FAA's removal provisions, see 9 U.S.C. §§ 205, 302, the uniformity sought under the Conventions would be undercut in state court cases if those courts applied their own statute of limitations in post-award actions under the FAA. Accordingly, the statute of limitations applicable to post-award actions under the FAA in state court is supplied by the FAA itself, thus three months for vacatur and three years for confirmation or enforcement, as specified in this Section.

A post-award action may also be brought under state law in connection with Convention and non-Convention awards. Such actions would in principle be subject to state law limitation periods. States generally enjoy broad authority to determine the procedures of their own courts. See Felder v. Casey, 487 U.S. 131, 138 (1988) ("[it is a] general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts"). That authority properly extends to the establishment of limitations periods on causes of action not created by federal law.

Even so, the states' authority to set limitations periods is not necessarily unlimited. It is well established that state statutes of limitations may be applied to federal laws only to the extent they are not "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). In the context of borrowing state statutes of limitation for civil rights claims, the Supreme Court has held that unduly short limitations periods can interfere with the enforcement of federal policies and are therefore not applicable. *E.g.*, Burnett v. Grattan, 468 U.S. 42 (1984) (state's six-month limitations period conflicts with the policies of § 1983); Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) ("State legislatures do not devise their limitations periods with

national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies").

Even though FAA Chapter One, which governs the enforcement of non-Convention awards, does not create a federal cause of action as such, the FAA does evidence a strong federal policy favoring arbitration, and particularly the enforcement of awards. A state limitations period for enforcing non-Convention awards that is substantially shorter than the one-year period provided in FAA § 9 could significantly inhibit enforcement of arbitral awards and accordingly be preempted. The situation is to be distinguished from state law limitations periods for challenging awards that are shorter than the three-month limitations period provided in FAA § 12, since a shorter period for vacatur of awards would provide greater repose for awards than the FAA and arguably not interfere with the federal policy favoring enforcement. See Moscatiello v. Hilliard, 939 A.2d 325, 330 (Pa. 2007) (applying Pennsylvania's 30-day limitations period to an action to challenge an award under FAA Chapter One). Yet states do not have unlimited authority to shorten the statute of limitations for vacatur of awards. While the strength of the federal policy regarding limitations periods may be attenuated in regard to vacatur, as compared to confirmation, the right to vacatur of an award is nonetheless an essential part of the FAA's overall scheme. Therefore, a state's limitations period for vacatur of awards could conceivably be so unduly short as to be preempted.

c. Limitations period applicable to post-award relief in connection with partial awards. Section 1-1(v) of the Restatement defines a partial award as one that disposes of some, but not all, of the matters in dispute in an arbitration. Arguably, the limitations period for seeking post-award relief in connection with a partial award runs from the award's date of filing or delivery, and courts have so held. See, e.g., La. Health Serv. Indem. Co. v. Gambro A B, 2010 U.S. Dist. LEXIS 135579 (W.D. La 2010) (a "partial final award" determining that class arbitration is appropriate for the dispute at issue is subject to the 3-month limitation period for vacatur in FAA Section 12). Other courts likewise treat a partial award as final and subject to confirmation, vacatur, or enforcement, presumably within the applicable limitations period. Courts have defined "partial final awards" as those that "finally and conclusively dispos[e] of a separate and independent claim and [are] subject to neither set-off nor abatement." Metallgesellschaft AG v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986). Still others seem to make the finality of the award, for statute of limitations purposes depend on whether or not the proceedings were bifurcated, either formally or informally. See Hart Surgical Inc. v. Ultracision, Inc., 244 F.3d 231, 236 (1st Cir. 2001); Providence Journal Co. v. Providence Newspaper Guild, 271 F.3d 16 (1st Cir. 2001); Trade & Transp., Inc. v. Natural Petroleum Charterers Inc., 931 F.2d 191 (2d Cir. 1991).

Allowing confirmation, vacatur or enforcement of a partial award to occur before completion of the arbitration presents distinct advantages. Both the party prevailing and the party losing in the partial award may have a legitimate interest in securing a definitive ruling on the validity and enforceability of the partial award, if only to narrow the issues or bring greater clarity to the rest of the proceedings. An early decision on a partial award also brings efficiencies. If, for example, review of a partial award is allowed and the court concludes that the arbitral tribunal lacked jurisdiction, the jurisdictional defect will be known before the tribunal and the parties expend time and other resources on a determination of the merits. Similarly, an early ruling vacating a partial award on liability would obviate the need for a lengthy hearing on damages.

The more troublesome question is whether the limitations period on confirmation, vacatur, or enforcement of a partial award necessarily expires three years (in the case of confirmation and enforcement) or three months (in the case of vacatur) from issuance or delivery of a partial award, so that the award cannot be confirmed, vacated, or enforced thereafter. Such a rule would tend to foment litigation, since if in doubt a party would be led always to seek post-award relief in connection with a partial award, lest it lose the right to seek such relief by waiting until the final award is rendered. This is especially problematic in the case of vacatur actions since, due to the brevity of the limitations period, an action to vacate a partial award would commonly need to be brought before issuance of the final award. A separate vacatur action would then be required if the losing party were to challenge the final award upon its issuance or delivery. More generally, parties may easily fail to understand that the limitations

period for seeking post-award relief in connection with a partial award runs from the issuance of that award and mistakenly wait for the final award on the reasonable assumption that the partial award may be the subject of a post-award action at that later point.

No court appears to have squarely decided whether, once the limitations period on post-award relief in connection with a partial award has run, a party may still seek such relief in connection with that portion of an award on the occasion of an action to confirm, vacate, or enforce the full and final award. Though unnecessary to its decision, the court in *Hart Surgical*, pointed out the risk in treating the content of a partial award as no longer subject to confirmation or vacatur merely because the limitations period following issuance of the partial award had expired and even though it was not yet too late to seek confirmation or vacatur of the remainder of the award. 244 F.3d at 236. The court recognized that a party that lost in a partial award might forfeit judicial review of that portion of the award by waiting until all arbitration proceedings have been completed.

The soundest policy is to permit confirmation, vacatur, or enforcement of a partial award immediately upon the award's issuance, but consider the running of the limitations period for seeking such post-award relief in connection with a partial award as tolled until issuance of the final award, at which point the limitations period would begin to run. The Restatement accordingly takes the position that both parties have the right, but are not required, to seek post-award relief in the immediate wake of a partial award, resulting in certain of the economies referred to above. Rather, they may, if they prefer, wait for a ruling on the partial award until after the final award comes down.

d. Limitations period applicable to cross-motions. Cross-motions arising under the FAA are treated identically for the purposes of statute of limitations as independent actions. Therefore, a cross-motion to vacate an award is subject to the same limitations period as an independent action to vacate, and does not benefit from the FAA's longer limitations period for confirmation. Florasynth, Inc. v. Pickholz, 750 F.2d 171 (2d Cir. 1984).

e. Limitations period for defeating confirmation. The FAA prescribes different statute of limitations for confirmation of U.S. convention awards (three years) and for vacatur of such awards (three months). This difference in limitation periods under the FAA has given rise to complications, especially since the grounds for confirmation and vacatur are themselves linked, insofar as an award subject to the FAA must be confirmed unless a ground for vacatur is established.

These complications are illustrated by the Second Circuit's decision in *Florasynth*. See Reporters' Note *e* of this Section. In *Florasynth*, the court reviewed the confirmation of an arbitral award resulting from an employment dispute between two domestic parties. The court held that under the only permissible construction of FAA Section 12, a party that fails to bring a motion to vacate within the three-month period allowed is not only barred from seeking vacatur under FAA Section 10 after that point in time, but also barred from raising a ground for vacatur as a defense to a confirmation action under Section 9. The court based its conclusion on a plain meaning interpretation of the statute. The summary nature of a confirmation proceeding and the desire of parties for a "quick and final resolution of their disputes" were also advanced as justifications. The court acknowledged that this decision creates an incongruity between federal arbitration law and New York arbitration law, despite the fact that the relevant language in both is the same. *Florasynth* did not involve a confirmation or vacatur of a Convention award, but its reasoning would equally apply to such a case.

The *Florasynth* position has been adopted in other circuits. See, e.g., Cullen v. Paine, Webber, Jackson & Curtis, Inc., 863 F.2d 851, 854 (11th Cir. 1989) ("the failure of a party to move to vacate an arbitral award within the three-month limitations period prescribed by section 12 of the United States Arbitration Act bars him from raising the alleged invalidity of the award as a defense in opposition to a motion brought under section 9 of the USAA to confirm the award."). Courts, however, have subjected the rule to certain exceptions. See, e.g., MCI Telecomms. Corp. v. Exalon Indus., Inc., 138 F.3d 426 (1st Cir. 1998) (party not precluded from litigating arbitrability by failure to raise objection to an adverse award within FAA Section 12's 3-month limitation period).

It is not illogical for Congress to have subjected vacatur actions to a shorter limitations period than the period applicable to actions to confirm, and Congress presumably intended that disparity when it enacted the FAA. While FAA Chapters Two and Three authorize actions to vacate a U.S. Convention award, through Section 208's incorporation of vacatur from Section 10 of the FAA, they must be read as incorporating the statute of limitations that attaches to Section 10. It would be impermissible to read FAA Section 10 into FAA Chapters Two and Three, while rejecting the statute of limitations to which FAA Section 12 expressly subjects such actions.

But just as confirmation and vacatur are distinct (see Section 4-1, supra), so too are vacatur and defenses to confirmation. There is a difference between seeking to vacate an award, on the one hand, and resisting an award's confirmation, on the other. Successfully defending a confirmation action means that the award fails to achieve the status of a judgment of a court of the place of arbitration. However, the award subsists. More important, it remains an award for Convention purposes; it is thus entitled to recognition and enforcement under the Conventions unless some independent Convention ground for denying recognition or enforcement is established. The ground stated in Section 5-12(b), infra, based on Articles V(1)(e) and 5(1)(e) of the Conventions will not have been established because the award was merely denied confirmation where made, not set aside. By contrast, vacatur of an award establishes the award's nullity within the legal system whose court vacated the award and in any jurisdiction that owes or gives that judgment of vacatur full faith and credit. While an award that has been vacated in the place where it was made may still, under exceptional circumstances, be recognized and enforced elsewhere (see § 4-16(b), infra), its chances of being recognized and enforced are much reduced. However, it should be noted that a judgment denying confirmation may be given preclusive effect within the United States and possibly elsewhere, in keeping with the applicable principles of judgment recognition.

Under the *Florasynth* rule, the party prevailing in an arbitration need only wait anywhere from three months and a day to one year from the running of the limitation period in order to render confirmation essentially denial-proof. A knowledgeable party may know that it has only three months in which to seek vacatur of an award, but at the same time reasonably suppose that it retains its defenses to confirmation for as long as the confirmation action itself is timely. To that extent, the position adopted in *Florasynth* sets a trap for the unwary.

The difficulty created by *Florasynth* is aggravated in the case of Convention awards made in the U.S. Such awards are Convention awards, and their confirmation or enforcement is governed by the Conventions. The Conventions have multiple purposes, including of course rendering awards presumptively enforceable. But they also provide important protections in the form of defenses to confirmation or enforcement. The two purposes go hand in hand. The intention of the Conventions' drafters would be frustrated if after three months confirmation of a Convention award was no longer subject to any of the Conventions' own safeguards and protections. This reasoning is unaffected by the fact that denial of enforcement under the Conventions is permissive rather than mandatory; that is to say, an award may be enforced even though a ground justifying denial is present. The point is not that the Conventions actually require defeat or confirmation or enforcement once aground for defeat is established. The point rather is that courts must at least entertain the defenses to confirmation or enforcement that the resisting party raises.

The question that arises is whether the language of the FAA mandates the position taken in *Florasynth*. A strict reading of the language of the FAA would suggest that confirmation may only be denied if the award "is vacated" under § 9, and that it is not enough that the award "could have been vacated" under that section. Under this reading, a confirmation action may not be defeated unless the opposing party has already brought an action to vacate that award and that action is successful. However, it seems highly unlikely that Congress intended to make a party's entitlement to defeat confirmation conditional upon that party's bringing an independent action for vacatur. Congress' principal intention was to borrow as defenses to a confirmation action the grounds that would entitle the opposing party to vacatur if that party were to have sought vacatur. Once it is accepted that a party need not affirmatively seek vacatur in order to defeat a confirmation action on FAA Section 10 grounds,

there is no reason to transpose the three-month statute of limitations on actions to vacate awards into a time limitation on defeating confirmation.

The Restatement accordingly takes the position that while affirmative relief in the form of vacatur of an award is barred after three months, the grounds for vacatur may be raised by way of defense to a confirmation action for the full period in which confirmation may be sought, which is one year for actions brought under FAA Chapter One and three years for actions brought under FAA Chapters Two or Three. This position has won the support of several courts. See, e.g., Jam. Commodity Trading Co., 1991 U.S. Dist LEXIS 8976 (S.D.N.Y. 1991); Generica Ltd. v. Pharmaceutical Basics, Inc., 125 F.3d 1123 (7th Cir. 1997)(defenses against enforcement of an ICC arbitral award are not time-barred even when brought more than three months after the award was issued); Hartford Fire Ins. Co. v. Lloyd's Syndicate 0056 ASH, 1997 U.S. Dist. LEXIS 10858 (D. Conn. 1997).

f. Tolling and waiver. The FAA's provisions on limitation periods for post-award actions do not address tolling or waiver. Tolling may nevertheless occur by operation of law or, given the non-mandatory nature of the period, through an agreement between the parties, unless the applicable law provides otherwise. See, e.g., Everplay Installation Inc. v. Guindon, 2009 U.S. Dist. LEXIS 113054 (D. Colo. 2009) ("The Court discerns no reason why tolling should not apply [to the three-year limitations period set forth in 9 U.S.C. § 207"). In the absence of any compelling reason to establish special tolling rules for post-award actions, the Restatement calls for application of the forum's general policies and practices on tolling.

A party may waive the limitations period expressly or impliedly, insofar as the applicable law allows. See Photopaint Techs., L.L.C. v. Smartlens Corp., 335 F.3d 152 (2d Cir. 2003) (in motion to confirm award under FAA Section 9, parties could toll or waive the applicable limitations party through contract or agreement). Again, there is no warrant for establishing special rules on the waiver of statutes of limitations for post-award actions.

§ 4-33. Procedural Issues in Post-Award Actions

(a) A post-award action is ordinarily a summary proceeding, whether brought by motion or otherwise.

(b) Notwithstanding paragraph (a), in exceptional circumstances a court may order discovery or receive evidence to the extent necessary to determine relevant issues of fact.

Comments:

a. Summary procedure in actions for post-award relief. Generally, post-award actions in connection with both Convention and non-Convention awards are summary proceedings to be conducted expeditiously. Motions are the usual vehicle. Accordingly, the Restatement recognizes what is essentially a presumption against evidentiary hearings and discovery in actions for post-award relief. However, in rare cases either evidentiary hearings or discovery, or both, are warranted. For example, a court extends its inquiry beyond summary proceedings in those unusual instances when a party seeking vacatur or opposing confirmation, recognition or enforcement raises a legitimate and colorable challenge that is based on a disputed issue of fact or mixed question of fact and law whose resolution is essential to determining whether a ground for granting relief exists. In those rare circumstances, a court may permit new evidence to be introduced and, in even rarer circumstances, permit relevant discovery to be conducted. See Comment *b*.

b. Availability of discovery. A party is generally not entitled to discovery in support of its action for post-award relief or in its defense against such an action. However, in rare and exceptional circumstances, when there is clear and specific evidence of a well-founded allegation of arbitrator bias or improper conduct, or similar basis for vacating or denying confirmation, recognition or enforcement of an award, limited discovery may be available at the court's discretion to develop a record with respect to those allegations.

Illustration:

1. In an action by *B* to confirm an award, *A* challenges the award on ground that it was denied an opportunity to present its case because of arbitrator misconduct. The basis of the alleged misconduct is that an arbitrator had improper communications with the opposing party in violation of governing rules. *A* submits the arbitrator's bills referencing such communications. *B* denies that any such communications occurred. The court grants limited discovery to determine the extent to which such communications occurred and the extent to which they affected the fundamental fairness of the proceedings under Section 4-13, supra.

REPORTERS' NOTES

a. Summary procedure in actions for post-award relief. It is necessary, in determining the procedural character of post-award proceedings, to distinguish between actions in federal and state court.

(i). Procedural issues in post-award actions in federal court. In the interest of expedition, an action to confirm, vacate or enforce an award under the Federal Arbitration Act is a summary procedure. See Legion Ins. Co. v. Ins. Gen. Agency, Inc., 822 F.2d 541, 543 (5th Cir.1987) (proceedings to confirm or

vacate arbitral awards are "summary in nature to effectuate the national policy of favoring arbitration, and they require 'expeditious and summary hearing, with only restricted inquiry into factual issues," quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 22 (1983)); Hall Street Assocs., L.L.C. v. Mattel, Inc., 552 U.S. 576, 578 (2008) ("The Federal Arbitration Act. provides for expedited judicial review to confirm [or] vacate" arbitration awards.); Imperial Eth. Gov't v. Baruch-Foster Corp., 535 F.2d 334, 335 (5th Cir. 1976) (enforcement is generally a "summary procedure in the nature of federal motions practice."); Zeiler v. Deitsch, 500 F.3d 157, 169 (2d Cir. 2007) (an enforcement action "is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm."); see also Encyclopaedia Universalis S.A. v. Encyclopedia Britannica, Inc., 403 F.3d 85, 89 n.2 (2d Cir. 2005); Taylor v. Nelson, 788 F.2d 220 (4th Cir. 1986); Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984). For example, a party seeking to confirm an award need not commence an action by filing a complaint, but rather may "apply to" the United States district court for an "order confirming the award." 9 U.S.C. §§ 9, 208 & 307.

In fact, there is seldom occasion for factual inquiry by courts hearing post-award actions. Not only are the grounds for vacating an award or denying its confirmation, recognition or enforcement exceedingly narrow, but parties rarely raise a legitimate and colorable issue of pure fact whose resolution is essential to determining whether a ground for post-award relief exists. Cf. Schoonmaker v. Cummings & Lockwood, P.C., 747 A.2d 1017, 1025 (Conn. 2000) (concluding in the context of vacatur that a court reviews de novo the issue of whether an award violates public policy, but only when that "challenge has a legitimate, colorable basis."). Even then, the arbitral record, including documentary evidence and transcripts of testimony, may provide a sufficient basis for establishing the basic facts relevant to a ground for relief. In that circumstance, the court need only make an independent assessment of the existing arbitral record.

On occasion, the party against which post-award relief is sought does not appear in the proceedings. Some courts have found that entry of a default judgment in such a proceeding is "generally inappropriate." See, e.g., D.H. Blair & Co., Inc. v. Gottdiener, 462 F.3d 95, 109-10 (2d Cir. 2006); SmartPrice.com, Inc. v. Long Distance Servs., Inc., 2007 WL 1341412 (W.D. Tex. 2007). These courts hold that the proper procedure is to treat the petition for post-award relief "as akin to a motion for summary judgment based on the movant's submissions . . . and even where non-mov[ing] party fails to respond[,] . . . [a] court 'may not grant the motion without first examining the moving party's submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial.'" Celsus Shipholding Corp. v. Pelayaran Kanaka Dwimitra Manunggal, 2008 U.S. Dist. LEXIS 12842, at *3 (S.D.N.Y. Feb. 21, 2008) (quoting Gottdiener, 462 F.3d at 109-110); see also SmartPrice.com, 2007 U.S. Dist. LEXIS 33085, at *8. In other jurisdictions, the local rules regarding summary judgment instruct courts to conclude that there is no genuine issue of material fact where a non-moving party fails to respond to a motion for summary judgment. See, e.g., N.D. ILL. R. 56.1(b)(3)(C) ("All material facts set forth in the statement required of the moving party will be deemed to be admitted unless controverted by the statement of the opposing party."). While the circuits are not in full agreement on whether such practices conflict with Fed. R. Civ. Pro. 56 (see Nathanial Boyer, The Tail Wagging the Dog: Local Summary Judgment Rules That Deem Facts Admitted, 30 Cardozo L. Rev. 2223 (2009)), the Federal Judicial Conference's Committee on Rules of Practice and Procedure has approved a revised Rule 56, which explicitly states that a court may treat facts as undisputed when the non-moving party fails to respond to the motion for summary judgment. See Comm. on Rules of Practice and Procedure, Judicial Conference of the U.S., Report of the Civil Rules Advisory Committee (2008). It remains to be seen whether this revised rule will be finally adopted.

Given the ongoing debate, and the fact that the procedural issues at hand are by no means unique to post-award actions, the Restatement does not take a position regarding the appropriate analysis when a non-moving party does not make an appearance to resist grant of the relief sought. Notably, however, the burden on the moving party in seeking to confirm or enforce an arbitral award is significantly less than the burden on a party seeking summary judgment. Accordingly, it is much easier

for a court to determine that a party has met the burden of proving that it is entitled to confirmation or enforcement of an award than to determine that a party has satisfied its burden of proving that it is entitled to summary judgment. In any event, failure to appear will not prevent confirmation or enforcement of the award.

(ii). Procedural issues in post-award actions in state court. States have broad authority to determine the procedures applicable in their own courts, and state courts are not required, as a matter of federal law, apply summary procedures in post-award actions. The Restatement position, however, is that state courts should and generally do follow federal law and treat post-award actions as summary proceedings. Procedures provided for under most state arbitration statutes are generally summary in nature. See, e.g., Conn. Gen. Stat. §§ 50a-101(2), 50a-135(1); Fla. Stat. § 684.25; Ga. Code § 9-9-42; Or. Rev. Stat. § 36.522(1); Unif. Arb. Act. § 12, 7 U.L.A. 12 (2005); Rev. Unif. Arb. Act § 23(b), 7 U.L.A. 74 (2005). It has been suggested that a common law contract action may also be available for the confirmation or enforcement of awards. See Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1057 (1961) ("In the United States, no state arbitration statute makes any provision for the enforcement of foreign arbitral awards; therefore, there is no summary procedure to confirm an interstate or foreign award in the state courts."). A difficulty with entertaining the prospect of state law actions in contract for these purposes is that, even if the courts were to limit themselves to the Convention or FAA Chapter One grounds for post-award relief, as applicable, the state court proceeding might not be summary in nature, as is desirable.

b. Availability of discovery. Parties generally are not permitted to pursue discovery in support of their challenges to arbitral awards. Hunt v. Mobil Oil Corp., 654 F. Supp. 1487, 1495-1496 (S.D.N.Y. 1987) (in action to vacate under FAA § 10, court finds that "a discovery process would negate the concept of arbitration as a relatively quick means of dispute resolution."). Indeed, "[o]utside the United States, discovery to support challenges to an arbitrators' independence and impartiality (or in other annulment claims) is unheard of." Gary B. Born, International Commercial Arbitration 2618 (2009).

In the United States, courts have recognized one very limited exception: "To justify discovery, the party challenging the arbitration decision has the burden of showing the alleged defect, such as partiality of the arbitrators or some other fundamental defect. Unless a party presents clear evidence of impropriety, the party will not be permitted to conduct additional discovery." Empresa Constructora Contex Ltda. v. Iseki, Inc., 106 F. Supp. 2d 1020, 1024-1025 (S.D. Cal. 2000) (Panama Convention); see also Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 702 (2d Cir. 1978) ("[A]ny questioning of arbitrators should be handled pursuant to judicial supervision and limited to situations where clear evidence of impropriety has been presented."); Woods v. Saturn Distrib. Corp., 78 F.3d 424, 430 (9th Cir. 1996) (refusing further discovery in the absence of the requisite clear evidence and suggesting what might constitute "clear evidence"). This narrow exception arises because on certain rare occasions an asserted ground for challenging an award involves a factual dispute or a disputed issue of mixed law and fact, such as the identity of a signatory to the arbitration agreement or the existence of a relationship that an arbitrator failed to disclose. A court is ordinarily required to conduct an independent review of the factual basis of the challenge.

Despite the obligation of a court to conduct an independent review, however, discovery is rarely necessary, since the grounds for challenging an award are exceedingly narrow and there is a limited range of factual assertions, even if proven, that would be sufficient to sustain a challenge. Moreover, discovery in post-award actions cannot be fishing expeditions and bare allegations of disputed facts that may give rise to a ground for challenging an award are not sufficient to justify discovery in a post-award action. Instead, the party must come forward with clear and credible evidence demonstrating that there is a sound basis for the factual allegation regarding which discovery is sought. See, e.g., Woods, 78 F.3d at 430 (in action to vacate under FAA § 10, court denies request for discovery to uncover alleged arbitrator bias in absence of "clear evidence of improper conduct by the arbitrators"); Andros Compania Maritima, SA, 579 F.2d at 702 (in the absence of clear evidence of impropriety, court disallows discovery into adequacy of disclosure by arbitrator). Because the grounds for vacating or denying confirmation or

enforcement of awards are exceedingly narrow, see § 4-11, supra, and all factual predicates for such grounds must be duly preserved by the party opposing the award, see § 4-25, supra, as a practical matter discovery and evidentiary hearings are generally unnecessary and unavailable in actions to confirm or vacate arbitral awards.

While there are narrow and rare exceptions to the general unavailability of discovery and evidentiary hearings, it is never appropriate for a court to permit discovery or evidentiary hearings for the purpose of investigating the underlying substantive claims on the merits or the arbitrators' related rulings. "Courts have repeatedly condemned efforts to depose members of an arbitration panel to impeach or clarify their awards." Legion Ins. Co. v. Ins. Gen. Agency, 822 F.2d 541, 543 (5th Cir. 1987) (action to vacate award under FAA § 10); see also Hoeft v. MVL Group, Inc., 343 F.3d 57, 67 (2d Cir. 2003) ("cases are legion in which courts have refused to permit parties to depose arbitrators—or other judicial or quasi-judicial decision-makers—regarding the thought processes underlying their decisions.").

The Second Circuit's decision in *Hoeft*, supra, a domestic arbitration case, illustrates both the general rule that discovery is impermissible and the exceptional circumstances in which it may nevertheless be permitted. In *Hoeft*, the losing party in the arbitration sought vacatur of the award on the grounds that the arbitrator had prejudged the parties' dispute and had manifestly disregarded the law in making the award (a ground not available for challenging international awards, see § 4-22, supra). The district court permitted the losing party to depose the arbitrator on both issues.

On appeal, the court held that the district court had not abused its discretion in permitting the arbitrator to be deposed on whether he had prejudged the parties' dispute, "in light of the fact that [the arbitrator] had performed, at [the prevailing party's] request and prior to the commencement of his role as arbitrator, the very calculation that was the substance of the [parties'] dispute." Id. at 66. The court of appeals also held, however, that the district court had abused its discretion in permitting the losing party to depose the arbitrator on the issue of manifest disregard. The court explained:

> An allegation that an arbitrator manifestly disregarded the law, unlike an allegation of bias or prejudgment, necessarily involves . . . the forbidden purpose: inquiring into the arbitrator's decisionmaking process . . . . [T]he parties to a confirmation or vacatur proceeding may not depose an arbitrator regarding "the knowledge [that he] actually possessed," or whether he "appreciated the existence of a clearly governing legal principle but decided to ignore or pay no attention to it." . . . While it may be difficult to prove . . . manifest disregard . . . without questioning the arbitrator, this fact does not change our result. Permitting depositions of arbitrators regarding their mental processes would make arbitration only the starting point in the dispute resolution process and deprive arbitration awards of the last word on their authors' intentions.

Id. at 67-68. Accordingly, the court of appeals held that the district court should not have relied on the arbitrator's testimony in vacating the award for manifest disregard of the law. Id. at 68.

§ 4-34. Appeal in Post-Award Action

(a) A party to a post-award action in federal court has a right of appeal from the final disposition of the action.

(b) A party to a post-award action in state court has a right of appeal from the final disposition of the action to the extent that it is permitted by the law of the forum and not preempted by federal law.

(c) An appeal from the final disposition of a post-award action, whether in federal or state court, is subject to the forum's general rules of appellate procedure.

Comments:

a. Availability of appeal in federal court. An order of a federal court in a post-award action is treated as final and appealable. Sections 16(a)(1)(D) and (1)(E) of the FAA (incorporated into FAA Chapters Two and Three by FAA Sections 208 and 307) permit an immediate appeal from any such order. The right to an immediate appeal applies whether an action is brought in federal court under FAA Chapters Two or Three or, in the case of non-Convention awards, under FAA Chapter One.

b. Availability of appeal in state court. A post-award action under federal law may also be brought in state court. See § 4-26 (c), supra. Indeed, any action for post-award relief brought under applicable state law, like any action for post-award relief in connection with non-Convention awards under FAA Chapter One, must be brought in

state court, unless an independent basis of federal subject matter jurisdiction is present. See § 4-26, Comment *e*, supra. In all these circumstances, the availability of appeal in state court is governed by the law of the forum, provided such law is not preempted by the FAA.

c. Standard of review on appeal. There is no reason to establish special rules on the standard of appellate review in appeals from the grant or denial of post-award relief. This Section assumes that in conducting appellate review, both state and federal courts will apply their usual rules governing the standard of review on appeal, as they likewise apply their usual rules of appellate procedure.

d. Waivability of the right of appeal. Although courts do not enforce attempts by parties to relinquish in advance their right to bring a post-award action (see § 4-24, supra), they ordinarily honor waivers of the right of appeal from an adverse ruling in such an action. Any such waiver must be express and unequivocal, and is subject to generally applicable grounds for denying effect to a waiver of rights.

REPORTERS' NOTES

a. Availability of appeal in federal court. FAA Section 16 provides that appeals may be taken from orders confirming or denying confirmation of an award, and from orders modifying, correcting, or vacating an award. 9 U.S.C. § 16; see Atl. Aviation, Inc. v. EBM Group, Inc., 11 F.3d 1276, 1280 (5th Cir. 1994) (orders vacating arbitration awards are appealable.); V.I. Hous. Auth. v. Coastal Gen. Constr. Servs. Corp., 27 F.3d 911, 913-14 (3d Cir. 1994) (decision vacating an award with direction for remand is appealable); Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654, 674-75 (S.D.N.Y. 2005) (right of appeal attaches to federal court orders enforcing or declining to enforce non-Convention awards). Time limits and other procedural aspects of the appeal are governed by general forum rules applicable to civil appeals.

By incorporation through Sections 208 and 307, these provisions apply to appeals in actions under FAA Chapters Two and Three to confirm or vacate Convention awards made in the U.S. and to enforce foreign Convention awards. Thus, courts routinely hear appeals of Chapter Two confirmation

orders. See Polimaster Ltd. v. RAE Sys., 623 F.3d 832, 843 (9th Cir. 2010) (reversing a district court's confirmation of an award under Chapter Two); Empresa Constructora Contex Limitada v. Iseki, Inc., 2002 U.S. App. LEXIS 2384, at *1-2 (9th Cir. Feb. 12, 2002) (unpublished opinion) (affirming a District Court's confirmation of a foreign arbitration award pursuant to the Panama Convention); Hewlett-Packard Co. v. Berg, 61 F.3d 101, 104 (1st Cir. 1995) (finding that an order confirming an award is appealable under 9 U.S.C. § 16 even if not a final judgment under Rule 58 of the Federal Rules of Civil Procedure).

Courts have found that the FAA "does not distinguish between orders vacating arbitration awards without directing a rehearing and those orders which vacate awards and direct a rehearing of the arbitration dispute; both are appealable." Atl. Aviation, 11 F.3d at 1280. Later courts have clarified that an order for a rehearing is not appealable if the rehearing is merely for purposes of clarification; however an order that would re-open the arbitration is appealable. V.I. Hous. Auth., 27 F.3d at 914.

The appealability of an order depends on its effect, rather than its language. See Guyden v. Prudential Life Ins. Co. of Am., 331 Fed. Appx. 915, 916 (3d Cir. 2009) (unpublished opinion) (district court order granting motion for discovery to determine whether to vacate the award is not appealable under 9 U.S.C. § 16(a)(1)(E)). Similarly a district court's order dismissing a motion to confirm an arbitration panel's class determination is "in effect an order denying confirmation of a partial award" appealable under § 16(a)(1)(D). Computer Servs. v. Dub Herring Ford, 623 F.3d 348, 351 (6th Cir. 2010).

In Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000), the Supreme Court ruled that a lower court order compelling arbitration was appealable under 9 U.S.C. § 16 because it was a final decision within the meaning of Section 16(a)(3), insofar as it disposed of the case and left nothing pending before the lower court. In so doing, it rejected the notion that a judgment is not final for these purposes if an order compelling arbitration is issued in an "embedded" proceeding, i.e. one that involves both a request for arbitration and one or more other claims for relief, rather than in a proceeding in which a request to compel arbitration is the sole issue before the court.

In referring to a "party," paragraph (a) contemplates a party to the post-award action and not necessarily a party to the arbitration agreement or the arbitral proceeding. The distinction is important in light of the Supreme Court decision in the case of Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896 (2009), which held, in the context of compelling arbitration, that, under some circumstances, even a person who is not a party to the agreement or the proceeding has a right of immediate appeal from a trial court decision enforcing or refusing to enforce an arbitral agreement. See § 2-___.[37] Presumably the same logic would extend to a decision granting or denying post-award relief.

b. Availability of appeal in state court. The Restatement does not read FAA Section 16 as imposing an obligation upon state courts to adhere strictly to the FAA's appellate procedures, even if the FAA is otherwise applicable to the action. Section 16 does not explicitly indicate that it applies to state court appellate procedures, though neither does it contain language expressly confining its applicability to actions in federal court. It merely indicates the various actions under FAA Chapter One as against which a right of appeal lies. Nevertheless, federal courts deciding cases in the context of compelling arbitration have characterized the right of appeal in FAA Section 16 as not involving substantive rights. See Campbell v. Dominick & Dominick, Inc., 872 F.2d 358, 361 (11th Cir. 1989) ("[section 16] does not affect substantive rights; only the timing of appeals is at issue."); see also Pac. Reins. Mgmt. Corp. v. Ohio Reins. Corp., 935 F.2d 1019, 1022 (9th Cir. 1991) (Section 16 of the FAA "addresses remedies and procedures . . . ."); Nichols v. Stapleton, 877 F.2d 1401, 1403 (9th Cir. 1989) (same). Moreover, in keeping with the wide latitude given states to structure their own court procedures, including appellate procedures, the Supreme Court has held that states are under no general obligation to provide appellate

[37] Section to be drafted on right of appeal from grant or denial of a motion to compel arbitration.

review. See, e.g., M.L.B. v. S.L.J., 519 U.S. 102, 111 (1996); see also Felder v. Casey, 487 U.S. 131, 138 (1988); Kohl v. Lehlback, 160 U.S. 293, 299 (1895) ("[T]he right of review in an appellate court is purely a matter of state concern."); Anthony Bellia, Federal Regulation of State Court Procedures, 110 Yale L.J. 947 (2001).

In point of fact, the uniform state arbitration statutes do specifically provide for appeal of orders confirming or denying confirmation of awards. See, e.g., Unif. Arb. Act § 19(a)(3); 7 U.L.A. 714 (2005); Rev. Unif. Arb. Act § 28(a)(3); 7 U.L.A. 89 (2005). Several states have also enacted international arbitration statutes. While the UNCITRAL Model Law on International Commercial Arbitration, on which some such statutes are based, does not expressly provide for appeal of orders enforcing or denying enforcement of awards, some states adopting that model have expressly incorporated by reference another section of state law that does establish that right. See, e.g., Illinois, § 710 Ill. Comp. Stat. 30/1-5(b) (incorporating § 710 Ill. Comp. Stat. 5/18 which provides for a right of appeal). Even if a state does not incorporate by reference into its enactment of the UNCITRAL Model Law another provision of law giving a right of appeal, such a right of appeal may nevertheless exist elsewhere in state law, such as in the state's basic arbitration statute, and may be transposable. See, e.g., Or. Rev. Stat. §§ 36.450-36.558 (Oregon International Commercial Arbitration and Conciliation Act), in combination with Or. Rev. Stat. § 36.730 (Oregon Uniform Arbitration Act provision governing appeals).

Other states have enacted international arbitration statutes not based on the UNCITRAL Model Law. Such statutes, too, generally provide an express right of immediate appeal. See, e.g., 42 Pa. Stat. Ann. § 7320; Fla. Stat. § 684.32; Ga. Code Ann. § 9-9-30 (applying the § 9-9-16 right of appeal to international awards).

However, in the unlikely event that state law does not provide a right of appeal, the FAA would probably not override state law by imposing such a right. See Weston Securities Corp. v. Aykanian, 703 N.E.2d 1185, 1189 (Mass. Ct. App. 1998) (FAA Section 16 does not preempt contrary Massachusetts procedural rules). In order for state procedural law to be overridden in this regard, that law would have to be shown to defeat the rights conferred by the FAA. See, e.g., Muao v. Grosvenor Props., 122 Cal. Rptr. 2d 131, 138 (Cal. Ct. App. 2002) ("'Therefore, like other federal procedural rules, section 16 of the FAA is not binding on our state court proceedings, *provided applicable state procedures do not defeat the rights granted by Congress.*'") (italics in original) (quoting Rosenthaal v. Great W. Fin. Sec. Corp., 926 P.2d 1061, 1069 (Cal. 1996)).

c. Standard of review on appeal. All appellate courts in the U.S. have generally applicable standards of review governing appeals from lower courts. The Restatement takes the position that these standards of review on appeal are appropriately applied to appeals from lower court decisions granting or denying requests for post-award relief. It accordingly does not prescribe a specific standard of review for these purposes. In fact the Supreme Court has suggested that "courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards." First Options v. Kaplan, 514 U.S. 938, 948 (1995) (court of appeals should accept district court's findings of fact regarding agreement to submit issue to arbitration if not "clearly erroneous" but decide questions of law de novo, regardless of whether district court has confirmed or denied confirmation of arbitration award); see also Hughes Training, Inc. v. Cook, 254 F.3d 588, 592 (5th Cir. 2001) ("A district court's decision refusing to vacate an arbitration award is reviewed under the same standard as any other district court decision."). The conventional approach in state and federal courts alike is to review findings of fact for clear error and findings of law on a de novo basis. See, e.g., Wartsila Finland OY v. Duke Capital LLC, 518 F.3d 287, 291 (5th Cir. 2008) (reviewing district court confirmation of arbitration award de novo, using the same standards as the district court); Zeiler v. Deitsch, 500 F.3d 157, 164 (2d Cir. 2007) ("Where a district court denies confirmation of an arbitral award, we review its findings of fact for clear error, and its conclusions of law de novo."). However, as a matter of principle, the Restatement leaves the question of the standard of review, along with questions of appellate procedure, to the forum's general rules governing the conduct of appeals.

d. Waivability of the right of appeal. As provided in Section 4-24, supra, the parties to an arbitration agreement may not validly relinquish in advance their right to post-award relief. But, as is the case with appeals generally, this does not mean that parties are precluded from renouncing the possibility of an appeal from an adverse ruling in such an action. However, such waiver needs to be express and unequivocal, typically in the arbitration agreement itself. Cf. MACTEC, Inc. v. Gorelick, 427 F.3d 821, 827-30 (10th Cir. 2005), cert. denied, 547 U.S. 1040 (2006) (express waiver required to validly waive right of appeal in vacatur action); Uhl v. Komatsu Forklift Co., 512 F.3d 294, 301 (6th Cir. 2008) (noting that language in the arbitration agreement stating that the award will be "final" did not expressly waive appeal in an action appealing denial of vacatur); cf. McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1209 (5th Cir. 1991) (finding the right of removal to federal court waivable, in the context of a suit to compel arbitration, but only if explicit). The court in *MACTEC* stated generally that "courts routinely enforce agreements that waive the right to appellate review over district court decisions. We see no reason to treat district court decisions concerning arbitration awards differently than any other kind of district court judgment." MACTEC, Inc., 427 F.3d at 830 (internal citations omitted). This is not to suggest that waivers, even if express and unequivocal, will invariably be enforced. Courts will apply generally applicable principles regulating the effectiveness of waivers of rights.

Waiver of the right to appeal from an order in a post-award action should be distinguished from waiver of the right to appeal an arbitral award itself. Courts have noted this distinction, pointing out that "a contract provision stating that arbitration is 'non-appealable' signifies that the parties to the contract may not appeal the merits of the arbitration; not that the parties agree to waive a right to appeal the district court's judgment confirming or vacating the arbitration decision." Southco, Inc. v. Reell Precision Mfg. Corp., 331 Fed. Appx. 925, 927 (3d Cir. 2009) (unpublished opinion); see also Tabas v. Tabas, 47 F.3d 1280, 1288 (3d Cir. 1995) (where a contract provided for "final, binding, and non-appealable" arbitration, the court must adhere to the arbitration decision on the merits).

TOPIC 4.

CORRECTION, MODIFICATION, AND REMAND OF AWARDS

§ 4-35. Correction and Modification of Convention Awards Made in the United States

A court may correct or modify a U.S. Convention award to the extent that:

(1) the award contains an evident and material miscalculation of figures;

(2) the award contains an evident and material mistake in the description of any person, thing, or property;

(3) the form of the award is imperfect in a way that does not affect the substantive outcome of the proceeding; or

(4) the award determines a matter not submitted to the arbitral tribunal, unless the determination does not affect the substantive outcome of the proceeding.

Comments:

a. Generally. This Section (on correction and modification of awards), like the next (on remand to the tribunal), contemplates a specific remedy that may be requested following the issuance of an award, but does not constitute "post-award relief" within the meaning of Section 1-1(y), supra. (The Restatement uses the term "post-award relief" to denote only vacatur, confirmation, recognition, and enforcement of awards.) Correction and modification are sought through motions to that effect,

rather than through "post-award actions," a term that, as defined in Section 1-1(x), supra, encompasses only actions for the vacatur, confirmation, recognition, and enforcement of awards.

In principle, a U.S. court enjoys authority to correct or modify a Convention award only if made in the United States. It does not enjoy authority to correct or modify foreign awards, unless the parties unambiguously designated U.S. arbitration law to govern the proceeding from which the award originates. This Section derives from FAA Section 11, which expressly authorizes a court to correct or modify an award in enumerated circumstances. It is made applicable to U.S. Convention awards through FAA Sections 208 and 307.

The authority this Section recognizes is limited. With respect to calculations and descriptions (covered by paragraphs (a) and (b), respectively), the remedy applies to evident and material defects that can be rectified by a court without undue speculation concerning what the tribunal intended. Under these limitations, a court properly corrects or modifies an award that, for example, conflates the parties, displays an erroneous date of making, imperfectly identifies property, reveals double counting or a pure mathematical error, or exhibits similar defects not attributable to a deliberate merits determination by the tribunal. Paragraphs (a) and (b) do not, however, empower a court to correct errors of fact or law under the guise of addressing a flawed description or calculation.

Paragraph (c) (based on FAA Section 11(c)) empowers a court to address defects in form of an unspecified magnitude and limits that power to flaws not affecting the merits. Certain irregularities in the award's form that impact the merits may fall under paragraphs (a)-(b) and thus may be corrected or modified under those provisions. Problems of form not caught by this Section may in any event lead to vacatur or remand. See Comments *b* and *c*, infra.

Under paragraph (d), courts may also correct or modify an award that decides a matter not submitted to the tribunal. Paragraph (d) only applies if the decision on the merits is affected by the improperly included matters; this qualification, in common with the materiality requirements of paragraphs (a) and (b), directs a court to flaws that would likely prejudice a party if left unrepaired.

Courts do not distinguish in a consistent fashion between "correction" and "modification." To a large extent, the two terms are used interchangeably.

b. Relationship to vacatur and partial vacatur. The relief authorized in this Section coexists with a court's power to vacate or deny confirmation of an award under the grounds set forth in Sections 4-12 through 4-18. Specific circumstances may legitimately present a court with options. For instance, when an award implicates paragraph (d) by deciding a matter not submitted to the tribunal, a court may also be entitled to vacate or decline to confirm the award under Section 4-14. In applying paragraph (d), a court will ordinarily identify the governing law in accordance with Section 4-14(b) and pursue its investigation de novo as specified under Section 4-

14(c). Some imperfections in form are beyond the reach of paragraph (d) because they affect the merits. If such flaws threaten to deprive a party of either the remedy the tribunal intended to grant or of an arbitral procedure for which the parties contracted, vacatur or denial of confirmation under Sections 4-14(b) or 4-15 may be appropriate.

Even when a matter of form would justify vacatur or denial of confirmation, or would call into question the putative award's status as "a decision in writing . . . that sets forth a final and binding determination on the merits of a claim, defense or issue" (see Section 1-1(a), supra), remand under Section 4-36 will often be appropriate. See Comment *c* of this Section.

Illustrations:

1. In an arbitration seated in the United States, the tribunal awards Buyer liquidated damages for late delivery of goods at a rate set in the contract. Seller requests a court to correct or modify the award because the tribunal used in its calculations an earlier delivery date than the one asserted by either party. Finding no evident mathematical error or inadvertence in setting the date, the court declines to correct or modify the award.

2. Same as *Illustration 1*, except the amount awarded cannot mathematically be reconciled with the contract rate and the duration of lateness designated by the tribunal. The amount of the award can only be explained by its having resulted from a typographical or

multiplication error. Having all the data necessary to perform the rudimentary multiplication required, the court corrects the award.

Parties sometimes petition a court for correction or modification in addition to partial vacatur or denial of confirmation. Requesting alternative relief is justified by the apparent overlap between FAA Section 11(b) (reflected in paragraph (d) of this Section) and the vacatur ground stated in Section 4-14, supra, (derived from N.Y. Convention, art. V(1)(c) and Panama Convention, art. 5.1(c)). Both forms of relief address excess of mandate. Each may seem appropriate when the offending portion of the award is severable, such as when, for instance, it grants both permitted contract damages and a discrete supplemental recovery expressly not within the tribunal's powers under the parties' arbitration agreement. It follows that courts often characterize their elimination of the offending portion as correction or modification, rather than as partial vacatur. Because ordinarily the unaffected portion may be confirmed in both instances, the characterization is not significant.

c. Relationship to corrections performed by the tribunal. Under most modern arbitration laws and rules, a tribunal is empowered to correct an award it issued or to perform related tasks required to more fully discharge its mandate, and it may do so on its own initiative or pursuant to a timely request by a party. The power of a court to remedy a material imperfection in an award under this Section is wholly independent of the power of the tribunal to address perceived errors in the same award. A court may perform corrective duties under this Section whether or not an arbitral tribunal

has had an opportunity to address the imperfections in question. A court may, however, postpone its consideration of an award pending a tribunal's active re-examination of the award.

d. Nature of remand alternative. As noted, this Section should be considered in light of Section 4-36, infra (see Comment *b* of this Section), on remand to the arbitral tribunal. That Section authorizes a court to return a U.S. Convention award to the tribunal in exceptional situations in which the award is best clarified or amplified by the tribunal that rendered it. For example, a court that is asked to correct or modify an award should instead remand to the arbitrators when an ambiguity or omission in the award cannot, without further consideration by the tribunal, confidently be recast to reflect the tribunal's intent. It often happens that upon remand, the tribunal itself corrects or modifies the award in a manner analogous to a court's operations under this Section. For a court to remand an award instead of attempting to rectify it through speculation is consistent with the parties' intention that their dispute be handled in arbitration.

e. Sua sponte and waiver. In the context of a proceeding to vacate or confirm a U.S. Convention award, a court may elect sua sponte to correct or modify an award. A court may do so whether or not a party preserved its rights to seek such relief and whether or not such relief was first sought before the arbitral tribunal. The parties may not by agreement preclude correction or modification by a court.

REPORTERS' NOTES

a. Generally. It is not controversial that courts at the seat may set aside (vacate) a Convention award. See § 1-1(aa) and (bb), supra. Authority to correct or modify U.S. Convention awards is a natural adjunct to the power to confirm and vacate and adds flexibility to a court's post-award operations. To accord courts that power is not in conflict with the Conventions since, in many cases, by correcting or modifying an award, a court is able to avoid vacating it, thus promoting the recognition and enforcement of awards. Federal and state courts have regularly been asked to apply FAA Section 11, upon which the Blackletter is based. The Conventions have no provision comparable to Section 11. The FAA's Convention chapters, however, are supplemented by FAA Chapter One to the extent that its provisions are not in conflict with the Chapter in question or the Convention it implements. See FAA §§ 208, 307. Section 11 therefore applies to U.S. Convention awards.

In general, Section 11 calls upon courts to distinguish between cases in which a party seeks the equivalent of merits review under the guise of a request for correction or modification and those in which genuine defects of the kind described in this Section are evident in the award. Often requests to correct or modify awards are merely attacks on the factual or legal premises upon which the tribunal's calculations are based (rather than on the calculations themselves). See, e.g., Pro-Fit Worldwide Fitness, Inc. v. Flanders Corp., 2006 U.S. Dist. LEXIS 26011 (D. Utah Apr. 20, 2006) (award of prejudgment interest reflected decision on question of law, revision of which would be improper incursion into merits); Cambridge Int'l Trading, Inc. v. Tigris Int'l Corp., No. 99-10245, 2000 U.S. Dist. LEXIS 3193, at *4 (S.D.N.Y. Mar. 17, 2000) (under 9 U.S.C. § 11(a), a "miscalculation" implies inadvertence or an error caused by oversight; instant case involved arbitrators' finding of fact, which irrespective of its correctness, was based on a substantial body of evidence and thus could not be disturbed). Similarly, some petitions for correction or modification introduce arguments or evidence not raised before the tribunal, or are simply transparent attempts to reargue the merits of the dispute.

Courts have generally recognized Section 11's limited scope and have thus declined to substitute their own appreciation of facts and law for that of the tribunal. See AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc., 508 F.3d 995, 1000 (11th Cir. 2007) (arbitral decision without benefit of information withheld by a party is not a "mistake" for purposes of FAA Section 11); Hesfibel Fiber Optik & Elektronik San Ve Tic A.S. v. Four S Grp., 315 F. Supp. 2d 1365 (S.D. Fla. 2004) (arbitrator's decision to prorate reflected a factual determination, not a mathematical error); Oceania Shipping Corp v. Thos. P. Gonzalez Corp., 442 F. Supp. 997, 1000 (S.D.N.Y 1997) (party had failed before arbitrators on same causation argument); Companhia De Navegacao Maritima Netumar v. Armada Parcel Serv., Ltd., No. 96-6441, 1997 U.S. Dist. LEXIS 309 (S.D.N.Y. Jan. 17, 1997) (set-off argument had been made and implicitly rejected by the arbitrators).

Even under the limits prescribed by this Section, a wide array of problems falls within its ambit. The principles of this Section have been applied, for instance, to prevent duplicative recoveries resulting from inadvertent double-counting. See Millmaker v. Bruso, No. 07-3837, 2008 U.S. Dist. LEXIS 79480 (S.D. Tex. Oct. 9, 2008) (certain costs and fees included twice; court reduced award accordingly); Netknowledge Techs., L.L.C. v. Rapid Transmit Techs., 2007 U.S. Dist. LEXIS 11550 (N.D. Tex. Feb. 20, 2007), aff'd on other grounds, 269 Fed. Appx. 443 (5th Cir. 2008) (arbitrator unintentionally double counted in quantifying damages). Regarding removing the name of a former party formally dropped from the proceedings, see Thomason v. Citigroup Global Mkts. Inc., 2006 U.S. Dist. LEXIS 3168 (D. Utah Jan. 18, 2006) (award included party dismissed before the arbitration hearing; award modified by striking the party's name from the caption and elsewhere).

b. Relationship to vacatur and partial vacatur. A court's power to correct and modify coexists with its power to vacate or deny confirmation under certain grounds set forth in Sections 4-12 through 4-18, supra. FAA Section 10 (enumerated vacatur grounds) and Section 11 (grounds for correction and modification) are part of the same post-relief architecture and were crafted together. Although the Restatement contemplates partial vacatur (see § 4-1(d), supra) and in doing so is consistent with New

York Convention, Article V(1)(c), FAA Section 10 does not. Rather, FAA Section 11 seems to have been intended to perform that function. Under the Restatement, which applies Article V grounds to motions to confirm or vacate U.S. Convention awards, specific circumstances may legitimately present a court with the option of either modifying or correcting the award under this Section or partially vacating or confirming it. Such circumstances will most likely occur when a tribunal decides matters not submitted to it. Under Sections 4-1(d), 4-14 (a) and (d), supra, a severable part of the award might be vacated or denied confirmation, while under paragraph (d) of this Section, modification may reach an equivalent result. That is, there is apparent overlap between Section 4-14 (a) and (d) and paragraph (d) of this Section. It is not surprising, given that the case law concerning correction and modification has arisen largely under FAA Sections 10 and 11 rather than under a Convention, that courts often refer to correction or modification rather than partial vacatur or confirmation.

The cases, however, provide modest guidance on the application of FAA Section 11(b), upon which paragraph (d) is based. There are, however, cases in which courts treat as problems of computation or description arbitral decisions on matters not submitted. See, e.g., Asturiana De Zinc Mktg., Inc. v. LaSalle Rolling Mills, Inc., 20 F. Supp. 2d 670 (S.D.N.Y. 1998) (court made correction necessitated by award's inclusion of damages arising under unrelated contract). In practice, parties regularly seek correction and vacatur as alternative remedies. See, e.g., id. (manufacturer petitioned to vacate or modify; court made correction).

Paragraph (c) of this Section presents a distinctive but circumscribed ground for correction. It reaches only matters of form that do not affect the merits. Defects in form that impact the merits, and thus are not caught by paragraph (c), may nonetheless deprive a party of the remedy the tribunal intended to grant, or run afoul of the parties' agreement on arbitral procedure. Such deficiencies may require vacatur or a refusal to confirm under Section 4-14(b) or 4-15. Cf. FAA Section 10(a)(4) (empowering courts to vacate imperfectly executed domestic awards if the imperfection prevents the award from being mutual, final or definite). Alternatively, a defect in form might be cured by remand under Section 4-36, infra, thus avoiding waste and frustration of the parties' reasonable expectations. See Comment *d* of this Section.

c. Relationship to correction by the arbitrators. Arbitration laws and rules commonly give arbitrators express authority to consider timely requests by a party to correct an award. See, e.g., UNCITRAL Model Law on International Commercial Arbitration, art. 33(a) and (b) (1985) (tribunal may correct clerical and computational errors on its own initiative); UNCITRAL Arbitration Rules, art. 38 (rev'd 2010) (if warranted, upon request, tribunal may correct typographical, computational or clerical error); ICC Rules of Arbitration, art. 29(1) (1998) (tribunal may on its own initiative, or per party request channeled through the Secretariat, correct clerical, computation, typographical and similar errors). Absent such authorization in rules or a statute, a tribunal may be reluctant to so act, due to the *functus officio* doctrine. See, e.g., Pro-Fit Worldwide Fitness, Inc., 2006 U.S. Dist. LEXIS 26011 (arbitral powers to correct depended on finding authorization in the governing rules). But see Laurin Tankers Am., Inc. v. Stolt Tankers, Inc., 36 F. Supp. 2d 645 (S.D.N.Y. 1999) (observing that the arbitral power to correct obvious error in its own award was inherent in the tribunal nature).

d. Nature of remand alternative. When asked to correct or modify an award under FAA Section 11, courts sometimes remand the award to the arbitrators instead. This may occur, for example, when the existence of a mathematical error depends upon one of several plausible assumptions the arbitrators intended. See UCO Terminals, Inc. v. Apex Oil Co., 583 F. Supp. 1213, 1217-18 (S.D.N.Y. 1984), judgment aff'd without opinion, 751 F.2d 371 (2d Cir. 1984) (calculation would be errant only if arbitrators intended to grant simple pre-award interest). Additionally, a defect in form that might justify vacatur or denial of confirmation, or call into question the putative award's status as "a decision in writing . . . that sets forth a final and binding determination on the merits of a claim, defense or issue" (see § 1-1(a), supra), might be eliminated on remand. A court may also remand if, though detecting an error, the court deems the arbitrators better equipped to remedy the problem given its complexity or specialized context. See § 4-36, infra.

e. Sua sponte and waiver. Sound policy favors that courts retain considerable flexibility in selecting the appropriate form of relief following issuance of an award, consistent with the relief actually requested. In the context of a post-award action to vacate or confirm a U.S. Convention award, little would be gained by precluding a court from correcting or modifying an award of its own initiative "so as to effect the intent thereof and promote justice between the parties." See FAA § 11(c). For similar reasons, courts may reform an award whether or not a party first sought such relief from the arbitral tribunal and notwithstanding an agreement purporting to limit a tribunal's options to vacatur or confirmation in the event of defects. In practice, such agreements are not often encountered.

§ 4-36. Remand to the Arbitral Tribunal of Convention Awards Made in the United States

A court may in exceptional circumstances remand a U.S. Convention award to the arbitral tribunal with instructions to complete the award or to clarify its meaning.

Comments:

a. Generally. This Section applies only to U.S. Convention awards and to foreign awards resulting from arbitrations that the parties unambiguously made subject to U.S. arbitration law. Under certain conditions, such an award may be remanded to the arbitral tribunal that rendered it with instructions to perfect or clarify the award to better enable the court to act on a request for post-award relief. The FAA does not expressly authorize a court to remand an award prior to vacatur being granted. The utility and propriety of doing so in narrow circumstances is nevertheless well established in decisional law, and is closely associated with a court's express powers to vacate, correct, or modify awards under the FAA. In appropriate settings, remand may serve efficiency and better reflect the parties' expectations. For example, the award may contain a significant ambiguity, leave unstated a matter vital to the award's proper implementation, contain a mathematical error that cannot be remedied by rudimentary calculations, or otherwise fail to convey the tribunal's intent. In all such circumstances, however, the tribunal must be able to correct the defect without revisiting the merits.

b. Limits on remand. A court does not remand if it may by consulting the arbitral record ascertain with certainty the tribunal's intent. Nor does it remand for reconsideration of the merits of a matter finally decided. Equally, a court does not remand to require more comprehensive reasoning, unless a fuller exposition is critical to giving effect to the award. Remand is not appropriate in the case of a tribunal that lacks the capacity to proceed, such as one that clearly lacks jurisdiction, is impaired by a demonstrable lack of impartiality or independence, or has been compromised by evident corruption.

The doctrine of *functus officio* is not in itself an obstacle to remand in an otherwise proper case. That doctrine holds that a tribunal loses its mandate once an award is communicated to the parties. Under an exception to the doctrine, when asked by a court, arbitrators may further consider the award's effectiveness and accuracy, and may make changes to remove ambiguities or ellipses. The doctrine is nevertheless rigorous with respect to questions of fact or law already decided; the return of an award is not an opportunity for the tribunal to pursue fresh deliberations in contemplation of possibly reversing the award's holdings.

Illustration:

1. In an international arbitration seated in the United States, the tribunal's final award requires *A* to "assign the insurance policy" to *B*. The tribunal might plausibly have been referring to either of two policies. Neither the award nor the arbitral record confirms

to which policy the tribunal was referring. The two policies are of significantly different cash values. The court remands to the tribunal with instructions to clearly identify the correct policy.

c. Waiver and determination sua sponte. In the context of a proceeding to vacate or confirm a U.S. Convention award, a court may elect sua sponte to remand an award to the arbitrators. To allow courts to remand to the arbitrators adds flexibility, and often efficiency, to the administration of justice. Entrusting the arbitrators to refine the award in appropriate instances also comports with the parties' choice of arbitration to resolve their dispute. It follows that the parties should not be empowered by agreement to restrict a court's access to the remand option. Equally, a court retains the prerogative to remand an award even if neither party has first sought post-award relief from the arbitral tribunal or otherwise preserved its right to seek remand to the arbitrators.

REPORTERS' NOTES

a. Generally. "Remand" as used in the Restatement refers to the return by a court of an award to the tribunal that issued it without first vacating it. Remand is not explicitly contemplated in the FAA except once vacatur has been granted. See FAA § 10(b). Courts in the United States nevertheless have followed the practice as an alternative to vacatur in limited settings, such as when the award's language leaves the court uncertain of the award's import. Arbitrators are often in the best position to address such situations. See Colonial Penn. Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 334 (3rd Cir. 1991) ("[C]ourts have uniformly stated that a remand to the arbitration panel is appropriate in cases where the award is ambiguous."); Hermandad Independiente de Empleados Telefonicos, v. P.R. Tel. Co., 498 F. Supp. 2d 454 (1975) (case remanded to the arbitrator for clarification of the remedy awarded for employee's termination); Rhone-Poulenc Agro, S.A. v. Calgene, LLC, No. 01-649, 2001 U.S. Dist. LEXIS 23951, at *1-*3 (D. Del. Sept. 26, 2001) (listing three circumstances in which remand is proper; remanding for tribunal to clarify whether holding was on standing or merits); Weinberg v. Silber, 140 F. Supp. 2d 712 (N.D. Tex. 2001) (award remanded for clarification of various ambiguities, including amounts that agent would have to pay under various circumstances); see also Am. Ins. Co. v. Seagull Compania Naviera, S.A., 774 F.2d 64, 67 (2d Cir. 1985); Island Creek Coal Sales Co. v. City of Gainesville, 764 F.2d 437, 440 (6th Cir. 1985), cert. denied, 474 U.S. 948 (1985); Abbott Labs. v. OraSure Techs., Inc., No. 04 C 1857, 2004 U.S. Dist. LEXIS 7063 (N.D. Ill. Apr. 23, 2004).

Authority to remand the award to the arbitrators is a natural complement to a court's powers to vacate, confirm, correct and modify an award under the FAA. Vacatur or refusal to confirm is a severe remedy, and in certain circumstances the policies underlying the Conventions may be better served by allowing the arbitrators to remedy a defect that might otherwise lead to the award's annulment. Cf. FAA § 10(a)(4) (vacatur of domestic awards allowed when imperfectly executed arbitral powers result in a definite award not being made). Remand is usually surgically framed. Thus, one court remanded when only a portion of the remedy given exceeded the tribunal's mandate, but the tribunal's help was required to identify the portion to be confirmed. See Clarendon Nat'l Ins. Co. v. TIG Reinsurance Co., 990 F. Supp. 304 (S.D.N.Y. 1998) (on remand arbitrators to distinguish damage portion from interest portion).

In other common law jurisdictions, remand to arbitrators is sometimes referred to as "remission." See Julian D.M. Lew et al., Comparative International Commercial Arbitration 682 (2003). The option to remand an award to the arbitrators is explicitly recognized in some arbitration statutes, notably those based upon the UNCITRAL Model Law. See UNCITRAL Model Law on International Commercial Arbitration, art. 34 (1985). The Model Law grant of authority is comparatively broad in that it authorizes remission to enable the tribunal to "resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the ground for setting aside." Id. It is more restrictive than the analogue recognized by the Restatement however, because under the Model Law a party must request remand for a court to consider it.

b. Limits on remand. In its strictest form, the common law doctrine of *functus officio* precludes an arbitrator from revising, re-examining, or supplementing his award once it is issued to the parties. See Allied Workers Int'l Union v. Excelsior Foundry Co., 56 F.3d 844, 846-47 (7th Cir. 1995); Colonial Penn Ins. Co. v. Omaha Indem. Co., 943 F.2d 327, 331 (3d Cir. 1991). The essence of the rule is that when "arbitrators have executed their award and declared their decision they. . . have no power or authority to proceed further." Mercury Oil Ref. Co. v. Oil Workers Int'l Union, 187 F.2d 980, 983 (10th Cir. 1951). Its rationale is that, unlike judges, arbitrators are not sheltered from communications and other ex parte influences that might cause an inappropriate revisiting of matters decided. See La Vale Plaza, Inc. v. R. S. Noonan, Inc., 378 F.2d 569, 572 (3d Cir. 1967). The common law's strict application of the doctrine reflected judicial hostility to arbitration. See Courier-Citizen Co. v. Boston Electrotypers Union No. 11, 702 F.2d 273, 278 (1st Cir. 1983) (observing that restrictions on arbitrators' post-award authority were rooted in court's antipathy toward arbitration).

The *functus officio* doctrine has been softened as judicial intolerance of arbitration has over time receded. While the doctrine still bars an arbitral tribunal from revisiting its final determinations, it does not prevent courts from remanding to the tribunal for correction or modification of the award. Decades of labor cases have contributed to this trend. See United Steelworkers v. Ideal Cement Co., 762 F.2d 837, 841 n.3 (10th Cir. 1985) (list of decisions where the court considered the *functus offico* doctrine); Int'l Bhd. of Elec. Workers v. New England Tel. & Tel. Co., 628 F.2d 644, 647 (1st Cir. 1980) (*functus offico* doctrine irrelevant in remitting award to arbitrators for amplification); Enter. Wheel & Car Corp. v. United Steelworkers, 269 F.2d 327, 332 (4th Cir. 1959) (resubmission of award to arbitrator permitted; hostility to arbitration less relevant in labor disputes), aff'd in relevant part, 363 U.S. 593, 599 (1960). The *functus officio* doctrine also does not prevent an arbitral tribunal from resolving on remand a claim it overlooked in its award, since the doctrine does not apply to claims that the tribunal never decided.

See Escobar v. Shearson Lehman Hutton, Inc., 762 F. Supp. 461 (D.P.R. 1991) (remand to arbitrators who, it appeared to the court, adjudicated only one of two claims).

In its modified form, the *functus officio* promotes finality without depriving the system of useful flexibility. Under recognized exceptions to the doctrine, arbitrators may, when requested by a court to do so, correct a mistake apparent on the face of the award, adjudicate an omitted issue, address an ambiguity in the award, or remove lacunae. See Colonial Penn, 943 F.2d at 332 (citing La Vale, 378 F.2d at 573). A court may thus request more elaborate or lucid reasoning if necessary to promote confident implementation of the award. See Robert W. Baird & Co. v. SunAmerica Sec., Inc., 399 F.Supp. 2d 1314, 1320 (M.D. Fla. 2005) (remanded to arbitrators to fix attorneys fees and explain basis therefore,

otherwise impossible for court to determine amount of award); Collins & Aikman Floor Coverings Corp. v. Froehlich, 736 F. Supp. 480, 487 (S.D.N.Y. 1990) (remanded for clarification of illogical damage award).

Remand is not, however, without risks. The principle that the tribunal may not revisit the merits of an award may be jeopardized once the award is placed again before it. Courts do not therefore frame the remand in a fashion that invites the tribunal to reconsider matters already decided or creates in parties an expectation that the substantive outcome may change as a result of the remand. Cf. Play Star, S.A. de C.V. v. Haschel Exp. Corp.,02-7364, 2003 U.S. Dist. LEXIS 7049 (S.D.N.Y. Apr. 28, 2003) (when asked for reasons by the parties, arbitrator changed previous award of damages; court later remanded for justification); nor does the court or the tribunal signal to the parties that remand presents an opportunity to reargue matters decided in the award. See, e.g. Colonial Penn, 943 F.2d at 332 (emphasizing need to prevent parties from attempting to persuade arbitrators "to overturn an adverse award").

Courts do not remand when there is reason to believe that one or more tribunal members are partial, incapacitated, or corrupt, or in other circumstances in which the tribunal demonstrably lacks the attributes essential to the remand process. Cf. Rev. Uniform Arbitration Act, § 23(6)(c) (2000) (post-vacatur rehearing must be by new arbitrators if vacatur based upon corruption, fraud, other undue means, or evident partiality, arbitrator corruption, or prejudicial misconduct).

c. Waiver and determination sua sponte. In the context of a proceeding to vacate or confirm a U.S. Convention award, a court may elect sua sponte to remand an award to the arbitrators. Cf. La Vale, 378 F.2d at 573-74 (court decided issue under Pennsylvania arbitration law but was influenced by federal law of labor arbitration). Additionally, no authority has been found establishing as a condition precedent to remand that a party first seek post-award relief from the arbitral tribunal or otherwise preserve its rights to seek remand to the arbitrators. Similarly, courts have not been asked to determine whether parties may by agreement preclude remand. Nevertheless, given that Section 4-24, supra, establishes that the parties may not eliminate grounds for vacatur, a convincing justification for allowing them to preclude remand by agreement is not evident.

Appendix A

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

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 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

(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 county; 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 avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the county 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.

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.

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.

Done at New York June 10, 1958: entered into force for the United States December 29, 1970, subject to declarations.

United States reservations:

The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

The United States of America 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 United States.

The Convention applies to all of the territories for the international relations of which the United States of America is responsible.

INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

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 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; or

(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, postpone 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.

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.

United States reservations:

1. Unless there is an express agreement among the parties to an arbitration agreement to the contrary, where the requirements for application of both the Inter-American Convention on International Commercial Arbitration and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards are met, if a majority of such parties 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. In all other cases, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards shall apply.

2. The United States of America will apply the rules of procedure of the Inter-American Commercial Arbitration Commission which are in effect on the date that the United States of America deposits its instrument of ratification, unless the United States of America makes a later official determination to adopt and apply subsequent amendments to such rules.

3. The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State.

FEDERAL ARBITRATION ACT

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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 person 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

(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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

9 U.S.C. § 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.

9 U.S.C. § 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

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that 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

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

9 U.S.C. § 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.

Appendix D

Black Letter of Council Draft No. 3

§ 1-1. Definitions

(a) An "arbitral award" is a decision in writing by an arbitral tribunal that sets forth the final and binding determination on the merits of a claim, defense, or issue, regardless of whether that decision resolves the entire controversy before the tribunal. Such a decision may consist of a grant of interim relief.

(b) An "arbitral tribunal" is a body consisting of one or more persons designated directly or indirectly by the parties to an arbitration agreement and empowered by them to adjudicate a dispute that has arisen between or among them.

(c) "Arbitration" is a dispute resolution method in which the disputing parties empower an arbitral tribunal to decide a dispute in a final and binding manner.

(d) An "arbitration agreement" is an agreement by which parties consent to submit one or more existing or future disputes to resolution by an arbitral tribunal.

(e) "Commercial" matters or relationships are those matters or relationships, whether contractual or not, that arise out of or in connection with commerce.

(f) A "competent authority" is a court or other body that is empowered to entertain set-aside proceedings with respect to a particular arbitral award and that is either part of the legal system of the arbitral seat or of a legal system whose arbitration law was designated unambiguously by the parties to govern the arbitral proceedings that produced the award.

(g) "Confirmation" is a determination that reduces to judgment a Convention award made in the United States.

(h) A "Convention award" is an arbitral award that is either a New York Convention award or a Panama Convention award. A "Convention award" does not include an award rendered in an arbitration governed by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").

(i) A "Convention award made in the United States" (or "U.S. Convention award") is an international arbitral award rendered in the United States that arises out of a legal relationship involving property located abroad, envisaging performance or enforcement abroad, or having some other reasonable relation with one or more foreign States.

(j) A "court" is any court within the United States.

(k) A "domestic award" is an arbitral award that has no reasonable relation with one or more foreign States.

(l) "Enforcement" is the reduction to a judgment of an international arbitral award, other than a Convention award made in the United States.

(m) "Execution" is the granting of relief provided in a judgment through measures ordered by or under the auspices of a court.

(n) The "final award" means the last award that the tribunal makes with respect to the particular dispute before it.

(o) A "foreign award" is an international arbitral award made in an arbitration seated outside the United States.

(p) A "foreign State" is an entity other than the United States that is recognized as a State under international law.

(q) An "interim measure" is a grant of temporary relief to preserve the status quo, help ensure the satisfaction of a subsequent award, or otherwise protect the rights of one or more parties and promote the efficacy of an arbitration and the resulting award. An interim measure is presumptively treated as a partial award.

A competent court may also order interim relief in aid of arbitration, which is distinguishable from interim measures granted by an arbitral tribunal and which is referred to as "provisional relief."

(r) An "international arbitral award" is an arbitral award that, by virtue of its reasonable relation with one or more foreign States, is not a domestic award. The term includes Convention awards (both foreign awards and Convention awards made in the United States) and non-Convention awards. An "international arbitral award" does not include an award rendered in an arbitration governed by the ICSID Convention.

(s) An arbitral award is "made" when under the arbitration law governing the proceedings that gave rise to the award it is deemed to come into existence.

(t) A "New York Convention award" is an arbitral award that is subject to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

(u) A "non-Convention award" is a foreign award that is not a New York Convention award or Panama Convention award.

(v) A "Panama Convention award" is an arbitral award that is subject to the provisions of the Inter-American Convention on International Commercial Arbitration ("Panama Convention").

(w) A "partial award" is an arbitral award that disposes of some, but not all, of the claims, defenses, or issues before the arbitral tribunal. A partial award does not include an order addressing scheduling, procedural, or evidentiary matters.

(x) A "post-award action" is a summary court proceeding brought to vacate, confirm, or enforce an international award.

(y) "Post-award relief" is a ruling by a court that vacates, confirms, recognizes, or enforces an international arbitral award.

(z) "Recognition" is a determination by a court or other tribunal that an international arbitral award is presumptively entitled to preclusive effect with respect to one or more matters determined therein.

(aa) The "seat" (or "arbitral seat") is the jurisdiction designated by the parties or by an entity empowered to do so on their behalf to be the juridical home of the arbitration. An arbitral proceeding is ordinarily governed by the arbitration law of the jurisdiction in which it is seated, and the resulting award is deemed made in that jurisdiction.

(bb) A "set-aside proceeding" is a legal action by which a party seeks to have an arbitral award annulled by a competent authority.

(cc) A "state" is a commonwealth, district, state, or territory of the United States.

(dd) The "United States" is all territory and waters subject to the jurisdiction of the United States.

§ 4-1. Post-Award Actions—Generally

(a) A party may seek confirmation of a U.S. Convention award in a competent court of the United States. A court confirms such an award unless a ground for vacatur set out in Sections 4-12 through 4-18 is established. If confirmed, the award becomes a judgment of the confirming court.

(b) A party may seek vacatur of a U.S. Convention award in a competent court of the United States. A court vacates such an award

only on the grounds set out in Sections 4-12 through 4-18. If vacated, the award becomes a nullity within the jurisdiction of the court.

(c) The defendant in a proceeding to confirm or vacate a U.S. Convention award may, in addition to defending against that action and in accordance with applicable procedural rules, make a cross-motion to confirm or vacate the award. The law of the forum on compulsory counterclaims governs whether such relief must be sought by cross-motion or may be sought through an independent proceeding.

(d) A party may seek enforcement of a foreign award in a competent court of the United States. A court enforces a foreign Convention award unless a ground for denying enforcement set out in Sections 4-12 through 4-18 is established. A court enforces a foreign non-Convention award unless a ground for denying enforcement set out in Sections 4-19 through 4-22 is established. If enforced, the award becomes a judgment of the enforcing court.

(e) A court may grant partial post-award relief regarding an international arbitral award. A grant of partial post-award relief is appropriate only if the portion of the award as to which relief is granted is reasonably separable from the remainder of the award and is otherwise eligible for the relief requested.

§ 4-2. No Authority to Vacate Foreign Awards

A court may not vacate a foreign award, unless the parties expressly agreed that the arbitration proceeding was to be governed by federal arbitration law or state arbitration law.

§ 4-3. Law Applicable to Post-Award Relief

(a) The law applicable to confirmation or vacatur of a U.S. Convention award and to recognition or enforcement of a foreign Convention award is:

(1) the relevant Convention as implemented by the Federal Arbitration Act; or

(2) state law, to the extent it is not preempted by applicable federal law.

(b) The law applicable to recognition or enforcement of a non-Convention award is:

(1) Chapter One of the Federal Arbitration Act; or

(2) state law, to the extent it is not preempted by applicable federal law.

(c) In giving effect to the grounds set forth in Sections 4-12 through 4-18 and Sections 4-19 through 4-22, a court may be required to interpret and apply the law of a foreign jurisdiction.

(d) If a foreign award has been reduced to judgment by a court in the arbitral seat, a party may seek either:

(1) recognition or enforcement of the award in accordance with the provisions of this Chapter; or

(2) recognition or enforcement of the judgment in accordance with the foreign judgment recognition and enforcement standards of the forum in which such relief is sought.

§ 4-4. Formal Requirements for Post-Award Relief

(a) A party seeking confirmation of a U.S. Convention award or recognition or enforcement of a foreign award must:

(1) if in federal court, submit the original or an authenticated copy of the arbitration agreement and arbitral award; or

(2) if in state court, comply with the formal filing requirements of the law of the forum to the extent that those requirements are not preempted by federal law.

(b) The arbitration agreement referred to in paragraph (a)(1) must be an "agreement in writing" as defined in Section 2-___.[1]

(c) A party seeking vacatur of a U.S. Convention award must:

(1) if in federal court, submit the original or an authenticated copy of the arbitral award; or

(2) if in state court, comply with the formal filing requirements of the law of the forum to the extent that those requirements are not preempted by federal law.

(d) Whether vacatur or confirmation of a U.S. Convention award or recognition or enforcement of a foreign award is sought in federal or state court, the materials referred to in subsections (a) and (c) must be in a language that the court accepts for filings, or, if the original is not in such a language, must be accompanied by an accurate and certified translation into such language.

[1] Cross-reference to section to be drafted dealing with the writing requirement for enforcing arbitration agreements.

§ 4-5. Reciprocity

(a) Recognition or enforcement of a Convention award is subject to a requirement of reciprocity. The requirement is satisfied if the seat of the arbitration that produced the award is a Contracting State to the applicable Convention. Recognition or enforcement of a Convention award is not subject to any other reciprocity requirement.

(b) Recognition or enforcement of a non-Convention award is not subject to any reciprocity requirement unless recognition or enforcement is sought under a treaty or state arbitration law that imposes such a requirement.

§ 4-6. Burden of Proof for Post-Award Relief

(a) A party seeking confirmation of a U.S. Convention award or recognition or enforcement of a foreign award bears the burden of satisfying the requirements of Section 4-4(a) and (b).

(b) A party seeking vacatur or opposing confirmation of a U.S. Convention award or opposing recognition or enforcement of a foreign Convention award bears the burden of establishing the existence of one or more of the grounds set forth in Sections 4-12 through 4-18.

(c) A party opposing recognition or enforcement of a non-Convention award bears the burden of establishing the existence of one or more of the grounds set forth in Sections 4-19 through 4-22.

§ 4-7. Standard of Review for Granting Post-Award Relief

(a) Except as provided in §§ 4-12 through 4-18, a court determines de novo whether a ground exists to vacate or deny confirmation of a U.S. Convention award or to deny recognition or enforcement of a foreign Convention award.

(b) Except as provided in §§ 4-19 through 4-22, a court determines de novo whether a ground exists to deny recognition or enforcement of a non-Convention award.

§ 4-8. Effect of Prior Judicial Determinations on the Grant of Post-Award Relief

In deciding whether to grant post-award relief, a court may reexamine a matter decided at an earlier stage of the proceedings by a court within the United States or by a foreign court, to the extent allowed by the forum's applicable principles governing the law of the case, claim and issue preclusion, and recognition of foreign judgments.

§ 4-9. Claim Preclusion

A court may preclude relitigation of a claim that was previously adjudicated in an international arbitral award to the extent that the party seeking preclusive effect demonstrates that the award:

a) is entitled to recognition under this Chapter;
b) involves the same parties and the same claim as required by the law of the court in which claim preclusion is sought; and
c) barring relitigation of the claim is consistent with the arbitration agreement and the reasonable expectations of the parties.

§ 4-10. Issue Preclusion

A court may preclude relitigation of a specific issue of fact or law made by an international arbitral award if:

(a) the award is entitled to recognition under this Chapter;

(b) the award satisfies the requirements for issue preclusion prescribed for an arbitral award by the law of the forum in which such recognition is sought, and

(c) barring relitigation of the issue is consistent with the arbitration agreement and the reasonable expectations of the parties.

§ 4-11. Grounds for Post-Award Relief—Generally

(a) A court may vacate or deny confirmation, recognition, or enforcement of a Convention award only on the grounds set forth in Sections 4-12 through 4-18.

(b) A court may deny recognition or enforcement of a non-Convention award only on the grounds set forth in Sections 4-19 through 4-22.

(c) A court may, in exceptional circumstances:

(1) confirm or decline to vacate a U.S. Convention award notwithstanding the existence of a ground for vacatur; or

(2) recognize or enforce a foreign award notwithstanding the existence of a ground for denying recognition or enforcement.

§ 4-12. Arbitration Agreement Does not Exist or Is Invalid

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that no arbitration agreement exists or the arbitration agreement is invalid.

(b) Whether the arbitration agreement referred to in paragraph (a) does not exist, or whether a party lacked capacity to enter into the arbitration agreement, is determined by the law applicable to that issue

under the choice-of-law rules of the forum where post-award relief is sought.

(c) Whether the arbitration agreement referred to in paragraph (a) is invalid is determined by the law to which the parties have subjected the arbitration agreement or, if no such law has been selected, by the law identified in the general choice-of-law clause in the contract or, in the absence of such a clause, by the law of the seat of arbitration.

(d) Under this Section, a court does not review the arbitral tribunal's determination of the validity of a contract that includes the arbitration agreement. However, a court determines de novo: (1) the existence of the arbitration agreement; (2) the validity of the arbitration agreement, unless the parties clearly and unmistakably submitted the validity issue to arbitration; and (3) the existence of the contract that includes the arbitration agreement.

§ 4-13. Denial of Notice or Opportunity to Present Case

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that the party opposing such grant of relief did not receive adequate notice of the appointment of the arbitral tribunal or of other important phases of the arbitration proceedings.

(b) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that a serious procedural defect in the arbitral process resulted in a material denial of the party's opportunity to present its case or to rebut its opponent's case.

(c) A party is denied an opportunity to present its case or rebut its opponent's case under this Section to the extent that the court finds

evident partiality by an arbitrator. Evident partiality exists when there is proof that would cause an objective, disinterested observer who is fully informed of the relevant facts related to the arbitrator's conduct or alleged conflicts to develop a serious doubt regarding the fundamental fairness of the arbitral proceedings.

(d) The adequacy of notice and of a party's opportunity to present its case under this Section is determined by reference to federal law and, to the extent not in conflict with federal law, state law.

§ 4-14. Award on Matters Beyond the Terms of the Submission to Arbitration

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that it deals with matters that were not submitted to arbitration.

(b) Whether a Convention award deals with matters that were not submitted to arbitration is determined by the law to which the parties have subjected the arbitration agreement or, if no such law has been selected, by the law identified in the general choice-of-law clause in the contract or, in the absence of such a clause, by the law of the seat of arbitration.

(c) A court determines de novo whether a Convention award deals with matters that were not submitted to arbitration, unless the parties clearly and unmistakably submitted that issue to arbitration.

§ 4-15. Arbitral Procedure or Composition of Arbitral Tribunal Violates Party Agreement or Law of the Arbitral Seat

(a) A court may vacate or deny confirmation, recognition, or enforcement of a Convention award to the extent that the composition of the arbitral tribunal or the arbitral procedure is contrary in a

material respect to the agreement of the parties or, in the absence of such agreement, to the law of the seat of the arbitration.

(b) In resolving challenges based on alleged violations under this Section, a court affords substantial deference to the procedural decisions of the arbitral tribunal.

§ 4-16. Award Set Aside or Subject to Set-Aside Proceedings

(a) A court may deny confirmation, recognition, or enforcement of a Convention award to the extent that the award has been set aside by a competent authority of the country in which or under the arbitration law of which the award was made.

(b) Even if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances.

(c) If a Convention award is the subject of a set-aside proceeding before a competent authority, a court of the United States may defer the decision whether to grant confirmation, recognition, or enforcement pending the outcome of that proceeding.

(d) For purposes of this Section, a Convention award is deemed made under a particular arbitration law if that law is unambiguously designated by the parties to govern the arbitration.

§ 4-17. Award Decides Matters Not Capable of Resolution by Arbitration

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that the award purports to decide matters that are not capable of resolution by arbitration.

(b) Whether a Convention award decides matters that are not capable of resolution by arbitration is determined by federal law.

(c) A court may examine whether a Convention award decides matters that are not capable of resolution by arbitration even if a party does not raise the issue.

(d) A limitation on arbitrability may be categorical or conditional. An objection that a matter is categorically non-arbitrable cannot be waived. However, if a matter may be arbitrated only if a particular condition is satisfied, an objection that the condition was not satisfied can be waived through a post-dispute agreement or by failure to raise the objection in a clear and timely manner.

§ 4-18. Post-Award Relief Violates Public Policy

(a) A court may vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award to the extent that the grant of post-award relief would be repugnant to the public policy of the United States.

(b) A court may examine whether the grant of post-award relief referred to in paragraph (a) would be repugnant to public policy even if a party does not raise the issue.

(c) A court generally determines whether a grant of post-award relief referred to in paragraph (a) violates public policy in accordance with federal law. However, in exceptional circumstances, a court may

vacate or deny confirmation of a U.S. Convention award or deny recognition or enforcement of a foreign Convention award based on repugnance to the public policy of a state if that state has a sufficiently compelling and predominant interest in the matter, and provided that the state policy is not inconsistent with federal policy.

§ 4-19. Award Procured by Corruption, Fraud, or Undue Means

A court may deny recognition or enforcement of a non-Convention award to the extent that the court finds that the award was procured through corruption, fraud, or undue means.

§ 4-20. Evident Partiality by the Arbitrators

A court may deny recognition or enforcement of a non-Convention award to the extent that the court finds evident partiality on the part of an arbitrator. Evident partiality exists when there is proof that would cause an objective, disinterested observer who is fully informed of the relevant facts relating to the arbitrator's conduct or alleged conflicts to have a serious doubt regarding the fundamental fairness of the arbitral proceedings.

§ 4-21. Arbitrator Misconduct

A court may refuse recognition or enforcement of a non-Convention award to the extent that:

(1) there was misconduct by an arbitrator in unjustifiably refusing to postpone a hearing, improperly refusing to hear pertinent and material evidence, or engaging in other misconduct; and

(2) such misconduct affected the fundamental fairness of the arbitral proceedings or resulted in significant prejudice to the basic procedural rights of a party.

§ 4-22. Arbitral Tribunal Exceeded Its Powers

(a) A court may deny recognition or enforcement of a non-Convention award to the extent that the arbitral tribunal exceeded its powers in making the award.

(b) An arbitral tribunal exceeds its powers in making an award if:

(1) the arbitration agreement does not exist or is invalid under Section 4-12;

(2) the arbitral award decides a matter beyond the terms of the submission to arbitration under Section 4-14;

(3) the arbitral procedure is contrary in a material respect to the agreement of the parties under Section 4-15;

(4) the arbitral award decides a matter not capable of arbitral adjudication under Section 4-17; or

(5) recognizing or enforcing the arbitral award would be repugnant to public policy under Section 4-18.

§ 4-23. Agreements to Expand Grounds for Post-Award Relief

(a) Parties may not by agreement expand or supplement the grounds for vacating or denying confirmation of a U.S. Convention award or for denying recognition or enforcement of a foreign Convention award, including by agreeing to subject their dispute to the arbitration law of a state within the United States that allows expanded review or provides grounds for such relief other than those provided in the applicable Convention.

(b) Parties may not by agreement expand or supplement the grounds for denying recognition or enforcement of a non-Convention award, including by agreeing to subject their dispute to the arbitration law of a state within the United States that allows expanded review or provides grounds for such relief other than those provided in Chapter One of the Federal Arbitration Act.

§ 4-24. Agreements to Reduce or Eliminate Grounds for Post-Award Relief

(a) Parties may not by agreement reduce or eliminate the grounds for vacating or denying confirmation of a U.S. Convention award or for denying recognition or enforcement of a foreign Convention award, including by agreeing to subject their dispute to the arbitration law of a state within the United States that allows reduced review or provides fewer grounds for such relief than those provided in the applicable Convention.

(b) Parties may not by agreement reduce or eliminate the grounds for denying recognition or enforcement of a non-Convention award, including by agreeing to subject their dispute to the arbitration law of a state within the United States that allows reduced review or provides fewer grounds for such relief than those provided in the applicable Convention.

§ 4-25. Waiver of Objections

(a) Except as provided in §§ 4-17 and 4-18, a party may at any time waive its right to invoke an objection that would justify a court vacating or denying confirmation, recognition, or enforcement of a Convention award after that party knew or should have known the basis for such objection.

(b) Except as provided in § 4-22, (__) and (__), a party may at any time waive its right to invoke an objection that would justify a court in denying recognition and enforcement of a non-Convention award after that party knew or should have known the basis for such objection.

(c) Waiver under paragraphs (a) and (b) may be the result of either express consent or a failure to raise an objection in a clear and timely manner.

(d) A court may vacate or deny confirmation, recognition, or enforcement of a Convention award based on an objection that was not raised by a party only to the extent that such an objection would constitute a ground under §§ 4-17 and 4-18.

(e) A court may deny recognition or enforcement of a non-Convention award based on an objection that was not raised by a party only to the extent that such an objection would constitute a ground under § 4-22, (b) (4) and (b)(5).

(f) A party ordinarily does not waive a particular objection merely by failing to bring a timely action to stay the arbitration or by failing to seek to have the award set aside. However, a party waives an objection to the extent that it:

(1) participated in judicial proceedings to enforce the arbitration agreement, to stay the arbitration, or to set aside the award;

(2) knew or should have known at that time the relevant facts underlying an objection; and

(3) failed to raise the objection in any such proceedings.

§ 4-26. Subject Matter Jurisdiction in Post-Award Actions

(a) Federal courts have subject matter jurisdiction over actions to confirm or to vacate a U.S. Convention award and actions to enforce a foreign Convention award.

(b) Federal courts have subject matter jurisdiction over an action to enforce a non-Convention award to the extent that an independent basis of federal subject matter jurisdiction exists.

(c) Unless the parties have designated an exclusive forum for a post-award action:

(1) an action to confirm or vacate a U.S. Convention award may be brought in the federal court in the district within which the award was made or in any other federal court that has jurisdiction over the defendant; and

(2) an action to enforce a foreign award may be brought in any federal court that has jurisdiction over the defendant.

(d) A post-award action may also be brought in a competent state court.

(e) A state court action to confirm or vacate a U.S. Convention award or to enforce a foreign Convention award may be removed to federal court. A state court action to enforce a non-Convention award may be removed to federal court to the extent that an independent basis of federal subject matter jurisdiction exists. A party may seek removal to federal court of a post-award action in state court pursuant either to the specific removal provisions of the Federal Arbitration Act or to other rules applicable to removal.

§ 4-27. Personal Jurisdiction in Post-Award Actions

(a) The adequacy of jurisdiction over the defendant in a post-award action is subject to the generally applicable statutory and constitutional standards governing the exercise of such jurisdiction.

(b) Unless forum law provides otherwise, jurisdiction over the defendant in a post-award action may be based on the presence of the defendant's property within the court's jurisdiction, whether or not the property bears any relationship to the underlying dispute. Whether

this exercise of jurisdiction requires the attachment of such property is determined by the forum's rules governing quasi-in-rem jurisdiction. If jurisdiction over the defendant is based solely on the presence of property within the court's jurisdiction, the resulting judgment may be entered only up to the value of that property, or any bond posted in substitution thereof.

§ 4-28. Sovereign Immunity and Act of State in Post-Award Actions

(a) A post-award action against a foreign State or an agency or instrumentality of a foreign State is not subject, either in state or federal court, to a defense of sovereign immunity as to any claim to which an exception to immunity under the Foreign Sovereign Immunities Act applies.

(b) Execution against property of a foreign State or an agency or instrumentality of a foreign State in an action to confirm a U.S. Convention award or enforce a foreign award is proper to the extent that the property against which execution is sought is not protected from execution under the Foreign Sovereign Immunities Act.

(c) The relief sought in a post-award action may not be refused on the basis of the Act of State doctrine.

§ 4-29. Forum Non Conveniens in Post-Award Actions

(a) An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on forum non conveniens grounds.

(b) An action to vacate a U.S. Convention award may, in exceptional circumstances, be subject to stay or dismissal on forum non conveniens grounds in favor of a foreign court that also has authority to vacate the award, in accordance with the standards generally

applicable to forum non conveniens motions in the court where confirmation is sought.

(c) An action to enforce a non-Convention award may, in exceptional circumstances, be subject to stay or dismissal on forum non conveniens grounds in favor of a foreign court, in accordance with the standards generally applicable to forum non conveniens motions in the court where enforcement is sought.

§ 4-30. Proper Plaintiff

(a) Any person that participates in an arbitral proceeding as a party by asserting or defending against a claim is a proper plaintiff in a post-award action. In addition, any person that the arbitral tribunal determines to be a party to an arbitral proceeding is a proper plaintiff in a post-award action, even if the person did not participate in the arbitral proceeding.

(b) A court may, in exceptional circumstances, determine that a person not a party to an arbitral proceeding is a proper plaintiff in a post-award action if it satisfies one of the grounds on which a non-party is permitted to enforce the arbitration agreement under Section 2-___,[2] unless the court, in its discretion, declines to recognize the person as a proper plaintiff because:

(1) determining the status of the non-party in the post-award action would unduly complicate that action, or

(2) the non-party could and reasonably should have participated in the arbitration but failed to do so.

[2] Cross-reference to Section to be drafted on ability of non-signatories to enforce arbitration agreements.

§ 4-31. Proper Defendant

(a) Any person that participates in an arbitral proceeding as a party by asserting or defending against a claim is a proper defendant in a post-award action. In addition, any person that the arbitral tribunal determines to be a party to an arbitral proceeding is a proper defendant in a post-award action, even if the person did not participate in the arbitral proceeding.

(b) A court may, in exceptional circumstances, determine that a person not a party to an arbitral proceeding is a proper defendant in a post-award action if it satisfies one of the grounds on which a non-party would be bound to the arbitration agreement under Section 2-___,[3] unless the court, in its discretion, declines to recognize the person as a proper defendant because:

(1) determining the status of the non-party in the post-award action would unduly complicate that action, or

(2) the non-party was improperly excluded from participating in the arbitration.

§ 4-32. Statute of Limitations

(a) The limitations period applicable to a post-award action under federal law and the rules pertaining to its application are governed by federal law, irrespective of whether the action is brought in federal or state court.

(b) The limitations period applicable to a post-award action under state law and the rules pertaining to its application are governed by state law to the extent that they are not preempted by federal law.

[3] Cross-reference to Section to be drafted on ability of non-signatories to enforce arbitration agreements.

(c) The limitations period applicable to a post-award action on an award begins to run on the date the award is issued. A party bringing a post-award action in connection with a partial award may do so within the prescribed limitations period following issuance of either the partial or the final award.

(d) A cross-motion to confirm or to vacate a U.S. Convention award is subject to the same statute of limitations as would apply if the motion were brought independently.

(e) A party opposing confirmation of an award may raise defenses to confirmation, even if the limitations period for seeking vacatur of the award on those grounds has passed.

(f) The applicable limitations period may be tolled by agreement of the parties, except to the extent that the applicable law provides otherwise. It may also be tolled on any other ground recognized under the law designated in paragraphs (a) and (b).

(g) A defense based on an applicable limitations period may be waived, except to the extent that the applicable law provides otherwise.

§ 4-33. Procedural Issues in Post-Award Actions

(a) A post-award action is ordinarily a summary proceeding, whether brought by motion or otherwise.

(b) Notwithstanding paragraph (a), in exceptional circumstances a court may order discovery or receive evidence to the extent necessary to determine relevant issues of fact.

§ 4-34. Appeal in Post-Award Action

(a) A party to a post-award action in federal court has a right of appeal from the final disposition of the action.

(b) A party to a post-award action in state court has a right of appeal from the final disposition of the action to the extent that it is permitted by the law of the forum and not preempted by federal law.

(c) An appeal from the final disposition of a post-award action, whether in federal or state court, is subject to the forum's general rules of appellate procedure.

§ 4-35. Correction and Modification of Convention Awards Made in the United States

A court may correct or modify a U.S. Convention award to the extent that:

(1) the award contains an evident and material miscalculation of figures;

(2) the award contains an evident and material mistake in the description of any person, thing, or property;

(3) the form of the award is imperfect in a way that does not affect the substantive outcome of the proceeding; or

(4) the award determines a matter not submitted to the arbitral tribunal, unless the determination does not affect the substantive outcome of the proceeding.

§ 4-36. Remand to the Arbitral Tribunal of Convention Awards Made in the United States

A court may in exceptional circumstances remand a U.S. Convention award to the arbitral tribunal with instructions to complete the award or to clarify its meaning.