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Navigating the Borders between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS Symposium

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Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS

*S.I. Strong**

I. INTRODUCTION

International commercial arbitration is a very attractive field right now, with significant numbers of practitioners and aspiring arbitrators making their first forays into what was once seen as a specialized niche practice. In many ways, this increased interest in international commercial arbitration is a direct result of market forces, as globalization requires and inspires an ever-larger number of commercial actors, many of whom are not located in well-established centers of international trade such as New York or Washington, D.C., to take part in cross-border transactions.

However, the mere fact that the number of international commercial arbitrations taking place around the world is on the rise cannot explain the number of practitioners and arbitrators who are handling these sorts of cases for the first (and perhaps only) time. Indeed, as recently as fifteen years ago international commercial arbitration was commonly viewed as so unique and demanding that only a handful of lawyers in a small number of boutique firms were considered capable of representing clients in such matters.

Since then, things have changed, both in terms of the practice and the business of law.¹ Rather than shying away from international commercial arbitration,

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1. These changes include a higher degree of mobility among practitioners, a decrease in mentorship of young attorneys and the expansion of electronic research methods have allows increased access (or the perception of increased access) to specialized international source materials that were once solely in the hands of arbitral specialists. See S.I. Strong, *Research in International Commercial Arbitration: Special Skills, Special Sources*, 20 AM. REV. INT'L. ARB. 119, 127-29 (2009) [hereinafter Strong, Research].

many practitioners and arbitrators now see this field as a lucrative, somewhat glamorous sub-specialty that can be added onto an existing dispute resolution practice with relative ease. The idea is that international commercial arbitration cannot be all that different from domestic arbitration or litigation.² Unfortunately, this assumption is dangerously misguided.³

As one expert in international commercial arbitration recently wrote, “the essential difference” between international and other types of arbitration “is so great that their similarities are largely illusory.”⁴ However, many newcomers to the field are entirely unaware of the extent to which the policies and procedures that apply to international arbitration vary from those in domestic litigation and arbitration. This is deeply troubling, since the biggest danger in law is when “you don’t know what you don’t know.” Indeed, many of those who participate only infrequently in international commercial arbitration do not even know of their own blind spots.

This lack of awareness can have serious repercussions. For example, practitioners who do not understand the nuances of international practice and procedure suffer a competitive disadvantage against more experienced counsel, leading either to the loss of the dispute or to a much higher bill at the end of the process because the lawyer has to get up to speed on issues that a specialist would already know. (Both outcomes obviously tend to make clients unhappy.) Arbitrators who are unfamiliar with international norms also experience difficulties, since errors made during the process can lead to either an unenforceable award or damage the arbitrator’s own professional reputation as a competent, knowledgeable decision-maker.

Aspiring arbitrators and practitioners, therefore, cannot simply step into the international realm without some subject-specific preparation, no matter how experienced they may be in other types of commercial law and practice. Fortunately, there are a number of methods by which newcomers to and infrequent participants in international commercial arbitration can obtain the skills necessary to work in this area of law.

The best alternative, of course, would be to acquire hands-on training from one of the increasing numbers of continuing legal education providers and universities that offer specialized courses in international commercial arbitration.⁵ Many

2. The legal literature is unfortunately littered with so-called experts who mistakenly claim that “[c]ffective arbitration advocacy is remarkably similar to model advocacy in court.” Kevin R. Casey & Marissa Parker, *Strategies for Achieving an Arbitration Advantage Require Early Analysis, Pre-Hearing Strategies, and Awards Scrutiny*, 26 *ALT. HIGH COST LITIG.* 167 (Oct. 2008); see also Anana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 *BAYLOR L. REV.* 1 (2008). However, “[t]he voices of the true experts in international commercial arbitration can be lost, sometimes – ironically – because their views are published in sources of which novices are unaware.” Strong, Research, *supra* note 1, at 124.

3. See PHILIP D. O’NEILL JR., *BEST PRACTICES FOR INTERNATIONAL ALTERNATIVE DISPUTE RESOLUTION: LEADING LAWYERS ON UNDERSTANDING ADR LAWS AND POLICIES, OVERCOMING CHALLENGES, AND SUCCEEDING IN A GLOBAL SETTING* 105, 119 (Aspatore 2007) (noting that clients mistakenly believe their usual litigation counsel can handle international commercial arbitrations).

4. Jan Paulsson, *International Arbitration Is Not Arbitration*, 2008 *STOCKHOLM INT’L ARB. REV.* 1, 1.

5. Some of the arbitral institutions that offer continuing education courses include the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Dispute Resolution (ICDR), which is the international arm of the American Arbitra-

of these programs are excellent and well worth the investment. However, not every practicing lawyer or arbitrator can travel to these types of in-person trainings, which often take place in well-established arbitral centers such as New York, Miami, or Washington, D.C. In those cases, some recourse may be had to the increasing number of written materials that are now available in this area of law. For example, various books and articles have been published regarding the “unwritten” aspects of practice in international commercial arbitration.⁶ Efforts have also been made to describe the unique types of legal authorities utilized in this field of law and where they may be found, since it is impossible to construct a convincing legal argument without the proper source material.⁷

One thing that is missing, however, is a concise yet detailed guide to the intersection between U.S. federal courts and international commercial arbitration.⁸ This is a very complicated subject, and one that infrequent participants in international arbitration find particularly perplexing. Furthermore, given the scope of materials relevant to this area of law,⁹ newcomers often find it difficult to find materials that quickly describe how individual issues and procedures fit into the overall scheme of things. This can be problematic, since legal disputes frequently must be handled on an expedited basis and are, therefore, not amenable to extensive and time-consuming research.

Thus, this Article aims to provide newcomers to and infrequent users of international commercial arbitration with a brief introduction to the relationship be-

tion Association (AAA). The Chartered Institute of Arbitrators (CIArb), which has branches in North America and other regions, offers a multi-tiered pathway to competence, providing varying degrees of certification to those who have completed their courses. Furthermore, some institutions have begun to provide specialized certificates or degrees in international or transnational law. See Doug Jones, *Acquisition of Skills and Accreditation in International Arbitration*, 22 *ARB. INT'L* 275, 275 (2006). Among the universities that offer certificate programs and/or intensive summer courses in international commercial arbitration are American University Washington College of Law in the United States; the School of International Arbitration at Queen Mary University of London in the United Kingdom; the International Centre for Arbitration, Mediation and Negotiation of the Institute for European Studies of the CEU San Pablo University in Spain; and the University of Hong Kong in Hong Kong. The International Bar Association also offers an LL.M. in international law in association with the Law College of England and Wales.

6. See STEVEN FINIZIO & DUNCAN SPELLER, *A PRACTITIONER'S GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION* (2010); H. RODERIC HEARD ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION ADVOCACY: A PRACTITIONER'S GUIDE FOR AMERICAN LAWYERS* (2011); LAWRENCE W. NEWMAN & RICHARD D. HILL, *LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION* (2008); *PRACTITIONER'S HANDBOOK ON INTERNATIONAL ARBITRATION AND MEDIATION* (Richard Chernick et al., eds., 2012); FRANK-BERND WEIGAND, *PRACTITIONER'S HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION* (2010); Loukas Mistelis, *Workshop on Research, Teaching and Training in International Arbitration – An Introduction*, 22 *ARB. INT'L* 243, 244 (2006); O'NEILL, *supra* note 3.

7. See S.I. STRONG, *RESEARCH AND PRACTICE IN INTERNATIONAL COMMERCIAL ARBITRATION: SOURCES AND STRATEGIES* (2009); Strong, *Research*, *supra* note 1, at 119; see also JULIAN D.M. LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 2-44 (2003). Some information on this topic is provided in this Article. See *infra* notes 48-51 and accompanying text.

8. Although some assistance is forthcoming in the form of the highly anticipated *Restatement on the U.S. Law of International Commercial Arbitration*, that project will not be completed for a number of years. See AMERICAN LAW INSTITUTE, *PUBLICATIONS CATALOG, RESTATEMENT ON THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION*, available at http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=130.

9. The leading treatise on this subject spans over 3,000 pages. See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* (2009).

tween international arbitral proceedings and U.S. federal courts.¹⁰ Limitations of space mean that a great deal has necessarily been left out of this discussion. For example, this Article does not describe processes internal to the arbitration, instead focusing solely on the interaction between tribunal, parties and court. Furthermore, the text often skips over basic propositions of U.S. law that are well-established in the domestic realm so as to concentrate more heavily on elements that are unique to international disputes.¹¹

Although this Article focuses on the intersection between U.S. litigation and international commercial arbitration, there will be times when the discussion introduces the law and practice of other nations. This type of limited comparative analysis is important because there are times when the U.S. approach to international commercial arbitration varies from that taken by other nations. In some cases, this divergence is problematic as a matter of international law and practice, while in other cases it is not.¹² However, this Article does not aim to critique or defend any individual policy or procedure. Instead, the goal is simply to introduce the various issues that may arise as a tactical matter so that practitioners and arbitrators can understand how actions taken in U.S. courts may affect procedures in the arbitration or in other national courts. One of the reasons why experienced counsel and arbitrators are so highly valued in international commercial arbitration is because of their ability to see the big picture, and newcomers need to learn to develop this kind of skill if they want to be successful in this field.

Finally, the purpose of this Article is not to provide answers to particular questions, since far too much depends on the individual facts and circumstances of a particular dispute to allow for abstract generalizations. Instead, the goal is to identify a useful framework for analysis of matters relating to international commercial arbitration so that newcomers and infrequent participants in this area of law can approach their specific concerns with a higher degree of understanding and sophistication.

10. This guide may also be of use to students, both in the U.S. and abroad, who need to understand the interplay between judicial and arbitral proceedings. One of the best ways for law students to learn about international commercial arbitration is to participate in one of the growing number of international arbitration moots that take place around the world. See, e.g., Eric E. Bergsten, *The William C. Vis International Commercial Arbitration Moot and the Teaching of International Commercial Arbitration*, 22 *ARB. INT'L* 309 (2006); Jack M. Graves & Stephanie A. Vaughan, *The Willem C. Vis International Commercial Arbitration Moot: Making the Most of an Extraordinary Educational Opportunity*, 10 *VINDOBONA J. COMP. & INT'L L.* 173 (2006); *THE VIS BOOK – A PARTICIPANT'S GUIDE TO THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT* (Janet Walker ed., 2008). Experts agree that international moot competitions can be extraordinarily helpful in developing internationally-minded advocates. See Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 *AM. U. L. REV.* 553, 663-64 (2007). Some DVDs of experienced advocates and arbitrators role-playing in mock arbitrations are also now available. See Jack J. Coc, Jr., *Some Thoughts on Teaching International ADR and the Case for Reality-Based Simulations*, 22 *ARB. INT'L* 249, 256-57 (2006). Those interested in improving their understanding of the international arbitral process can also view videos of oral argument and obtain copies of the written submissions in an inter-state arbitration held at the Permanent Court of Arbitration at The Hague in April 2009. See *The Government of Sudan v. The Sudan People's Liberation Movement/Army (Abyei Arbitration)*, available at http://www.pca-cpa.org/showpage.asp?pag_id=1306.

11. Basic information on domestic U.S. arbitration law and procedure is available elsewhere. See LARRY E. EDMONSON, *DOMKE ON COMMERCIAL ARBITRATION* (2011).

12. Uniformity of practice is often a goal of the international arbitral community, although there are also times when national divergence is both contemplated and welcomed. See BORN, *supra* note 9, at 210; LEW ET AL., *supra* note 7, ¶ 2-20.

The structure of the Article is as follows. First, part II sets the discussion in context by describing the differences between international commercial arbitration and other dispute resolution mechanisms, including domestic arbitration.

Next, part III describes a number of fundamental concepts that lay the groundwork for further analysis. For example, part III provides an overview of the arbitral process and considers the various sources of authority relied upon in international commercial arbitration. This part also gives a basic outline of the U.S. statutory approach to international commercial arbitration and introduces certain basic jurisdictional concerns that will be referred to throughout the text.

The next section, part IV, is in many ways the core of the Article, since this portion of the text addresses the various procedural motions that are associated with international commercial arbitration. The discussion is arranged chronologically so as to give the maximum practical benefit, beginning with issues that arise in court prior to or at the initiation of the arbitration before moving on to issues that arise during and after the arbitration.

Although part IV covers the range of motions that may be brought in U.S. federal court in cases involving international commercial arbitration, there are some matters that do not fall neatly into one of these categories. These issues relate to who may be a proper party in an international commercial arbitration and include questions involving non-signatories, multiparty proceedings and state parties. Because these matters can arise at any time, they are addressed separately in part V. Part VI then concludes the Article with some closing observations.

Before beginning, it is useful to provide a cautionary word to those who may be tempted to turn straight to the part that addresses the immediate issue that they are researching. International commercial arbitration is a complex subject, requiring a sophisticated understanding of the interplay between substantive and procedural law at both the national and international levels. Readers are therefore urged to review parts II and III in their entirety before moving on to one of the subparts contained in part IV. While the text does contain a significant amount of internal cross-referencing to help provide context for the various discussions, it is important to have an overview of the field as a whole before addressing one of the constituent elements. Part V contains a number of useful points, although readers may wish to refer to this part only when one of the relevant issues arises.

The substantive discussion now begins with an overview of the differences between international commercial arbitration and various forms of arbitration commonly seen in domestic disputes.

II. DIFFERENCES BETWEEN INTERNATIONAL COMMERCIAL ARBITRATION AND OTHER FORMS OF ARBITRATION

The term “arbitration” encompasses a wide variety of dispute resolution mechanisms. However, arbitration is not a one-size-fits-all proposition. Distinct variations arise across different types of disputes, both with respect to the applicable policies and procedures. It is therefore necessary to differentiate between the various types of proceedings so as to avoid any misconceptions about the nature of international commercial arbitration.

A. *Distinguishing International Commercial Arbitration From International Investment Arbitration*

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

For example, international commercial arbitration is a private dispute resolution mechanism that relies heavily on the agreement of the parties, both as a means of demonstrating consent to arbitration and as a way of describing the shape of the proceedings. The types of procedures that can be used in international commercial arbitration are as diverse as the disputes themselves, and arbitral tribunals are encouraged to tailor the procedures to meet the needs of the individual parties and the dispute at hand.

International investment arbitration, on the other hand, is a treaty-based procedure that is rooted in public international law.¹³ Consent to international investment arbitration exists at the state-to-state level and must be found in each particular proceeding through reliance on one of the hundreds of bilateral investment treaties (BITs), multilateral investment treaties (MITs) or investment protection agreements (IPAs) that are currently in place worldwide.¹⁴ The most well-known instrument on international investment arbitration is the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, more commonly known as the ICSID Convention or the Washington Convention.¹⁵ Procedures in each individual dispute are dictated by the terms of the governing investment treaty, with little opportunity for deviation from the internationally agreed terms.¹⁶

Because treaty-based arbitration is a public law mechanism, it gives rise to a number of practical and jurisprudential issues that do not exist in international commercial arbitration, which constitutes a matter of private international law.¹⁷ While some investment arbitrations resemble commercial arbitrations in some regards, the two procedures reflect a sufficient number of differences to make it impossible to address both in this Article.¹⁸ Therefore, the following discussion should be taken to refer only to international commercial arbitration, not investment arbitration under the ICSID Convention or any applicable BIT, MIT or IPA.¹⁹

13 See CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES (2008); CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY (2001).

14. See SCHREUER, *supra* note 13.

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

16. See MCLACHLAN ET AL., *supra* note 13.

17. See LEW ET AL., *supra* note 7, ¶¶ 28-1 to 28-119 (2003).

18. *Id.* ¶¶ 28-1 to 28-119; MCLACHLAN ET AL., *supra* note 13.

19. See ICSID Convention, *supra* note 15.

*B. Comparing International Commercial Arbitration to
Other Forms of Dispute Resolution*

The next task is to compare international commercial arbitration to domestic arbitration and litigation. Although there are some similarities between the various dispute resolution mechanisms, key differences arise as a matter of both policy and procedure.

First, certain distinctions can be made between international and domestic arbitration. For example, most parties are well aware of the robust pro-arbitration policy currently in place in the United States.²⁰ However, relatively few people know that the U.S. Supreme Court has indicated that international commercial arbitration is to be treated even more favorably than domestic arbitration. Thus, the:

concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, *even assuming that a contrary result would be forthcoming in a domestic context.*²¹

Policy is not the only area where international and domestic arbitration differ. Distinctions also exist at the procedural level. For example, international commercial arbitration typically involves:

- Sophisticated, specialized counsel for both parties (as opposed to consumer, employment and securities arbitration, which may proceed without counsel for one or both of the parties);
- Highly qualified arbitrators with years of experience in international law and practice (as opposed to securities arbitration, which uses “public” arbitrators who lack any insider knowledge of the securities industry, or other forms of arbitration, which may not routinely use lawyers as arbitrators);
- Strict policies requiring arbitrators to disclose conflicts of interest, including previous contacts with the parties or with counsel (as opposed to labor and employment arbitration, which can experience difficulties arising from perceptions regarding arbitrator bias concerning “repeat players”);
- Arbitration agreements negotiated by sophisticated players at arm’s length (as opposed to consumer or employment arbitration, which can involve contracts of adhesion signed by lay persons with no real understanding of arbitration or its alternatives);

²⁰ See BORN, *supra* note 9, at 48-49, 132-44.

²¹ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (emphasis added).

- Highly formal procedures, often dictated by detailed institutional rules of procedure and requiring extensive pre- and post-hearing written submissions, and involving days, if not weeks, of hearings (as opposed to consumer, labor, and employment arbitration, which use very little in the way of written submissions and evidence, and which emphasize short and informal hearings);
- Complex legal claims involving large sums of money, often ranging in the millions or billions of dollars (as opposed to consumer, labor, and employment arbitration, which often involve simple legal issues and small amounts in dispute); and
- Extensive reliance on statutes, judicial precedents, international treaties and other legal authorities (as opposed to consumer, labor, and employment arbitration, which often involve less complex questions of substantive and procedural law).

Although these comparisons are obviously very general, they nevertheless demonstrate certain fundamental differences between international commercial arbitration and various forms of domestic arbitration.

Second, international commercial arbitration reflects certain distinct qualities when compared to international litigation. For example, international commercial arbitration provides:

- An effective and reliable means of enforcing foreign arbitral awards through use of various international treaties (as opposed to international litigation, which requires U.S. parties to rely primarily on unpredictable principles of international comity, since the U.S. is not a party to any multilateral agreements on the enforcement of civil judgments);
- A faster route to the final determination of the matter, due to limited judicial review (as opposed to international litigation, which can involve multiple appeals and the possible need for enforcement in various jurisdictions through the comity-based procedure noted above);
- A single forum in which to resolve disputes (as opposed to international litigation, which can involve multiple proceedings in different jurisdictions, particularly in cases where there is no enforceable choice of forum clause);
- Neutral decision-makers free from national or political prejudices (as opposed to international litigation, which can subject parties to bias (or perceived bias) from national courts that favor their own citizens);
- Adjudication by persons with extensive experience in international law and commerce (as opposed to international litigation, which may not involve decision-makers who are expert in complex commercial matters or international trade); and

- A purposeful and time-tested blend of common law and civil law procedures (as opposed to international litigation, which typically gives one party a home-court advantage in terms of procedure).

Interestingly, many multinational actors find international litigation in national courts so problematic that arbitration is no longer considered an alternative means of resolving disputes in the international commercial realm. Instead, many parties consider arbitration to be the only realistic method of resolving disputes arising out of cross-border transactions.

The cornerstone of the international arbitral regime is the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, more commonly known as the New York Convention.²² With 146 state parties as of January 2012, the New York Convention is perhaps the most successful commercial treaty in the world.²³ This multilateral agreement revolutionized global commerce by creating a neutral, reputable, and effective means of resolving international legal disputes.²⁴ Although several other international treaties on arbitration exist, the only one that parties to U.S. proceedings will regularly have to address is the Inter-American Convention on International Commercial Arbitration of 1975, more commonly known as the Panama Convention.²⁵

Both the New York and Panama Conventions have been incorporated into domestic U.S. law through the Federal Arbitration Act (FAA).²⁶ The two treaties, which are similar in many ways, are to be applied uniformly as per Congressional mandate.²⁷ For this reason, much of the discussion in this guide refers only to the New York Convention, although the principles apply equally to the Panama Convention.²⁸

Given its vast geographic scope, the New York Convention arises more frequently in U.S. practice than the Panama Convention.²⁹ However, in cases where

22. See United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention].

23. See New York Convention, Status, available at http://www.uncitral.org/uncitral/cn/uncitral_texts/arbitration/NYConvention_status.html [hereinafter New York Convention Status].

24. See BORN, *supra* note 9, at 91-101; LEW ET AL., *supra* note 7, ¶¶ 1-21 to 1-22.

25. See Inter-American Convention on International Commercial Arbitration of 1975, Pub. L. No. 101-369, 104 Stat. 448 (1990) [hereinafter Panama Convention]; see also European Convention on International Commercial Arbitration, Apr 21, 1964, 484 U.N.T.S. 364; Organization of American States, Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), May 14, 1979, 1439 U.N.T.S. 87.

26. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25; 9 U.S.C. §201 (2011) (regarding the New York Convention); *id.* §301 (regarding the Panama Convention).

27. See House Report No. 501, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 U.S.C.C.A.N. 675, 678; DRC, Inc. v. Republic of Honduras, 774 F. Supp. 2d 66, 71 (D.D.C. 2011); BORN, *supra* note 9, at 104 n. 615.

28. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25; see also John P. Bowman, *The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1 (2000); Helena Tavares Erickson et al., *Looking Back, and Ahead: The Panama Convention After 30 Years*, 23 ALT. HIGH COST LIT. 184 (2004).

29. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25; New York Convention Status, *supra* note 23. The seventeen states that have ratified the Panama Convention include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela. See Panama Convention, *supra* note 25; see also Organization of American States, Foreign Trade Information System, available at <http://www.sicc.oas.org/dispute/comarb/iacac/iacac2c.asp> [hereinafter SICE]. The two

both treaties apply, the Panama Convention takes precedence if a majority of the parties to the arbitration agreement are from countries that have ratified or acceded to the Panama Convention and also are members of the Organization of American States.³⁰ Therefore, lawyers involved in disputes involving Latin America should familiarize themselves with the differences between the New York and Panama Conventions.³¹

III. FUNDAMENTAL CONCEPTS IN INTERNATIONAL COMMERCIAL ARBITRATION

Because this Article focuses on matters that come before U.S. federal courts, it might not seem necessary to discuss issues involving internal arbitral procedure. To a large extent, that is true, since a quick review of some of the leading institutional rules provides a rough outline of the process and demonstrates that international arbitration follows well-established procedures that give the parties clear guidance about written submissions, the taking and presentation of evidence, powers of the tribunal, and so on.³²

Nevertheless, some general background information about arbitral procedures is necessary to demonstrate how and why certain disputes end up in court. Furthermore, providing some context regarding internal arbitral procedures can help explain why national courts are required to adopt certain standards or procedures as a matter of international law. This section, therefore, provides a brief introduction to various fundamental concepts in international commercial arbitration so as to lay the groundwork for later discussions.

A. Institutional Arbitration versus Ad-hoc Procedures

To begin with, a distinction must be made between institutional and ad hoc proceedings.³³ Although there is no requirement that an international commercial arbitration be administered by an arbitral institution, parties often find it useful to seek the assistance of one of the many organizations specializing in the resolution of international disputes. These organizations, which may be based in the United States or elsewhere, typically provide two different services.

countries that have signed the Convention but not yet ratified it are the Dominican Republic and Nicaragua. *See id.*

30. *See* 9 U.S.C. §307 (2011).

31. *See* New York Convention, *supra* note 22; Panama Convention, *supra* note 25. One of the major differences is discussed below. *See infra* notes 67-78 and accompanying text. Further reading on this topic is available. *See* Bowman, *supra* note 28; Erickson et al., *supra* note 28.

32. *See* International Chamber of Commerce (ICC) Rules of Arbitration, effective January 1, 2012, 2011, available at <http://www.iccwbo.org/court/arbitration/id4199/index.html> [hereinafter ICC Arbitration Rules]; International Centre for Dispute Resolution (ICDR) International Arbitration Rules, effective June 1, 1999, available at <http://www.adr.org/icdr> [hereinafter ICDR Arbitration Rules]; London Court of International Arbitration (LCIA) Arbitration Rules, effective Jan. 1, 1998, available at http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx [hereinafter LCIA Arbitration Rules].

33. The differences between these two proceedings are discussed in detail elsewhere. *See* LEW ET AL., *supra* note 7, ¶¶ 3-1 to 3-59.

First, arbitral institutions administer arbitrations, providing a variety of types of practical assistance to the parties.³⁴ For example, an arbitral institution can help with the selection of the arbitral tribunal, consider challenges to individual arbitrators and facilitate communications between the parties and the tribunal, among other things.

Second, arbitral institutions publish procedural rules for use in individual arbitrations.³⁵ These rules offer a number of benefits, including neutrality, consistency and predictability. Published rules typically allow for a great deal of flexibility and discretion on the part of the arbitral tribunal while also providing time-tested solutions to issues that routinely arise in international disputes.

Arbitrations that are not administered by an institutional body proceed “ad hoc.” Some ad hoc arbitrations are truly independent of institutional influence, with all procedures determined by the parties and/or arbitrators themselves. However, international arbitration is a complex undertaking, and it can be both risky and time-consuming for parties to design a complete set of individualized procedures for each dispute or transaction.³⁶ Therefore, parties can decide to adopt procedural rules published by an arbitral institution, even if the process is not administered by that organization. These arbitrations are still referred to as ad hoc proceedings, even though they are governed by published procedural rules. However, most published rule sets require any parties using those rules to have their arbitration administered by the organization that promulgated the rules.³⁷

Ad hoc arbitrations are often chosen by parties because such proceedings are seen as less expensive. However, the absence of an administering institution can create difficulties, as in situations where the parties need assistance appointing an arbitrator or organizing a challenge to a sitting panelist. It has, therefore, become increasingly common for parties to ad hoc proceedings to agree to allow an arbitral institution to assist with certain tasks (such as those involving appointments of or challenges to an arbitrator) that are normally associated with an administered arbitration. Although this procedure does not transform an ad hoc arbitration into an administered one, it does provide parties with one of the major benefits of administered arbitration, namely the ability to avoid going to court to resolve these types of procedural disputes.

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

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

34. For a list of well-known international arbitral institutions, *see infra* notes 38-43 and accompanying text.

35. *See infra* notes 38-43 and accompanying text.

36. Indeed, most experts suggest that parties use a well-known model clause and tailor it to their own particular needs. *See* GARY B. BORN, INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: DRAFTING AND ENFORCING 37 (2010) [hereinafter BORN, DRAFTING].

37. *See infra* notes 38-43 and accompanying text.

- The International Chamber of Commerce (ICC);³⁸
- The London Court of International Arbitration (LCIA);³⁹
- The Swiss Chambers of Commerce;⁴⁰ and
- The Stockholm Chamber of Commerce (SCC).⁴¹

More recent arrivals on the international scene include rules published by:

- The China International Economic and Trade Arbitration Center (CIETAC);⁴² and
- The International Centre for Dispute Resolution (ICDR), which is associated with the American Arbitration Association (AAA).⁴³

Not every set of arbitral rules is associated with an arbitral institution. For example, the United Nations Commission on International Trade Law (UNCITRAL) promulgated its own set of arbitral rules in 1976 (amended in 2010) (UNCITRAL Arbitration Rules).⁴⁴ However, UNCITRAL does not act as an administering institution, which means that proceedings under the UNCITRAL Arbitration Rules cannot be considered institutional.

The UNCITRAL Arbitration Rules are very popular with parties who want some structure to their proceedings but who do not want an administered arbitration.⁴⁵ The UNCITRAL Arbitration Rules were also instrumental in helping standardize international arbitral procedures worldwide, although they have also introduced a number of innovations, particularly with respect to provisions regarding situations where the parties are having difficulties in selecting or challenging an arbitrator.⁴⁶ According to both the new and amended Rules, the Secretary

38. See International Chamber of Commerce (ICC), International Court of Arbitration, available at <http://www.iccwbo.org/court/arbitration/id4398/index.html>.

39. See London Court of International Arbitration (LCIA), available at <http://www.lcia.org/>.

40. See Swiss Chambers' Court of Arbitration and Mediation, available at <https://www.sccam.org/sa/en/>.

41. See Arbitration Institute of the Stockholm Chamber of Commerce, available at <http://www.sccinstitute.com/>.

42. See China International Economic and Trade Arbitration Center (CIETAC), available at <http://www.cietac.org/index.cms>.

43. See International Centre for Dispute Resolution, available at <http://www.adr.org/icdr>.

44. See UNCITRAL Arbitration Rules, G.A. Res. 31/98, UNCITRAL, 31st Sess., Supp. No. 17 at 34, U.N. Doc. A/31/17 (Apr. 28, 1976), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf> [hereinafter UNCITRAL Arbitration Rules 1976]; UNCITRAL Arbitration Rules, G.A. Res. 65/22, U.N. Doc. A/RES/65/22 (Jan. 10, 2011), available at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> [hereinafter UNCITRAL Arbitration Rules 2010].

45. See UNCITRAL Arbitration Rules 2010, *supra* note 44; UNCITRAL Arbitration Rules 1976, *supra* note 44; see LEW ET AL., *supra* note 7, ¶ 3-11 (noting the UNCITRAL Arbitration Rules are sometimes also used in arbitrations administered by other organizations).

46. See UNCITRAL Arbitration Rules 2010, *supra* note 44; UNCITRAL Arbitration Rules 1976, *supra* note 44.

General of the Permanent Court of Arbitration at The Hague may designate an appointing authority to assist with the selection or challenge of arbitrators in cases where the parties cannot agree on an appropriate procedure themselves.⁴⁷ This approach – which led various private institutions to provide similar services to parties to ad hoc arbitrations – eliminates the need for judicial assistance in the area of arbitrator challenges and selection.

B. Sources of Legal Authority

Although some people may believe that arbitrators are not strictly bound by legal principles, that is very much not the case with international commercial arbitration, which involves an incredibly broad and diverse mix of legal authorities. In that sense, international commercial arbitration can be referred to as a highly legalistic procedure. However, some newcomers to the field may be surprised by what constitutes a reputable legal authority in international commercial arbitration.

Some of the relevant sources are “public,” in that they have been promulgated by various state entities, while other materials are “private,” in that they derive their persuasive power from the agreement of the parties.⁴⁸ Both forms of authority are central to the arbitration process and must be taken into consideration by both judges and arbitrators. However, not every type of authority is relevant to every issue, which can make analysis difficult for those who are entering the field.

The situation is further complicated by the fact that international commercial arbitration involves a number of legal authorities that are not used in litigation.⁴⁹ Furthermore, some materials that may seem familiar may be used slightly differently in proceedings related to international arbitration than in litigation.⁵⁰ This unique approach to legal authorities arises not only because of the high degree of party autonomy that is reflected in arbitration, but also because of the specific way in which international commercial arbitration melds practices and procedures found in both the common law and civil law traditions.

Navigating this complex web of materials can be difficult. Nevertheless, it is vitally important that those working in this area of law understand the role that each of the various authorities plays in court and in arbitration, lest a critical principle of controlling law or procedure be overlooked or given diminished weight. Practitioners who do not understand how to find or how to use these specialized materials suffer a competitive disadvantage in front of judges and arbitrators.

The following subparts therefore provide a brief summary of the legal materials used in international commercial arbitration and introduces the various ways in which these resources are used. In so doing, the discussion also provides insights into some of the fundamental principles of international commercial arbitration.

47. See UNCITRAL Arbitration Rules 2010, *supra* note 44; UNCITRAL Arbitration Rules 1976, *supra* note 44.

48. See STRONG, *supra* note 7; Strong, Research, *supra* note 1, at 130-31.

49. For example, arbitral awards are typically not used as authority in court (though they are brought in as evidence in motions to enforce or vacate an award).

50. For example, scholarly works and case law are used somewhat differently in international commercial arbitration and U.S. litigation.

Restrictions of space allow for only a cursory analysis of these topics, although further reading on research techniques and source material is available.⁵¹

1. Substantive Law: Issues Regarding Scope

The first issue to address – substantive law – is perhaps the easiest to consider, since arbitration and litigation address substantive disputes in very similar ways. For example, arbitral tribunals use the law or legal principle that is chosen by the parties or, in the absence of party agreement, the law or legal principle that the tribunal determines to be appropriate, typically through the application of standard choice of law (i.e., conflict of law) analyses.⁵² In this, tribunals behave in ways that are very similar to courts.⁵³

However, there are some ways in which international commercial arbitration differs from other forms of adjudication vis-à-vis the application of substantive law. For example, in international commercial arbitration, the parties or the arbitrators may decide that the substance of the dispute is not to be decided by reference to the law of a particular country but instead by reference to general principles of law, such as those found in the *lex mercatoria*⁵⁴ or encompassed in the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts.⁵⁵

Substantive disputes may also be governed by the United Nations Convention on Contracts for the International Sale of Goods (sometimes known as the Vienna Convention for the International Sale of Goods but more commonly referred to as the CISG), which is a self-executing treaty under U.S. law that applies automatically to transactions involving the international sale of goods between parties resident in contracting states.⁵⁶ Although parties can opt out of the CISG,⁵⁷ not everyone knows to do so. This can lead to surprises, since Article 2 of the Uniform Commercial Code (UCC), which applies to domestic sales of goods, is different than the CISG in several key regards.⁵⁸

Because parties often want their disputes to be determined in accordance with international commercial practices and principles, it is not uncommon for one of

51. See STRONG, *supra* note 7; Strong, Research, *supra* note 1.

52. See LEW ET AL., *supra* note 7, ¶¶ 17-1 to 17-78.

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

54. “*Lex mercatoria*” refers to the customary law merchant, which has been revitalized for current use. See LEW ET AL., *supra* note 7, ¶¶ 17-18, 17-73 (noting use of *lex mercatoria* in an ICC arbitral award); Klaus Pöter Berger, *Lex Mercatoria Online: the CENTRAL Transnational Law Database at www.ilda.de*, 18 ARB. INT’L 83, 83-94 (2002); L. Yves Fortier, *The New, New Lex Mercatoria, or, Back to the Future*, 17 ARB. INT’L 121, 121 (2001).

55. See UNIDROIT Principles of International Commercial Contracts, art. 1.6(2), UNIDROIT Principles 2004, available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>; BORN, *supra* note 9, at 2143; Fortier, *supra* note 54, at 124-25.

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

57. See CISG, *supra* note 56, art. 6.

58. See UNIFORM COMMERCIAL CODE, art. 2; Kokoruda, *supra* note 56, at 103.

these internationally oriented legal regimes to apply. In such cases, courts have very limited ability to review the arbitrators' determinations regarding the choice of substantive law, since matters involving choice of law are very much for the arbitral tribunal to decide.⁵⁹

Application of general or transnational principles of law should not be confused with deciding a matter *ex aequo et bono* or as an *amiable compositeur*.⁶⁰ These two interpretive techniques were at one time regularly relied upon in international commercial arbitration and allow arbitral tribunals to decide disputes by reference to certain equitable principles.⁶¹ Notably, most arbitral rules and statutes now forbid arbitrators from deciding a dispute *ex aequo et bono* or as *amiable compositeurs* except with the express permission of the parties.⁶² Absent this express authority, arbitral tribunals follow the governing legal principles, although those principles may, of course, involve equitable considerations.

Finally, newcomers to this area of practice need to understand that different substantive laws may apply to different aspects of an arbitral proceeding. For example, the law that governs the issue of the validity of an arbitration agreement might be different than the law that governs the merits of the dispute.⁶³ It is therefore important to distinguish between the different legal issues under discussion and apply the law that is appropriate to each of those issues.

2. Procedural Law: Issues Involving Choice of Law and Persuasive Law

The identification and application of the appropriate substantive law in international commercial arbitration can be complicated at times, but it is not a conceptually difficult task, since it involves analyses that are similar to those used in litigation. However, identifying and applying the appropriate procedural law in an international commercial arbitration can be a different endeavor. Arbitration offers a much wider variety of legal authorities from which to choose than litigation does, and it can be difficult for newcomers to the field to determine which authority governs which procedural issue.⁶⁴ This means that parties must learn how to choose the appropriate governing law for a particular issue and to introduce persuasive authority as necessary. Notably, these sorts of "choice of law" issues do not necessarily relate to debates about the applicability of different national laws

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

60. See LEW ET AL., *supra* note 7, ¶¶ 17-18, 18-5. The phrase "*ex aequo et bono*" describes a process whereby an arbitrator is permitted to rely primarily on equitable principles to decide an issue or dispute in justice, fairness and equity. The term "*amiable compositeur*" refers to an arbitrator who is permitted to disregard or alter legal rules when the strict application of those rules would violate equity.

61. See *id.* ¶¶ 17-18, 18-5.

62. See, e.g., ICC Arbitration Rules, *supra* note 32, art. 21(3); ICDR Rules, *supra* note 32, art. 28(3); LCIA Rules, *supra* note 32, R. 22.4.

63. See Gerard Meijer & Josefina Guzman, *The International Recognition of an Arbitration Clause in the Articles of Association of a Company*, in ONDERNEMING EN ADR 117, 125 (C.J.M. Klaassen et al., eds., 2011) (noting formal validity of an arbitration agreement should be considered under the law of the place of arbitration, while substantive validity should be considered under the law of the place of enforcement, absent any choice of law between the parties concerning the law applicable to the arbitration agreement; also noting that these laws may be different than that applicable to the substance of the dispute).

64. See BORN, *supra* note 9, at 1240-44 (describing procedural law governing internal and external procedures).

(although they may). Instead, the question relates to the different types of authorities that a party may introduce.

The process is further complicated by the fact that there are some procedures that are entirely internal to the arbitration itself and some procedures that involve interactions between the arbitral tribunal and the court.⁶⁵ There is no single law that governs all of these issues, nor is there a single interpretive rule that can be followed in all instances. Instead, it is often necessary to consider procedural disputes on a motion-by-motion basis, as is done in this Article.⁶⁶ However, it is impossible to conduct a proper legal analysis if one does not know which sources of authority are relevant to which issues or what the relative weight is of those authorities. Therefore, the following discussion describes each of the types of authorities available in international commercial arbitration and the uses to which they are put.

Experienced arbitral counsel, along with courts and arbitrators, rely on seven different types of authority to determine procedural issues in international commercial arbitration, including:

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

Each is discussed in turn below.

a. International Conventions and Treaties

The United States has ratified two treaties concerning international commercial arbitration: the New York Convention and the Panama Convention.⁶⁷ Both instruments address the recognition and enforcement of foreign arbitral awards, which means that these treaties are cited regularly in international enforcement proceedings in U.S. courts. As shall be seen, the two conventions apply not only

65. For example, questions regarding the introduction of evidence are entirely internal to the arbitration. Questions regarding the appointment of or challenge to an arbitrator in a situation where there is no appointing entity (such as an arbitral institution) involve interactions between the arbitral tribunal and the court.

66. See *infra* notes 256–645 and accompanying text.

67. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25; 9 U.S.C. §§201, 301 (2011).

to arbitrations seated outside of the United States but also to certain arbitrations seated within the United States.⁶⁸

Although the primary purpose of the New York and Panama Conventions is to outline the means of enforcing certain types of arbitral awards, these treaties apply in other proceedings as well.⁶⁹ For example, parties seeking to compel arbitration often rely on language found in Article II(1) of the New York Convention indicating that a court “shall” refer a dispute to arbitration if the dispute falls within the scope of the convention.⁷⁰

The New York and Panama Conventions have been incorporated into domestic U.S. law through Chapters 2 and 3 of the FAA, respectively.⁷¹ As such, the two conventions not only constitute binding federal law, but also reflect the United States’s international treaty obligations.⁷² This dual role is important to remember, for there is a “very specific interest of the federal government in ensuring that its treaty obligation to enforce arbitration agreements covered by the Convention finds reliable, consistent interpretation in our nation’s courts.”⁷³

When construing the New York and Panama Conventions, U.S. courts must look beyond domestic policies and practices, and take international norms into consideration.⁷⁴ This is because the primary purpose of the two conventions is to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”⁷⁵

There is one other way in which the Panama Convention, but not the New York Convention, might be used in a U.S. court.⁷⁶ Article 3 of the Panama Convention states that the arbitrators shall adopt the procedural rules of the Inter-American Commercial Arbitration Commission in any case where the parties have not made an express agreement regarding the governing procedural rules.⁷⁷ Therefore, a U.S. court could be required to consult the Panama Convention and the procedural rules of the Inter-American Commercial Arbitration Commission when determining or confirming what the proper arbitral procedure should be.⁷⁸

68. See *infra* notes 143-201 and accompanying text.

69. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25.

70. See New York Convention, *supra* note 22, art. II(1).

71. See 9 U.S.C. §§201, 301 (2011).

72. See *Medellin v. Texas*, 552 U.S. 491, 504-06 (2008); BORN, *supra* note 9.

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

74. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25.

75. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974) (discussing New York Convention); see also House Report, *supra* note 27 (requiring New York and Panama Conventions to be construed in a similar manner).

76. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25.

77. See Panama Convention, *supra* note 25, art. 3; Inter-American Commercial Arbitration Commission Rules of Procedure, as amended Apr. 1, 2002, 22 C.F.R. Pt. 194, App. A.

78. See Panama Convention, *supra* note 25; Inter-American Commercial Arbitration Commission Rules of Procedure, *supra* note 77; Bowman, *supra* note 28, at 11; Erickson et al., *supra* note 28; S.I. Strong, *International Arbitration and the Republic of Colombia: Commercial, Comparative and Constitutional Concerns From a U.S. Perspective*, 22 DUKE J. COMP. & INT’L L. 47, 57-60 (2011) (discussing application of article 3 of the Panama Convention) [hereinafter Strong, Colombia].

b. National Statutes on Arbitration

As important as international treaties on arbitration are, they concern a very limited number of issues. However, more extensive guidance can be found in national statutes on arbitration.

National laws on arbitration address a broader range of subjects than international treaties do, but most arbitration statutes are nevertheless limited in scope, focusing primarily on the relationship between the court and the arbitration, rather than on the procedures to be used during the arbitration itself.⁷⁹ Therefore, arbitration statutes cannot be considered analogous to codes of evidence or civil procedure, since laws on arbitration typically do not address many of the procedures internal to arbitral proceedings. However, these statutes do constitute the primary source of authority for questions regarding whether and to what extent a court is competent to undertake certain actions relating to an international commercial arbitration.

Sometimes the national arbitration law resolves an issue independently, without requiring the court to have recourse to any other source of law. Other times, national arbitration provisions may need to be construed in tandem with another legal authority. For example, motions to enforce an arbitral award typically fall under one of the international treaties on arbitration, but treaty provisions may be supplemented by the national statute on arbitration in some jurisdictions.

The national arbitration statute most relevant to U.S. judges is the FAA.⁸⁰ However, parties may occasionally need to consider the national arbitration laws of other nations as well.⁸¹ Questions regarding the circumstances in which these other national statutes apply are best handled on a motion-by-motion basis and are, therefore, discussed in that manner in this Article.⁸²

Parties and counsel sometimes also have to consider whether and to what extent an issue is governed by the arbitration statute of an individual U.S. state. This analysis may give rise to questions about whether the FAA has preempted that particular state provision.⁸³

U.S. courts regularly rely on the FAA to identify the permissible powers of the court concerning a variety of matters, including the court's ability to compel or aid arbitration; stay litigation; set aside, confirm, or enforce arbitral awards; appoint arbitrators; remove a dispute from state court; and appeal certain orders relating to arbitration.⁸⁴ The FAA also establishes federal jurisdiction in matters

79. For example, the New York Convention explicitly deals only with the enforcement and recognition of foreign arbitral awards, although it also addresses matters concerning the enforcement of arbitration agreements by implication. See New York Convention, *supra* note 22, arts. II, V. The FAA, on the other hand, deals not only with motions to compel arbitration (i.e., enforce an arbitration agreement) and motions to enforce an arbitral award, but also with appointment of arbitrators, compelling attendance of witnesses, and staying proceedings. See 9 U.S.C. §§ 7, 12, 206, 208 (2011).

80. See 9 U.S.C. §§ 1-307.

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

82. See *infra* notes 256-645 and accompanying text.

83. See 9 U.S.C. §§ 1-307; *Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 477-78 (1989); BORN, *supra* note 9, at 140-44; Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 99 (2012).

84. See 9 U.S.C. §§ 3-5, 16, 205.

involving international arbitration arising under the New York and Panama Conventions and gives domestic effect to the two treaties.⁸⁵

Although the FAA itself is outlined in more detail below, it is beyond the scope of this Article to consider the content of any national arbitration statute other than the FAA in detail.⁸⁶ However, brief reference should be made to the UNCITRAL Model Law on International Commercial Arbitration (commonly referred to as the Model Arbitration Law or MAL).⁸⁷

The Model Arbitration Law, which was drafted in 1985 and amended in 2006, was intended to act as a template for nations wishing to reform their statutory approach to international commercial arbitration.⁸⁸ The Model Arbitration Law has been adopted in whole or in part in sixty-six countries and seven U.S. states, and has been instrumental in helping to harmonize the law relating to international arbitration.⁸⁹

The Model Arbitration Law contains a number of distinctive elements that are discussed at various points in this Article.⁹⁰ However, one item bears mention now. It was stated previously in this subsection that most national statutes on arbitration do not include provisions regarding arbitral procedure. While that remains largely true, some jurisdictions are modifying their approach as a result of the Model Arbitration Law, which supplements the usual statutory provisions concerning the relationship between the court and the arbitral tribunal with certain default rules addressing arbitral procedure.⁹¹ These rules are found in chapter V of the Model Arbitration Law and can be overcome by the parties' implicit or explicit agreement to use other procedures.⁹²

Although the United States has not adopted the Model Arbitration Law at the federal level, parties may need to raise certain issues governed by national legislation based on the Model Arbitration Law from time to time.⁹³ Parties who find themselves in these circumstances should be prepared to conduct and possibly present a significant amount of comparative legal research to show how a particular provision of the Model Arbitration Law has been interpreted in several different jurisdictions, including but not limited to the nation whose law governs the issue.⁹⁴ This type of research is not only permissible but recommended, given that UNCITRAL has specifically stated that the Model Arbitration Law was intended

85. *See id.* §§ 201, 203, 301-02.

86. *See id.* §§ 1-307; *see also infra* notes 143-201 and accompanying text.

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

88. *See* Model Arbitration Law 2006, *supra* note 87; Model Arbitration Law 1985, *supra* note 87.

89. *See id.*; *see also* UNCITRAL, Model Arbitration Law Status, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

90. *See* Model Arbitration Law 2006, *supra* note 87; Model Arbitration Law 1985, *supra* note 87.

91. *See* Model Arbitration Law 2006, *supra* note 87, arts. 18-27; Model Arbitration Law 1985, *supra* note 87, arts. 18-27.

92. *See id.*

93. *See* Model Arbitration Law 2006, *supra* note 87; Model Arbitration Law 1985, *supra* note 87.

94. *See id.*

to be applied consistently across national borders.⁹⁵ This means parties may appropriately refer to international consensus on matters relating to the interpretation and application of the various provisions of the Model Arbitration Law.⁹⁶

c. Case Law

Case law plays a central role in U.S. litigation, so little needs to be said about the use of judicial opinions in the determination of domestic principles of law. However, international commercial arbitration often involves issues that are not governed by U.S. law. These matters may not be determined or determinable by case law in the same way that domestic issues are.

To understand how case law is treated in international commercial arbitration, it is necessary to understand how judicial opinions are used in both the common law and civil law traditions. As is well known, common law lawyers tend to rely heavily on judicial opinions as a primary source of authority.⁹⁷ Although statutes are of course important, subsequent judicial interpretations of statutory provisions are often equally, if not more, persuasive to common law decision-makers. Scholarly commentary is relied on rarely, typically only in cases involving a novel point of law.

The situation is somewhat different in civil law countries.⁹⁸ There, the statutory text is the primary source of authority, and the first task of a judge is to identify which of several competing statutory provisions governs the issue in question.⁹⁹ Once that task is complete, the judge must apply the law to the facts of the dispute.¹⁰⁰

However, it is something of a misperception to say that the civil law does not follow precedent, for civil law courts do aim to provide consistent judgments over time, although the extent to which civil law judges rely on precedent may vary from jurisdiction to jurisdiction and issue to issue.¹⁰¹ Nevertheless, civil law codes can be relatively abstract and difficult to apply. Therefore, civil law judges typically consider how other authoritative sources have handled issues similar to the one at bar.¹⁰² It is at this point that the common law and civil law diverge, for although judges in both traditions look to previously published judicial opinions, civil law judges are at least equally likely to turn to scholarly treatises to determine how the matter ought to be decided.¹⁰³

95. See G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

96. See Model Arbitration Law 2006, *supra* note 87; Model Arbitration Law 1985, *supra* note 87.

97. See KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 259-62 (Tony Weir trans., 3d ed. 1998).

98. See *id.* at 262-65.

99. See *id.*

100. See *id.*

101. See BORN, *supra* note 9, at 2957-59.

102. See ZWEIGERT & KÖTZ, *supra* note 97, at 262-65.

103. For a good example of a civil law judgment in English, see *Empresa Colombiana de Vías Férreas (Ferroviarias) v. Drummond Ltd.*, 24 Oct. 2003 – Consejo de Estado, Sala de lo Contencioso Administrativo, Sección Tercera [Council of State, Administrative Chamber, Third Section], No. 25.25, ¶8, *aff'd* 22 Apr. 2004, No. 24.261, ¶ 25, in XXIX Y.B. COMM. ARB. 643 (Albert Jan van den Berg ed., 2004) (demonstrating Colombian court's reliance on both judicial precedent and scholarly authorities).

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

Judicial opinions written by civil law judges are much shorter and more conclusory than those written by common law judges.¹⁰⁴ Because there is so little in the way of judicial reasoning reflected in a civil law opinion, case law provides future courts with little guidance on how to address similar disputes in the future. Although the courts will understand the outcome of the earlier dispute, a judge will not necessarily be able to glean the reasoning behind the decision.

Scholarly works fill this gap by providing in-depth analysis of the various statutory texts. This is particularly useful because of the way in which civil law lawyers approach questions of law. Civil law jurisprudence strives to set forth general principles of law in the abstract rather than respond to individual facts on a case-by-case basis.¹⁰⁵ As a result, the civil law has more use for scholarly works that elucidate general principles of law than the common law does. Furthermore, the civil law tradition has a great respect for materials that are written by objective experts who can look at the issues holistically, rather than on a limited case-by-case basis.¹⁰⁶ The fact that scholars lack any personal or financial interest in the outcome of their legal analyses also increases the persuasive power of academic works in the civil law tradition. Together, these factors lead civil law judges to give significant weight to scholarly commentary as a supplement to judicial precedent.

This distinction is important to understand for two reasons. First, parties may need to ask a U.S. court to decide a point governed by foreign law. To decide that issue, the judge must determine what was required under that foreign law and, therefore, must understand the relative importance of the various types of authority in that jurisdiction, including both case law and scholarly works. Parties must provide the court with the tools necessary to make this determination.

Second, parties may need to ask a U.S. court to review certain issues decided by the arbitral tribunal, which could raise questions about the legal authorities relied upon by the arbitrators. While it is generally inappropriate for courts to review arbitrators' decisions as to the weight of various authorities,¹⁰⁷ judges who understand how legal resources are used in different legal systems are less likely to question arbitrators' reasoning simply as a result of a common-law based conception about what constitutes a "proper" form of legal authority.

d. Arbitral Rules

As indicated previously,¹⁰⁸ parties to an international commercial arbitration often agree to adopt any one of a wide variety of procedural rules, regardless of whether the arbitration is administered or ad hoc. There are very few restrictions

104. See ZWEIGERT & KÓTZ, *supra* note 97, at 262-65.

105. See *id.* at 91, 262-65.

106. See *id.* at 270.

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

108. See *infra* notes 33-47 and accompanying text.

on the type of rules that can be used in an international arbitral proceeding.¹⁰⁹ Furthermore, even those parties who choose to proceed under institutional rules still have a significant amount of autonomy and can, if necessary, tailor the published procedures to suit the needs of the dispute, since most arbitral rules indicate that their provisions apply unless the parties agree otherwise.¹¹⁰ However, the parties' power is not limitless, since some rule sets include provisions from which the parties cannot derogate. For example, parties to an ICC arbitration may not contract around provisions regarding the scrutiny of the draft award by the International Court of Arbitration of the ICC.¹¹¹ Parties also may not derogate from certain mandatory rules of law, such as those ensuring due process.¹¹²

Arbitral rules focus primarily on matters of internal procedure and are therefore most relevant to processes undertaken in front of the arbitral tribunal rather than the court. However, many rule sets also include some provisions outlining the relationship between the tribunal and the court and, therefore, may be relevant to certain jurisdictional questions.¹¹³

As a general rule, judges defer to arbitral tribunals on matters of procedure, since most arbitration agreements, national statutes on arbitration, and procedural rules give the arbitrators a great deal of discretion in such matters.¹¹⁴ However, arbitral discretion is not unbounded; indeed, the use of published procedural rules is one of the key methods by which the parties agree to limit and define the power of the arbitral tribunal.¹¹⁵

Therefore, courts occasionally need to determine whether the procedure used by the tribunal was consistent with the parties' agreement and fundamental notions of due process.¹¹⁶ When construing the terms of the parties' agreement – including with respect to the interpretation of any relevant rules – courts must consider what legal authorities are relevant to the determination of the issue at bar.

Critically, arbitral rules are not U.S. laws.¹¹⁷ Instead, these rules of procedure have been promulgated by specialized arbitral bodies such as the ICC, the ICDR, the LCIA or UNCITRAL, and adopted by the agreement of the parties.¹¹⁸ At the time the rules were adopted by the parties – which was in all likelihood the time the underlying transaction was concluded, typically years before the dispute in question arose – there may not have been any indication that some aspect of arbitral procedure would be heard in a U.S. court.

109. See LEW ET AL., *supra* note 7, ¶¶ 21-3 to 21-18.

110. See *id.*

111. See ICC Arbitration Rules, *supra* note 38, art. 27. The ICC International Court of Arbitration is distinct from the arbitral tribunal and primarily exercises a supervisory role over certain administrative issues. See W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION §2.03 (2000).

112. See LEW ET AL., *supra* note 7, ¶¶ 21-14 to 21-18.

113. See *infra* notes 331-50 and accompanying text.

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

115. See LEW ET AL., *supra* note 7, ¶ 21-10.

116. See 9 U.S.C. §10 (2011); New York Convention, *supra* note 22, art. V.

117. Although parties may decide to adopt the rules of civil procedure enacted by a particular country, they seldom do so and are never considered to have chosen those rules by implication. See LEW ET AL., *supra* note 7, ¶ 21-11.

118. See *id.* ¶ 21-10.

Therefore, it is commonly accepted that parties choose arbitral rules based on an international, rather than national, understanding of how the rules would be interpreted and applied rather than on a perspective enunciated by one particular nation. This international understanding is reflected in a variety of sources, including not only U.S. case law but also published arbitral awards construing the relevant language, scholarly commentary, and judicial opinions from other jurisdictions. All of these sources contribute to and reflect the international understanding of the procedural rules in question and are, therefore, relevant to what these particular parties intended and expected when they adopted the provisions. Thus, parties to disputes involving international commercial arbitration will need to consult a variety of sources when construing matters involving arbitral rules, even if the dispute is being heard in a U.S. federal court.

Most arbitral rules address a relatively standard set of issues that are sufficient for most purposes. However, there are a few potentially contentious matters that are not included within the normal procedural rules. These issues are covered in supplemental provisions that can be adopted as necessary by arbitrators and parties. The two most important rule sets were promulgated by the International Bar Association (IBA) and consist of the IBA Rules on the Taking of Evidence in International Arbitration, which were originally published in 1999 and amended in 2010,¹¹⁹ and the IBA Guidelines on Conflicts of Interest in International Arbitration, which were published in 2004.¹²⁰

The importance of these supplemental rules has been growing steadily over the years, and a significant number of arbitrators and courts find the two documents to be highly persuasive indications of international procedural norms concerning the taking and presentation of evidence and the grounds for challenges to arbitrators.¹²¹

e. Agreements between the Parties

International commercial arbitration is based on the concept of party autonomy, which means that the intent of the parties controls the question of whether the dispute is to be arbitrated as well as what procedure is to be used to resolving that dispute.¹²² Parties are allowed to adopt a wide variety of procedures in international arbitration, even those (such as documents-only or fast-track proceedings) that are not available in litigation.¹²³

When it comes to procedural issues, it is the arbitral tribunal, rather than the court, that is to determine the terms of the parties' agreement.¹²⁴ Nevertheless,

119. See IBA, Rules on the Taking of Evidence, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

120. See IBA, Guidelines on Conflicts of Interest in International Arbitration, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

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

122. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002); *Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

123. See BORN, *supra* note 9, at 1232, n. 442.

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

parties may ask a court to resolve certain matters relating to the agreement of the parties.

For the most part, the types of issues that require reference to the arbitration agreement are the same in both domestic and international arbitration. Furthermore, because an agreement to arbitrate must be in writing for it to be enforceable as a matter of both international and domestic law, parties will be parsing through the same manner of documents in both kinds of cases: contracts containing arbitral clauses, stand-alone arbitration agreements, standard terms and conditions making reference to arbitration, and so forth. Therefore, the concept and use of an arbitration agreement as a source of legal authority is consistent in both national and international disputes.

f. Arbitral Awards

Of the various types of legal authority available in international commercial arbitration, arbitral awards are perhaps the most misunderstood. Even though they constitute a private (i.e., non-state-generated), rather than public, source of authority, arbitral awards from international proceedings have long been available in collected series and yearbooks that are similar to case reporters.¹²⁵ Many of these awards are also available on specialized subscription databases such as *kluwerarbitration.com*, with a growing number appearing on Westlaw and LexisNexis as well. However, parties need to exercise caution when using any electronic database that purports to compile sources relating to international commercial arbitration, since the library of materials may not be as broad as one might hope or expect.¹²⁶

While publishers remove various pieces of identifying information, such as the parties' names, so as to respect the strictures of confidentiality, published awards often contain a considerable amount of information about the arbitrators' procedural and substantive decisions.¹²⁷ Parties and arbitrators, therefore, can and

125. Arbitral awards are often the hardest type of source material for non-specialists to find. However, detailed guidance on where to find international arbitral awards is available. See STRONG, *supra* note 7; Strong, Research, *supra* note 1, at 142-45.

126. For example, general legal databases like Westlaw and LexisNexis claim to offer materials in international commercial arbitration even though they do not have access to very many international arbitral awards. Specialized subscription databases, such as *kluwerarbitration.com* and Arbitration Law Online (*arbitrationlaw.com*) can fill the gap left by more general legal databases, since the subject-specific databases include material from at least some of the major arbitral reporters. Nevertheless, no single electronic database has comprehensive access to all relevant materials. For a list of sources for international arbitral awards, see STRONG, *supra* note 7.

127. Most awards arising out of international commercial arbitration are fully reasoned, pursuant to requirements found in individual arbitration agreements and/or institutional rules. See BORN, *supra* note 9, at 2457 (noting "reasoned" or "fully reasoned" awards contain detailed descriptions of the tribunal's legal and factual analyses). This is in contrast to "unreasoned" or "standard" awards, which are more common in domestic disputes and which simply indicate who the prevailing party is and what sort of relief is due. The FAA does not require arbitral awards to be reasoned, and U.S. courts have generally held that unreasoned awards are valid and enforceable so long as the parties' agreement or governing rules did not require the arbitral tribunal to provide its reasoning. See 9 U.S.C. §§ 9, 207, 302 (2011); *Stark v. Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 803 (8th Cir. 2004); BORN, *supra* note 9, at 2456. This is equally true in the international context. See *Matter of Arbitration Between Trans Chem. Ltd. and China Nat'l Mach. Import & Export Corp.*, 978 F.Supp. 266, 308 (S.D. Tex. 1997), *aff'd* 161 F.3d 314 (5th Cir. 1998).

do review previously rendered awards to determine whether and to what extent international consensus exists on a particular point of law or procedure. This is similar to what occurs in other areas of arbitration, including employment, labor, maritime, and international investment arbitration, where the frequent and consistent use of arbitration and publication of arbitral awards leads to the creation of something akin to arbitral precedent.¹²⁸

This kind of widespread reliance on arbitral awards makes a great deal of sense, given the high need for consistency and predictability in international commercial arbitration. Indeed, as one ICC award has noted:

[t]he decisions of these tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively formulated should respond.¹²⁹

Nevertheless, the persuasive value of previously published awards often varies according to the issue in question. Thus, for example, arbitral awards are often not highly influential on matters of substantive law, since there are other, more authoritative materials available (i.e., “public” or state-sponsored sources of law). However, awards carry a great deal of weight in other areas of arbitration law and practice.¹³⁰

Arbitral awards are perhaps most useful with respect to procedural matters such as the interpretation of arbitral rules or the provision of interim relief. These are issues that reside firmly within the realm of arbitrator discretion,¹³¹ and arbitral awards are the best source of information about how expert international arbitrators construe these principles in practice. However, parties may need to ask courts to rule on these sorts of issues as well and, therefore, may need to present a judge with previously published awards as a form of relevant authority.

Notably, parties may find it even more appropriate to rely on arbitral awards in the international realm than in the domestic context. This is for two reasons. First, the kinds of procedural matters discussed in arbitral awards are typically not issues of national law, so it makes less sense for a party to rely exclusively on judicial precedent. Second, parties typically expect these matters to be resolved in accordance with international commercial and legal norms rather than by reference to a single national perspective. Therefore, reference may properly be had to authorities describing the relevant international standards.

128 See *Fournelle v. N.L.R.B.*, 670 F.2d 331, 343-44 (D.C. Cir. 1982); *Matter of Andros Compania Maritima, S.A. (Marc Rich & Co., A.G.)*, 579 F.2d 691, 696 (2d Cir. 1978) (noting review of 1200 published awards of Society of Maritime Arbitrators); *State Farm Mut. Auto. Ins. Co. v. Mallela*, Civ. No. CV-00-4923, 2002 WL 31946762, *12 (E.D.N.Y. Nov. 21, 2002), *question certified by* 372 F.3d 500 (2d Cir. 2004), *certified question answered by* 4 N.Y.3d 313 (N.Y. 2005).

129. Interim Award in ICC Case No. 4131, IX Y.B. COMM. ARB. 131, 135 (1984).

130. See BORN, *supra* note 9, 2965-70 (listing areas where arbitral awards affect the development of international commercial arbitration); Gabrielle Kaufmann-Kohler, *Arbitral Precedent. Dream, Necessity or Excuse?* 23 ARB. INT’L 357, 361-78 (2007) (discussing development of precedent in arbitral realm).

131. See BORN, *supra* note 9, 1758-65.

g. Scholarly Works (Treatises, Monographs and Articles)

Parties in U.S. litigation are used to using scholarly works as persuasive authority. However, these types of authorities play a larger role in international commercial arbitration than they do in domestic forms of dispute resolution. To some extent this is because international commercial arbitration reflects an intentional blend of civil and common law traditions, and the civil law has always relied heavily on scholarly work as a source of legal authority.¹³² However, academic commentary is also given heightened respect in international commercial arbitration because this is a private form of dispute resolution, with much of what goes on during the decision-making process being hidden from public view.

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

This may seem troubling to those who are used to the transparency of litigation. However, arbitral procedure is not as secretive or as discretionary as it may initially appear. For years, the international arbitral community has relied on scholarly commentary, often written by top arbitrators and practitioners with years of experience in the field, to describe what goes on behind the closed doors of the hearing room.¹³³ Treatises and other forms of scholarship provide comprehensive analyses of a wide variety of procedural and practical matters that are ostensibly subject to arbitral discretion but that are in fact largely guided by international consensus and customary practice.¹³⁴ Experienced counsel rely heavily on these materials at all stages of the arbitral process: when drafting arbitration agreements, selecting arbitral rules, identifying the seat of arbitration, choosing arbitrators, and deciding what tactical steps to take with response to judicial relief. This shared understanding of arbitration results in a highly predictable dispute resolution regime, which is precisely what the parties contract for when they sign their arbitration agreements.¹³⁵

Although the universe of scholarly works concerning international commercial arbitration is expanding rapidly, several works stand out as being particularly authoritative. These include:

- Gary B. Born's *International Commercial Arbitration* (substantially revising an earlier edition entitled *International Commercial Arbitration in the United States*);¹³⁶
- W. Laurence Craig, William W. Park and Jan Paulsson's *International Chamber of Commerce Arbitration*,¹³⁷

132. See *supra* notes 97-107 and accompanying text.

133. See practitioners' handbooks and guides, *supra* note 6.

134. See BORN, *supra* note 9, at 1739-1939; LEW ET AL., *supra* note 7, ¶¶ 21-1 to 22-106.

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

136. See BORN, *supra* note 9.

137. See CRAIG ET AL., *supra* note 111.

- Emmanuel Gaillard and John Savage's *Fouchard Gaillard Goldman on International Commercial Arbitration*;¹³⁸
- Julian D.M. Lew, Loukas A. Mistelis and Stefan Kröll's *Comparative International Commercial Arbitration*;¹³⁹ and
- Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter's *Redfern and Hunter on International Arbitration* (substantially revising an earlier edition entitled *Law and Practice of International Commercial Arbitration*).¹⁴⁰

Not only are these authorities regularly relied upon by parties and practitioners,¹⁴¹ they have also been recognized by various federal courts as constituting persuasive authority.¹⁴²

C. U.S. Statutory Regime

Many commercial practitioners are of course already familiar with the FAA through their work on domestic disputes.¹⁴³ However, international disputes experience a number of complications that do not arise in domestic arbitrations. Many of these difficulties are tied to the structure of the statute. Therefore, it is useful to provide a brief overview of the FAA as a whole so as to set later, more detailed discussions into context.¹⁴⁴

Structurally, the FAA appears relatively straightforward, with three separate chapters dealing with three separate scenarios. Chapters 2 and 3 are known as the "international" chapters, since they give domestic effect to the New York and Panama Conventions, respectively.¹⁴⁵ However, the FAA does not simply incorporate the two conventions into domestic law verbatim and leave it at that, as some nations do.¹⁴⁶ Instead, Chapters 2 and 3 include additional provisions re-

138. See EMMANUEL GAILLARD & JOHN SAVAGE, *FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION* (1999) [hereinafter *FOUCHARD GAILLARD GOLDMAN*].

139. See LEW ET AL., *supra* note 7.

140. See NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* (2009) [hereinafter *REDFERN & HUNTER*].

141. Several other titles are also worth considering. See JACK J. COE, JR., *INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT* (1997); MARGARET MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (2008); MAURO RUBINO-SAMMARTANO, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE* (second edition forthcoming 2012); STRONG, *supra* note 7. Numerous helpful articles also exist, although not all are found in U.S. law reviews. Indeed, several of the most authoritative sources come from outside the United States. These materials include *ARBITRATION INTERNATIONAL*, *ASA BULLETIN*, the *JOURNAL OF INTERNATIONAL ARBITRATION*, and the *YEARBOOK OF COMMERCIAL ARBITRATION*. See STRONG, *supra* note 7; Strong, Research, *supra* note 1, at 150-56.

142. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633-34 (1985) (citing *Craig, Park, and Paulsson*); *Polimaster Ltd. v. RAE Systems, Inc.*, 623 F.3d 832, 838-39 (9th Cir. 2010) (citing *Born*; Gaillard and Savage; and Redfern and Hunter).

143. See 9 U.S.C. §§ 1-307 (2011).

144. See *id.*

145. See *New York Convention*, *supra* note 22; *Panama Convention*, *supra* note 25; 9 U.S.C. §§201, 301 (2011).

146. See 9 U.S.C. §§201, 301; see also *Dražozač*, *supra* note 83.

garding the application of the two treaties in U.S. courts.¹⁴⁷ As shall be seen throughout this Article, this approach has created significant difficulties at times.

Chapter 1 is commonly considered the FAA's "domestic" chapter.¹⁴⁸ Nevertheless, it has residual application to international disputes to the extent that it "is not in conflict with" Chapters 2 or 3.¹⁴⁹ This, too, has created trouble for courts, with numerous debates arising about the applicability of certain aspects of Chapter 1 to disputes arising under one or the other of the conventions.¹⁵⁰

Questions also exist regarding the extent to which the FAA preempts state law.¹⁵¹ This issue is still under consideration in both the domestic and international realms.¹⁵² However, several recent decisions have stated that the New York Convention preempts any provision of domestic law that limits the enforceability of arbitration agreements.¹⁵³ Because Congress has indicated that the New York and Panama Conventions are to be construed harmoniously and consistently, these holdings apply equally to the Panama Convention.¹⁵⁴

Although the basic structure of the FAA can be easily described in the abstract, difficulties arise in the application of its language.¹⁵⁵ For example, it is not always clear whether a dispute falls under Chapter 1 (the "domestic" chapter) or under Chapters 2 or 3 (the "international" chapters).¹⁵⁶ This confusion is largely due to the interaction between FAA's definitional sections.¹⁵⁷

Chapter 1, which was originally enacted in 1925, indicates that it applies to both domestic arbitrations and arbitrations involving interstate and foreign commerce.¹⁵⁸ These arbitrations must arise out of written agreements involving maritime or commercial transactions.¹⁵⁹ However, Chapter 2, which was enacted in 1970, limits Chapter 1's broad applicability.¹⁶⁰ For example, Section 202 states that "[a]n 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 [New York] Convention."¹⁶¹ At first, this would appear to bring all disputes listed in Section 2 under the governance of Chapter 2, leaving nothing to the ex-

147. See 9 U.S.C. §§ 201-307.

148. See *id.* §§ 1-16.

149. *Id.* §§ 208, 307.

150. See *id.* §§ 1-307.

151. See *id.*; Drahozal, *supra* note 83.

152. See *AT&T Mobility L.L.C. v. Concepcion*, 131 S.Ct. 1740, 1753 (2011); *Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008).

153. See *New York Convention*, *supra* note 22; *Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's, London*, 543 F.3d 744, 755 (5th Cir. 2008), *reh'g en banc*, 587 F.3d 714 (5th Cir. 2009), *cert. denied sub nom. Louisiana Safety Ass'n of Timbermen – Self Insurers Fund v. Certain Underwriters at Lloyd's, London*, 131 S.Ct. 65 (2010); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1155 (9th Cir. 2008), *cert. denied* 129 S.Ct. 2827 (2009).

154. See *New York Convention*, *supra* note 22; *Panama Convention*, *supra* note 25; House Report, *supra* note 27.

155. See 9 U.S.C. §§ 1-307.

156. See *id.*

157. See *id.* §§ 1-2, 202, 302.

158. See *id.* § 1.

159. See *id.* § 2.

160. See *id.* §§ 1-208.

161. *Id.* § 202.

clusive jurisdiction of Chapter 1.¹⁶² However, Section 202 then goes on to limit the types of disputes to which Chapter 2 applies, stating that:

[a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention. . . .¹⁶³

This clause returns a subset of disputes to the exclusive jurisdiction of Chapter 1.¹⁶⁴ However, Section 202 includes one more provision that brings some disputes that arise out of a relationship entirely between citizens of the United States back within the scope of Chapter 2.¹⁶⁵ This occurs when:

. . . that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.¹⁶⁶

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

- agreements or awards arising between a U.S. and foreign party;
- agreements or awards arising entirely between foreign parties; and
- agreements or awards arising entirely between U.S. citizens, but only if there is some sort of international nexus (i.e., “property located abroad, . . . performance or enforcement abroad, or . . . some other reasonable relation with one or more foreign states”).¹⁶⁷

Any agreement or award that falls under Chapter 2 is subject not only to the statutory requirements set forth in that chapter, but also to the requirements of the New York Convention.¹⁶⁸ Chapter 1 of the FAA also has residual application to agreements and awards falling under Chapter 2, to the extent that no inconsistencies between Chapter 1 and either Chapter 2 or the New York Convention arise.¹⁶⁹

Notably, Chapter 2 of the FAA does not impose any kind of territorial limitations on arbitrations arising under its provisions.¹⁷⁰ Therefore, Chapter 2 applies to an arbitration located anywhere in the world, including the United States, so

162. *See id.* §§ 2, 202.

163. *Id.* § 202.

164. *See id.* §§ 1-16.

165. *See id.* § 202.

166. *Id.*

167. *See id.*

168. *See* New York Convention, *supra* note 22; 9 U.S.C. § 201; *see also* S.I. Strong, *What Constitutes an “Agreement in Writing” in International Commercial Arbitration? Conflicts Between the New York Convention and the Federal Arbitration Act*, 48 STAN. J. INT’L L. 47 (2012) [hereinafter Strong, Writing].

169. *See* New York Convention, *supra* note 22; 9 U.S.C. § 208.

170. *See* 9 U.S.C. §§ 201-08.

long as the definitional test described in section 202 is met, subject to certain restrictions on reciprocity and commerciality.¹⁷¹

Chapter 3, which was enacted in 1990, incorporates much of Chapter 2 by reference, both in terms of its definitions and its procedures.¹⁷² Thus, Chapter 3 states that Section 202 “shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter ‘the Convention’ shall mean the Inter-American Convention.”¹⁷³ However, Chapter 3 also indicates that when the requirements of both the New York and Panama Conventions are met, the Panama Convention (and thus Chapter 3) shall apply if a majority of the parties are citizens of states that have ratified the Panama Convention and that are members of the Organization of American States.¹⁷⁴

There are two ways to give domestic effect to an international treaty. One simply declares that the treaty is directly applicable in national courts while the other embeds the treaty in domestic legislation indicating how the treaty provisions are to be given effect in the national legal system.¹⁷⁵ The United States uses the second approach for matters involving international commercial arbitration.¹⁷⁶ Unfortunately, however, the terms used in the FAA do not mirror those used by the New York Convention, creating significant difficulties for courts attempting to construe the various provisions.¹⁷⁷ Disputes arising under the Panama Convention experience slightly fewer problems, since the Panama Convention simply refers to “[a]n agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction” rather than adopting the more complex definitional aspects of Article II of the New York Convention.¹⁷⁸

The New York Convention is often said to govern two types of arbitral awards – “foreign” and “non-domestic” – rather than “international” awards.¹⁷⁹ This distinction arises out of the language of the Convention itself, which states that it:

shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought [i.e., “foreign” awards], and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought [i.e., “non-domestic” awards].¹⁸⁰

171. See *infra* notes 177-202 and accompanying text.

172. See 9 U.S.C. § 302.

173. *Id.*; see also Panama Convention, *supra* note 25.

174. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25; 9 U.S.C. § 305.

175. See Robert E. Dalton, *United States*, in NATIONAL TREATY LAW AND PRACTICE 765, 788-90 (Duncan B. Hollis et al., eds., 2005) (discussing self-executing and non-self-executing treaties).

176. See 9 U.S.C. §§201, 301.

177. See New York Convention, *supra* note 22; 9 U.S.C. §§2, 202; Strong, Writing, *supra* note 168.

178. Panama Convention, *supra* note 25, art. 1; see also New York Convention, *supra* note 22, art. II; Strong, Writing, *supra* note 168.

179. See New York Convention, *supra* note 22, art. I(1).

180. *Id.*

Although this provision refers only to the recognition of awards, the Convention also applies to motions to compel arbitration by virtue of Article II, which indicates that “[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration” certain relevant disputes.¹⁸¹ Therefore, the New York Convention governs arbitration agreements as well as arbitral awards.¹⁸²

Problems can arise with respect to both foreign and non-domestic agreements and awards. Analytically, courts have had the least amount of difficulty with foreign awards, since those are often perceived as being clearly “international” in scope. Nevertheless, some problems occasionally arise regarding arbitrations that are entirely between U.S. citizens and seated outside the U.S., but that do not involve “property located abroad” or “performance or enforcement abroad.”¹⁸³ Although these are clearly “foreign” arbitrations under the New York Convention, based on geographic considerations, U.S. courts have occasionally held that Chapter 2 of the FAA does not apply to these types of disputes.¹⁸⁴ However, this question has seldom been addressed and, therefore, remains relatively open. Thus, it may be that seating an arbitration outside the United States creates a reasonable relationship with a foreign state sufficient to bring the arbitration within the scope of section 202 of the FAA, “at least where this was not an effort to circumvent local regulatory protections.”¹⁸⁵

The second type of agreements and awards – those considered “non-domestic” under the Convention – can also cause trouble, perhaps because they are not always perceived as being “international” to the same extent that foreign agreements and awards are.¹⁸⁶ Clearly, however, an agreement or award comes within the scope of the Convention and thus Chapter 2 of the FAA arbitration even if it is seated within the United States, so long as it involves a foreign party or has the requisite international nexus.¹⁸⁷ Nevertheless, some controversies still remain about the applicability of the Convention to U.S.-seated arbitrations in some situations, most particularly those involving motions to vacate an award.¹⁸⁸

Courts considering the relevance of the New York Convention to a particular dispute must take two additional factors into account.¹⁸⁹ According to the terms of the treaty, contracting states may make two declarations limiting the applicability of the Convention.¹⁹⁰ These declarations allow a state party to apply the New York Convention only to “differences arising out of legal relationships . . . which are considered as commercial under the national law of the State making such declaration” and only “on the basis of reciprocity,” meaning that the state making

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

182. *See id.*

183. 9 U.S.C. § 202 (2011).

184. *See New York Convention, supra* note 22; 9 U.S.C. § 202; *Wilson v. Lignotock U.S.A. Inc.*, 709 F. Supp. 797, 799 (E.D. Mich. 1989).

185. BORN, *supra* note 9, at 293-94 (citing analogies to section 1-105 of the UNIFORM COMMERCIAL CODE); *see also* 9 U.S.C. § 202.

186. *See New York Convention, supra* note 22, art. I(1).

187. *See id.*; 9 U.S.C. §202; *Lander Co., Inc. v. MMP Inv., Inc.*, 107 F.3d 476, 482 (7th Cir. 1997) (holding that the New York Convention applied to a dispute between two U.S. parties and seated in the U.S. when performance was to occur abroad).

188. *See New York Convention, supra* note 22; *see also infra* notes 470-97 and accompanying text.

189. *See New York Convention, supra* note 22.

190. *See id.* art. I(3).

the declaration “will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State.”¹⁹¹

The United States has made both declarations, but this has little effect in actual practice. First, U.S. courts have defined the term “commercial” so broadly that the first limitation is virtually irrelevant.¹⁹² Thus, for example, the New York Convention applies not only to the prototypical commercial relationship exemplified by the purchase and sale of goods between two corporations, but also to disputes involving employers and employees, consumers, shareholders, foreign state actors, antitrust issues, foreign regulatory authorities, insurers and reinsurers, and maritime matters.¹⁹³ Courts have even concluded that the New York Convention applies to relationships (such as those involving contracts regarding the employment of seamen) that are excluded from the scope of Chapter 1 of the FAA.¹⁹⁴ Thus, it has been said that doubts as to whether a contract involves a commercial dispute and, thus, falls under the New York Convention should be resolved in favor of the arbitrability of the dispute under the Convention.¹⁹⁵

The U.S. declaration regarding reciprocity also has little effect in practice. In this case, the reason is that very few countries have not signed the New York Convention.¹⁹⁶ That means that a U.S. court will seldom, if ever, be asked to deny enforcement of an arbitral award based on a lack of reciprocity. Notably, reciprocity under Article I(3) relates only to the place where the award was rendered (i.e., the arbitral seat) and not to the nationalities of the parties.¹⁹⁷

Confusion sometimes arises as a result of a second provision in the New York Convention that mentions reciprocity.¹⁹⁸ This section indicates 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.”¹⁹⁹ U.S. courts have addressed this language only rarely, but it would appear that Article XIV applies only in cases where a country is routinely behaving in an improperly restrictive manner with respect to its obligations under the Convention.²⁰⁰ Notably, this is a very high burden to meet.

Finally, foreign awards that are rendered in nations that are not parties to the New York or Panama Convention are nevertheless enforceable in the United States.²⁰¹ However, because the vast majority of proceedings fall under one of the two conventions, that will be the focus of this Article.

191. *Id.*

192. See BORN, *supra* note 9, at 258-59, 272.

193. See New York Convention, *supra* note 22; BORN, *supra* note 9, at 262.

194. See New York Convention, *supra* note 22; 9 U.S.C. §§ 1-16 (2011); *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1155 (9th Cir. 2008).

195. See New York Convention, *supra* note 22; *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 274-75 (5th Cir. 2002).

196. See New York Convention Status, *supra* note 23.

197. See New York Convention, *supra* note 22, art. I(3); see also BORN, *supra* note 9, at 303-05.

198. See New York Convention, *supra* note 22.

199. See *id.* art. XIV.

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

201. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25; *Weizmann Inst of Sci. v. Neschis*, 421 F. Supp. 2d 654, 674 (S.D.N.Y. 2005) (concerning an award rendered in Liechtenstein prior to Liechtenstein’s adherence to the New York Convention).

D. Overview of an International Commercial Arbitration

Having outlined the U.S. statutory regime regarding international commercial arbitration, it is now useful to give a brief overview of the entire arbitral process to help put various types of judicial proceedings into context. This subsection introduces topics that will be discussed in more detail below.²⁰²

1. Drafting Stage

Although parties may modify the terms of their arbitration agreement at virtually any time, the parameters of a particular agreement are relatively set by the time the dispute arises, since real or perceived tactical concerns often foreclose the parties' willingness to create or modify an arbitration agreement after a dispute comes alive.²⁰³ Nevertheless, practitioners need to understand how choices made at the drafting stage influence the shape of the proceedings, particularly since international transactions give rise to several problems that are not found in purely domestic matters. Thus, for example, parties to an international arbitration agreement must consider:

(1) where to seat their arbitration;

This is important in international disputes because:

- the law of the country where the arbitration is seated (i.e., is legally located) typically governs several important procedural issues;²⁰⁴ and
- the courts in the country where the arbitration takes place are considered under U.S. law to have "primary jurisdiction" over certain types of actions associated with arbitration, most particularly motions to vacate an arbitral award, although a vacated award may still be enforceable in other countries.²⁰⁵

(2) what procedure is to govern the dispute;

This is important in international disputes because:

- the failure to choose the procedure either explicitly or implicitly (as through the designation of institutional rules) leaves numerous issues to the discretion of the arbitrator, since national

202. See *infra* notes 256-645 and accompanying text.

203. See BORN, DRAFTING, *supra* note 36, at 37; BORN, *supra* note 9, at 202. For this reason, parties to international transactions tend not to use post-dispute agreements (known internationally as submission agreements or *compromis*), although this does occasionally happen.

204. See *infra* notes 248-55 and accompanying text.

205. See *infra* notes 470-97 and accompanying text.

rules of civil procedure or evidence do not apply to arbitration unless clearly and explicitly adopted by the parties;²⁰⁶ and

- some countries have default rules of procedure embedded within their arbitration statutes, and the failure to contract specifically out of these provisions will leave the parties subject to the statutory text.²⁰⁷

(3) which laws apply to which issues.

This is important in international disputes because:

- three types of law can arise in international commercial arbitration: procedural law (supplemented by any applicable arbitral rules), substantive law, and the law governing the construction of the arbitration agreement;²⁰⁸ and
- there is no requirement that the same country's law must apply to each of the issues that arise.²⁰⁹

2. Prior to or at the Initiation of the Arbitration

The time surrounding the initiation of a legal claim is often quite busy. Although many disputes proceed straight into arbitration without the need for any judicial intervention, sometimes parties need assistance with certain preliminary matters.

For example, the parties may disagree about whether the dispute is to be heard in court or arbitration. This can lead to motions being brought in any one of a number of courts around the world regarding the validity of the arbitration agreement and whether arbitration can properly be compelled.²¹⁰ Since the parties may have different views about which court has competence to hear this particular issue, parallel proceedings are possible, although they are not ordinarily permitted at this stage as a matter of international law and practice. As a result, anti-suit injunctions may be sought to protect the jurisdiction of a particular court or tribunal over a matter.²¹¹

Furthermore, even parties who agree that their substantive dispute should be heard in arbitration may need the court's assistance on a particular procedural matter. For example, a court may be asked to help select the arbitral tribunal or issue a preliminary injunction to preserve the status quo.²¹²

206. See *infra* notes 566-76 and accompanying text.

207. See *supra* notes 79-96 and accompanying text.

208. See *infra* notes 535-52 and accompanying text.

209. See *infra* notes 535-52 and accompanying text.

210. See *infra* notes 256-88 and accompanying text.

211. See *infra* notes 298-309 and accompanying text.

212. See *infra* notes 317-30, 331-50 and accompanying text.

3. *During the Arbitration*

Once the arbitration has begun, most concerns are referred to the arbitral tribunal. However, courts and tribunals share jurisdictional competency over certain matters, which can lead to debates not only over the resolution of the dispute itself, but also over the question of who should properly hear the matter. Among the issues that can appear in court while an arbitration is proceeding are disputes regarding the production of evidence or witnesses,²¹³ the availability of injunctive relief, including anti-suit injunctions,²¹⁴ and challenges to one of the arbitrators.²¹⁵

Some countries take the view that judges should not be involved in a dispute between the parties while an arbitration is proceeding and, thus, prohibit all recourse to the courts until the arbitration has concluded.²¹⁶ While the United States has not adopted quite that strict an approach, it is generally considered best for courts to exercise caution and restraint when asked to assist with an ongoing arbitration so as not to upset the parties' contractual expectation that the dispute would be resolved through arbitral means.²¹⁷

4. *After the Arbitration*

Most parties in international commercial arbitration voluntarily comply with the terms of the arbitral award.²¹⁸ Nevertheless, there are times when judicial assistance is needed after the completion of the arbitration. For example, a party may seek to have an award vacated or confirmed at the place where it was made.²¹⁹ Alternatively, a court may be asked to enforce an award made in another jurisdiction.²²⁰ Although these proceedings are in some ways analogous to what occurs in domestic disputes, international commercial arbitration is unique in several ways, not the least of which is the possibility that actions to enforce an arbitral award may be brought simultaneously in any number of national courts. Notably, parallel proceedings at this point of the process are not unusual and are instead considered entirely proper as a matter of international law and practice.²²¹

213. See *infra* notes 352-421 and accompanying text.

214. See *infra* notes 452-55 and accompanying text.

215. See *infra* notes 422-51 and accompanying text.

216. France is well known for taking an extremely hands-off approach to arbitral proceedings. See LEW ET AL., *supra* note 7, ¶¶ 14-55 to 14-56 (discussing the concept of negative *competence-competence*).

217. See *infra* notes 331-50 and accompanying text.

218. See REDFERN & HUNTER, *supra* note 140, ¶ 11.02

219. See *infra* notes 470-97 and 498-509 and accompanying text.

220. See *infra* notes 510-630 and accompanying text.

221. See BORN, *supra* note 9, at 2853, 2872-78. The New York Convention permits a court to suspend enforcement proceedings pending the outcome of an annulment procedure in the place where the arbitration took place, but says nothing about suspending an enforcement proceeding pending the outcome of another enforcement proceeding. See New York Convention, *supra* note 22, art. VI.

E. Jurisdictional Competence: Courts versus Arbitral Tribunals and U.S. Courts versus Foreign Courts

As the preceding discussion shows, there are many different ways in which U.S. federal courts may become involved in an international commercial arbitration. Furthermore, it is entirely possible that assistance may be sought simultaneously from several different national courts. For example, parties may seek judicial assistance at the seat of the arbitration (i.e., the place where the arbitration is legally located, which is often but not always named in the arbitration agreement), the countries where the parties reside, the location where the injury was suffered, and/or the place where assets are located.

Sometimes – as in the case of enforcement proceedings – it is considered proper to bring actions in one or all of these venues.²²² In situations where multiple proceedings are permitted, parties may bring their actions simultaneously or seriatim.²²³

However, there are other times when parallel proceedings are neither encouraged nor permitted.²²⁴ Furthermore, it is possible for a party to seek judicial intervention at a proper time and regarding a proper issue, but from a court that does not have proper jurisdiction over the dispute.²²⁵ When this happens, the problem is not one of domestic law, since the judge overseeing the dispute will undoubtedly ensure that any necessary tests are met as a matter of national law. Instead, the jurisdictional objection arises as a matter of international law and practice.

In this, international commercial arbitration is quite different than domestic arbitration. In domestic proceedings, the prototypical jurisdictional dispute focuses on whether the court or the arbitral tribunal should hear a particular issue. In international proceedings, it is not only necessary to consider whether the dispute may properly be heard by a court, but if so, which court or courts. To answer this second question, the U.S. arbitral community has developed the concept of “primary” and “secondary jurisdiction.”²²⁶

This approach is somewhat unique in the world of international commercial arbitration, with courts and commentators in most other countries taking the view

222. The decision on where to proceed will likely be driven by tactical concerns such as where the award-debtor’s assets are located and what the ease and likelihood of recovery is, given local law and procedure.

223. Most of the time, award-debtors comply voluntarily with the terms of an award in international commercial arbitration. See LEW ET AL., *supra* note 7, ¶ 26-1. However, parties resist enforcement through a variety of means, either through motions to vacate or annul an award or through objections to enforcement proceedings brought by the prevailing party. One extreme example of parallel proceedings is discussed in *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 113-16 (2d Cir. 2007) (outlining offensive and defensive actions brought in Switzerland, Singapore, Hong Kong, Canada and Indonesia as well as both U.S. district and circuit courts in the Second and Fifth Circuits). The extent of post-award litigation demonstrated by *Karaha Bodas* is very unusual. See *id*.

224. For example, it would be extremely disruptive to have multiple proceedings to appoint or challenge an arbitrator. See *infra* notes 65-79 and accompanying text.

225. For example, the award-debtor in the *Karaha Bodas* case improperly asked a court in Indonesia to vacate an arbitration award rendered in Switzerland. See *Karaha Bodas*, 500 F.3d at 115 (noting only the Swiss court could annul the award); see also *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 308-10 (5th Cir. 2004).

226. See BORN, *supra* note 9, at 1286.

that the purpose of the New York Convention was not to create a hierarchy of jurisdictional competence, but rather to facilitate the enforcement of arbitral awards.²²⁷ According to this latter perspective, any deference to the seat or the law governing the procedure is both unwarranted under the Convention and counterproductive to the fast and easy enforcement of arbitral awards.²²⁸ Indeed, shifting the focus to the award and away from the judicial process surrounding the award in the country where it was rendered is one of the greatest achievements of the New York Convention.²²⁹

1. Primary and Secondary Jurisdiction as a Choice of Forum Issue

The U.S. concept of primary and secondary jurisdiction developed as a result of particular language in the New York Convention indicating that a court may refuse to enforce an award rendered in another state if the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”²³⁰ This language has been read as giving some courts (i.e., those with primary jurisdiction) preferential status over other courts (i.e., those with secondary jurisdiction).²³¹

Primary jurisdiction is vested either in the place where the award was made (i.e., the arbitral seat) or in the place under whose law the award was made. (As discussed below, this usually turns out to be the same place.)²³² “Secondary jurisdiction” exists in all other courts, regardless of whether there is any preexisting connection with the parties, the arbitration or the dispute.²³³ Quite simply, in U.S. jurisprudence, every court in the world has secondary jurisdiction over an arbitration agreement or award with the sole exception of the court that has primary jurisdiction.

Notably, courts with primary jurisdiction only receive preferential treatment with respect to certain well-defined issues. Two of the most important involve the right to set aside an award²³⁴ and the right to address certain procedural matters relating to the internal workings of the arbitration. These might include appointment of or challenge to arbitrators or assistance in the taking of evidence, among others.²³⁵

In theory, there could be two courts with primary jurisdiction, since the reference to “the law of which...that award was made” means the procedural law governing the arbitration that led to the award.²³⁶ However, in the vast majority of

227. See New York Convention, *supra* note 22; FOUCHARD GAILLARD GOLDMAN, *supra* note 138, ¶¶ 1666, 1688-89.

228. See *id.*

229. See *id.*

230. New York Convention, *supra* note 22, art. V(1)(c).

231. BORN, *supra* note 9, at 1286; see also *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Das Gas Bumi Negara*, 500 F.3d 111, 124 (2d Cir. 2007); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Das Gas Bumi Negara*, 364 F.3d 274, 308-10 (5th Cir. 2004).

232. See *infra* notes 236-47 and accompanying text.

233. *Karaha Bodas*, 364 F.3d at 287.

234. See *infra* notes 470-97 and accompanying text.

235. See *infra* notes 317-30, 352-421 and accompanying text.

236. See New York Convention, *supra* note 22, art. V(1)(c); *Steel Corp. of Philippines v. Int’l Steel Serv., Inc.*, 354 Fed. Appx. 689, 692-94 (3d Cir. 2009); *Int’l Standard Elcc. Corp. v. Bidas Sociedad*

cases, the procedural law of the arbitration is that of the arbitral seat. Indeed, it is both unusual and unwise for the parties to attempt to choose the law of a state other than the seat as the procedural law of the arbitration, although there are times when a party will attempt to do so. In these cases, the arbitral seat retains competence over what has been called “external” matters (i.e., the relationship between the courts and the arbitration) while the law that has been chosen to control procedural issues governs any “internal” matters.²³⁷

Numerous difficulties arise when the procedural law is not that of the arbitral seat, both with regard to the choice of the court to hear the motion and the choice of applicable law.²³⁸ This has led U.S. courts and commentators to adopt a strong presumption that parties intended the procedural law of the arbitration to be that of the arbitral seat. Indeed, as the Fifth Circuit has noted:

[u]nder the New York Convention, an agreement specifying the place of the arbitration creates a presumption that the procedural law of that place applies to the arbitration. Authorities on international arbitration describe an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as “exceptional”; “almost unknown”; a “purely academic invention”; “almost never used in practice”; a possibility “more theoretical than real”; and a “once-in-a-blue-moon set of circumstances.” Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum.²³⁹

Any derogation from this principle must be both clear and explicit as a matter of U.S. law. Thus, for example, any general choice of law provisions contained within a contract are usually not considered to include matters of procedure but are instead interpreted as referring only to matters of substance.²⁴⁰

However, U.S. courts not only need to establish that they have jurisdiction as a matter of international law and practice, they also must confirm that they have jurisdiction as a matter of domestic law. This requirement gives rise to a few interesting issues.

Issues relating to federal subject matter jurisdiction are relatively straightforward, since the FAA clearly states that “[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States,” with district courts having “original jurisdiction . . . regardless of the amount in controversy.”²⁴¹ Venue is found in “the place designated in the agreement as the place of arbitration if such place is within the United States” or “any

Anonima Petrolera, 745 F.Supp. 172, 176-77 (S.D.N.Y. 1990) (noting this phrase does not refer to the law governing the substance of the dispute); BORN, *supra* note 9, at 2410-11.

237. See *Union of India v. McDonnell Douglas Corp.*, [1993] 2 Lloyd’s Rep. 48, 50-51; BORN, *supra* note 9, at 1330-31.

238. See *supra* notes 222-29 and accompanying text.

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

240. See BORN, *supra* note 9, at 1330; see also *infra* notes 535-52 and accompanying text.

241. 9 U.S.C. §§203, 302 (2011); see also *New York Convention*, *supra* note 22; *Panama Convention*, *supra* note 25.

court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought.”²⁴²

Questions regarding personal jurisdiction are slightly more complicated. On the one hand, private parties – whether foreign or domestic – are entitled to the due process protections found in the U.S. Constitution.²⁴³ This means that all of the necessary constitutional tests regarding personal jurisdiction must be met with respect to private parties.²⁴⁴

However, the situation is not quite so clear with respect to foreign states and state agencies or instrumentalities. Recent decisions have held that foreign states are not “persons” under the U.S. Constitution and are therefore not entitled to the protection of the Due Process Clause.²⁴⁵ However, it is unclear whether and to what extent this principle extends to other state-affiliated entities, such as a state-owned foreign corporation.²⁴⁶ Issues relating to foreign states and state agencies are discussed below.²⁴⁷

2. *Primary and Secondary Jurisdiction as a Choice of Law Issue*

The preceding subsection focused on the question of which court is competent to hear a particular motion or action in international commercial arbitration and indicated that the phrase “law . . . under which that award was made” typically refers to the arbitral seat in U.S. practice.²⁴⁸ However, the concept of primary and secondary jurisdiction has a second application in the United States. As a matter of U.S. practice, the national arbitration law of the country with primary jurisdiction applies to various procedural matters if the parties have not decided otherwise.²⁴⁹ This means that courts sometimes have to apply the national arbitration law of the place of arbitration on matters relating to arbitral procedure, even when that particular issue is not heard at the arbitral seat.

This approach can be justified on both legal and practical grounds. Legally, the parties are considered to have implicitly chosen the procedural law of the place of arbitration when they choose the seat.²⁵⁰ Practically, the application of the law of the seat to procedural matters, wherever heard, eliminates forum shopping (since the court at the seat and the court at a distant location will both apply the same procedural law), and increases the predictability of the arbitral process, since the procedural law will be known and settled at the time the seat is chosen

242. 9 U.S.C. §§204, 302.

243. See U.S. CONST., amends. V, XIV.

244. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 414-15 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978); *Int’l Shoc Co. v. Washington*, 326 U.S. 310, 316 (1945).

245. See U.S. CONST., amend. V; *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009); *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005).

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

247. See *infra* notes 698-713 and accompanying text.

248. New York Convention, *supra* note 22, art. V(1)(e).

249. See BORN, *supra* note 9, at 1286.

250. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288-92 (5th Cir. 2004).

(i.e., when the agreement is made) and will not depend on the parties' later choices on where to bring a particular motion.

However, this approach has not been universally adopted. In contrast to U.S. practice, some members of the international community take the view that "the seat of the arbitration, often chosen for reasons of convenience or because of the neutrality of the country in question, does not necessarily cause the procedure to be governed by the law of that jurisdiction."²⁵¹ This approach is evidenced by the national legislation in a number of jurisdictions, such as France, Switzerland, The Netherlands, Portugal, Egypt and Italy, as well as arbitral rules from prominent arbitral institutions, international conventions and arbitral case law.²⁵²

Courts and commentators adopting this approach take the view that deferring to the seat for rules of procedure would be neither warranted nor in accordance with the parties' expectations.²⁵³ Instead, arbitral procedure should be determined through reference to private rules prepared by arbitral institutions, transnational rules derived from comparative law or arbitral case law, or any combination of these and other laws. This approach emphasizes the ability of arbitrators to decide on any procedural issue if and when it arises, subject to the agreement of the parties.²⁵⁴

Notably, the U.S. concept of primary and secondary jurisdiction as a choice of law device does not extend to the substantive law that applies to the merits of the dispute. These default mechanisms involving the choice of the national arbitration law of the arbitral seat only apply to certain matters of arbitral procedure.

Having described the necessary background concepts, it is time to consider the role of U.S. courts in specific situations relating to international commercial arbitration. The following section breaks the discussion down into three different time periods: prior to or at the initiation of arbitral proceedings; during arbitral proceedings; and after arbitral proceedings have concluded.²⁵⁵

IV. ROLE OF U.S. FEDERAL COURTS IN INTERNATIONAL COMMERCIAL ARBITRATION

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

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

1. Motions to Compel Arbitration

The first and perhaps most common motion that might be made during the early stages of a dispute involves a request to compel an international commercial arbitration. Under Chapters 2 and 3 of the FAA, a motion to compel can be made

251. FOUCHARD GAILLARD GOLDMAN, *supra* note 138, ¶ 1178.

252. *See id.* ¶ 1178 *et seq.*

253. *See BORN, supra* note 9, 1299-1301.

254. FOUCHARD GAILLARD GOLDMAN, *supra* note 138, ¶ 1171 *et seq.*

255. *See LEW ET AL., supra* note 7, ¶¶ 15-21 to 15-57.

in a U.S. court regardless of where in the world the arbitration is supposed to take place.²⁵⁶ The technical requirements regarding the making of a motion to compel arbitration appear in section 4 of the FAA, which applies to international proceedings by virtue of the residual application provisions of Chapter 2 and 3.²⁵⁷

When considering motions to compel in the international context, U.S. federal courts are required to take into account the strong federal policy in favor of international commercial arbitration.²⁵⁸ This pro-arbitration policy is based on two different statutory provisions. First, the FAA states that if an arbitration agreement exists and “there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.”²⁵⁹ Second, the New York Convention indicates, in similarly mandatory terms, that:

[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this Article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.²⁶⁰

Notably, the pro-arbitration stance exhibited by both the FAA and the New York Convention is predicated on the existence of a valid arbitration agreement between the parties.²⁶¹ Therefore, courts facing a motion to compel arbitration may be asked to determine whether a valid arbitration agreement actually exists. This leads to the question of who should determine questions regarding the validity or existence of an arbitration agreement: the court or the arbitral tribunal. The FAA does not speak directly to this issue, which means that judges must look to other sources of authority for guidance.²⁶²

Analysis of the question of “who decides?” involves two separate but related concepts: the notion of separability and the idea of *competence-competence* (*Kompetenz-Kompetenz*), known in the U.S. as the arbitrators’ ability to determine their own jurisdiction.²⁶³ Although judges are familiar with these principles in the domestic context, international disputes give rise to some unusual quirks.

In the United States, the notion of separability refers to the idea that the existence, validity, and legality of the underlying contract does not necessarily affect the existence, validity, or legality of the arbitration agreement.²⁶⁴ Therefore, “unless the challenge is to the arbitration clause itself, the issue of the contract’s va-

256. See 9 U.S.C. §§ 206, 303 (2011) (stating “[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”).

257. See *id.* §§ 4, 208, 307.

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

259. 9 U.S.C. § 4.

260. New York Convention, *supra* note 22, art. II(3).

261. See *id.*; 9 U.S.C. §§ 2, 4.

262. See 9 U.S.C. §§ 1-307.

263. See BORN, *supra* note 9, at 851-52.

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

lidity is considered by the arbitrator in the first instance.²⁶⁵ This analysis can get quite complicated and will not be discussed in detail here.²⁶⁶

In the U.S., questions about the validity of the arbitration agreement itself (as opposed to the contract in which the arbitration agreement is found) evoke the concept of “gateway” issues. Gateway determinations distinguish between those matters that are properly within the jurisdiction of the arbitrator and those that are properly within the jurisdiction of the court.²⁶⁷ A considerable amount of jurisprudence regarding gateway issues has developed in the context of domestic arbitration, which appears to be equally applicable in the international realm.²⁶⁸

Domestic case law regarding gateway issues can give rise to some confusion when transferred to the international realm. Fortunately, this is primarily a linguistic issue rather than a conceptual one.

Gateway issues often involve discussion of the concept of “arbitrability,” which is used in the United States to refer to “[t]he question whether the parties have submitted a particular dispute to arbitration.”²⁶⁹ According to this definition, arbitrability is a private concern that goes to the scope of the parties’ agreement and, thus, lies at the heart of gateway issues as a matter of U.S. jurisprudence.

“Arbitrability” is not defined the same way elsewhere. Outside the United States, the notion of “arbitrability” refers to a public law concern going to whether a country will permit a particular subject matter to be resolved through arbitration.²⁷⁰ This type of arbitrability is not considered very often in U.S. courts because the United States takes a very liberal approach to arbitration and has few restrictions on the types of issues that can be heard in the arbitral setting.²⁷¹ Thus, for example, antitrust concerns were once considered non-arbitrable as a matter of U.S. law, although that has now changed.²⁷²

While there is a general international trend to increase the number and types of issues that are arbitrable, some types of claims remain off-limits in some jurisdictions.²⁷³ There is nothing wrong with a country designating a particular type of subject matter as non-arbitrable, and in fact the practice is specifically contemplated in the New York Convention.²⁷⁴ However, the restriction on non-arbitrability must be narrowly construed, and references in the New York Convention to “a subject matter capable of settlement by arbitration” should not be interpreted by reference to the national law of single state but instead “must be made

265. *Buckeye Check Cashing*, 546 U.S. at 445-46.

266. See BORN, *supra* note 9, at 322-43, 359-91.

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

268. See *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 155 (3d Cir. 2001) (applying *First Options* in an international dispute); BORN, *supra* note 9, at 911-48.

269. *Howsam*, 537 U.S. at 83 (citations omitted).

270. See FOUCHARD GAILLARD GOLDMAN, *supra* note 138, ¶¶ 532-33 (referring to “objective arbitrability” or “arbitrability *ratione materiae*”).

271. See BORN, *supra* note 9, at 781-85.

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

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

274. See New York Convention, *supra* note 22, art. II(1) (noting applicability of the Convention only to arbitration agreements “concerning a subject matter capable of settlement by arbitration”).

on an international scale, with reference to the laws of the countries party to the Convention.”²⁷⁵

Both types of arbitrability can be raised in U.S. courts. The domestic understanding of arbitrability is seen most frequently in discussions relating to gateway issues. However, the international understanding of arbitrability can also be introduced in some instances. For example, even though the United States has adopted a broad view of arbitrability in the international sense (i.e., of various subject matters) as a matter of domestic law, courts can occasionally be asked to determine an issue of arbitrability (again in the international sense) under the law of a different country.²⁷⁶ Therefore, parties need to be prepared to distinguish between the two types of arbitrability, depending on the question at hand.

However, returning to the jurisdictional question of “who decides,” parties need to consider more than just separability and arbitrability (in the U.S. sense). Counsel briefing these issues also need to take into account the concept of *competence-competence*, or the arbitral tribunal’s ability to decide its own jurisdiction.²⁷⁷ The international community has recognized that when the validity or existence of the arbitration agreement is challenged, the principle of *competence-competence* allows an arbitral tribunal to rule on its own jurisdiction without invalidating the result of that determination should it find there is no valid arbitration agreement.²⁷⁸ *Competence-competence* prevents parties from challenging the validity or existence of arbitral agreements as a delaying or obstructionist tactic, and consolidates resolution of disputes about the existence and validity of arbitral agreements with disputes about the existence and validity of the underlying contract to prevent wasted costs and time through parallel and duplicative proceedings.²⁷⁹

Although the FAA is silent on the subject, the U.S. Supreme Court has indicated that arbitral tribunals are generally competent to decide matters relating to their own jurisdiction.²⁸⁰ However, just because arbitrators are competent to determine their own jurisdiction does not mean that they are allowed to do so in all circumstances. This gives rise to the “gateway issue” debate in U.S. case law, which focuses on whether the parties agreed to submit the question of jurisdiction to arbitration (in which case the matter will be determined through arbitration) or whether the parties reserved that issue for judicial determination (in which case the matter will be determined through litigation).²⁸¹

Some controversy exists regarding the extent to which U.S. practice on gateway issues conforms to international norms. Some commentators take the view that “the *First Options* approach bears important resemblances to those [taken] in other jurisdictions.”²⁸² Other experts believe that the U.S. stance is difficult to

275. *Meadows Indem. Co. Ltd. v. Baccala & Shoop Ins. Services, Inc.*, 760 F.Supp. 1036, 1042 (E.D.N.Y. 1991); see also New York Convention, *supra* note 22, art. II(1).

276. See New York Convention, *supra* note 22, art. V(1)(a).

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

278. See BORN, *supra* note 9, at 328-32.

279. See FOUCHARD GAILLARD GOLDMAN, *supra* note 138, ¶¶ 680-82.

280. See 9 U.S.C. §§ 1-307 (2011); *Rent-a-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2777-79 (2010); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83-84 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995).

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

282. BORN, *supra* note 9, at 911.

implement and conceptually problematic when compared to that used in other nations.²⁸³ Applied in its fullest sense, *competence-competence* allows arbitrators to be the first (though not the sole) judges of their jurisdiction.

Although case law regarding jurisdictional concerns will doubtless continue to develop over time, as a practical matter, a U.S. court faced with a motion to compel arbitration has several possible responses:

- the court can immediately compel arbitration, even if questions exist about the validity or existence of the arbitration agreement, on the grounds that the arbitral tribunal is competent to determine its own jurisdiction, in accordance with the principle of *competence-competence*;
- the court can hear argument about the validity or existence of the arbitration agreement on the grounds that the parties did not want to give this issue to the arbitral tribunal and then, if the arbitration agreement is upheld, send the substantive dispute to arbitration; or
- the court can hear argument about the validity or existence of the arbitration agreement on the grounds that the parties did not want to give this issue to the arbitral tribunal and then, if the arbitration agreement is not upheld, retain jurisdiction over the substantive dispute.

It is also possible to split parties and issues, sending some to arbitration while others remain in litigation.²⁸⁴

Should the court decide to compel arbitration under one of the first two options, the proper and, indeed, necessary next step is to issue an order compelling arbitration.²⁸⁵ This is a mandatory duty that exists in cases where the arbitration is to be seated in the United States as well as in situations where the proceedings are to be seated abroad. Indeed, the First Circuit has noted that:

[s]o long as the parties are bound to arbitrate and the district court has personal jurisdiction over them, the court is under an unflinching, nondiscretionary duty to grant a timely motion to compel arbitration and thereby enforce the New York Convention as provided in Chapter 2 of the FAA, even though the agreement requires arbitration in a distant forum.²⁸⁶

However, any order directing the parties to arbitration must not attempt to specify the procedures that are to be used in the arbitration, since doing so could run afoul of governing laws, as well as important principles regarding party autonomy, arbi-

283. See William W. Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?* 12 ARB. INT'L 137, 148-50 (1996) (comparing the U.S. approach to English, French, Swiss and German techniques of determining jurisdiction).

284. See *infra* notes 289-97 and accompanying text.

285. See 9 U.S.C. §§ 4, 206, 303 (2011).

286. *InterGen NV v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003); see also 9 U.S.C. §§201-08; BORN, *supra* note 9, at 1015-16 (citing numerous decisions).

trator discretion, and the supervisory competence of courts at the arbitral seat (i.e., the primary jurisdiction).²⁸⁷

Notably, the United States appears to be unique in the way that it issues a mandatory order compelling the parties to proceed to arbitration. Other nations typically give effect to the pro-arbitration mandate of the New York Convention by merely referring the parties to arbitration.²⁸⁸

2. *Motions to Stay Litigation*

Another type of proceeding that parties may bring in a U.S. court at the early stages of an international commercial arbitration is a motion to stay litigation. Notably, this type of motion may only be brought in the same court where a lawsuit has been filed.²⁸⁹ If an action is proceeding in another venue, then the proper tactic is to seek an anti-suit injunction, which is discussed below.²⁹⁰

A motion to stay litigation arises out of an agreement to arbitrate to the same extent as a motion to compel arbitration, with the latter simply reflecting a positive obligation and the former reflecting a negative obligation. Because the two motions are mirror images of one another, they merit the same level of respect under the New York Convention, even though the Convention only speaks of the court's duty to refer parties to arbitration.²⁹¹

The FAA is more explicit, stating expressly that:

[i]f any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.²⁹²

This provision is made applicable to international disputes through the residual application clauses of Chapters 2 and 3.²⁹³

Sometimes a party files an action that involves both arbitrable and non-arbitrable claims. In those situations, a court may compel the arbitration of some disputes and stay litigation of the remaining issues pending the outcome of the arbitration.²⁹⁴ A similar outcome results when a plaintiff attempts to bring claims

287. See *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazioni v. Achille Lauro*, 712 F.2d 50, 54-55 (3d Cir. 1983); BORN, *supra* note 9, at 1018.

288. See New York Convention, *supra* note 22, art. II(3); BORN, *supra* note 9, at 1014-15.

289. See 9 U.S.C. §§ 3, 208.

290. See *infra* notes 289-309 and accompanying text.

291. See New York Convention, *supra* note 22, art. II(3); BORN, *supra* note 9, at 1020-28.

292. 9 U.S.C. § 3.

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

294. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217, 221 (1985) (recognizing the possibility of “piccemeal” litigation” and “the possibly inefficient maintenance of separate proceedings in

against multiple parties but only some of the defendants are subject to an arbitration agreement. In those situations, a court may compel the arbitration of some disputes while staying the remaining claims until the arbitral proceedings have concluded.²⁹⁵ In some rare cases, a court may decide that the FAA does not preempt a state law that allows for a stay of arbitration pending the outcome of litigation.²⁹⁶

In general, the U.S. approach to staying litigation is the same in international disputes as in domestic disputes. Interestingly, this is one of the areas where civil law and common law jurisdictions differ, at least as a technical matter, in that common law courts typically stay a litigation that has been initiated in violation of a valid arbitration agreement, while civil law courts dismiss the case altogether.²⁹⁷ However, the difference between the two systems is lessened to the extent that U.S. and other common law courts consider the stay of litigation mandatory rather than discretionary.

3. Motions Seeking an Anti-suit Injunction

Parties wishing to protect the arbitration process may come to a U.S. court seeking a third type of assistance: an anti-suit injunction. Unlike motions to stay litigation, which involve proceedings in one particular court, anti-suit injunctions prohibit parties from seeking or pursuing judicial relief in any court anywhere in the world.²⁹⁸ Recently, the international arbitral community has also begun to see a related form of relief, the anti-anti-suit injunction.²⁹⁹ Although anti-suit injunctions are discussed here in the context of preliminary proceedings, they may be sought during an arbitration as well.³⁰⁰

Because anti-suit and anti-anti-suit injunctions have their roots in common law jurisdictions, U.S. and other common law courts are often prime candidates for receiving motions of this type.³⁰¹ Interestingly, the U.S. has become an even more attractive jurisdiction for anti-suit injunctions ever since the Court of Justice of the European Communities curtailed English courts' ability to issue such in-

different forums"); *Kwasney Co. v. AcryliCon Int'l Ltd.*, No. 09-13357, 2010 WL 2474788, at *3 (E.D. Mich. June 11, 2010); BORN, *supra* note 9, at 1032.

295. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 20-21 (1983) (stating that "federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement" and noting that the agreement must be enforced "notwithstanding the presence of other persons who are parties to the underlying dispute but not to the arbitration agreement") (emphasis in original); *AgGrow Oils, LLC v. Nat'l Union Fire Ins. Co.*, 242 F.3d 777, 783 (8th Cir. 2001); *Marubeni Corp. v. Mobile Bay Blue Chip Center*, No. 02-0914-PL, 2003 WL 22466215, at *17-18 (S.D. Ala. June 16, 2003); BORN, *supra* note 9, at 1032.

296. See 9 U.S.C. §§ 1-307; *Volt Info. Sciences v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 471, 479 (1989).

297. See BORN, *supra* note 9, at 1026-27.

298. See *id.* at 1036.

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

300. See *infra* notes 452-55 and accompanying text.

301. See BORN, *supra* note 9, at 1041. However, civil law systems have also become increasingly willing to enjoin parties from initiating or continuing actions in other jurisdictions. See Emmanuel Gaillard, *Reflections on the Use of Anti-Suit Injunctions in International Arbitration*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* 203 at 10-1 (Loukas A. Mistelis & Julian D.M. Lew eds., 2008) [hereinafter Gaillard, *Reflections*].

junctions in cases involving proceedings brought in other Member States of the European Union.³⁰²

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

- the parties in the foreign litigation are the same as those who are bound by the agreement to arbitrate;
- the foreign litigation involves the same issues as would be resolved under the arbitration agreement;
- irreparable injury or grave hardship would occur absent the injunction; and
- the public policy of the U.S. forum warrants a grant of injunctive relief.³⁰³

In the cross-border context, it is also necessary to weigh matters of international comity against “the need to ‘prevent vexatious or oppressive litigation’ and to ‘protect the court’s jurisdiction.’”³⁰⁴ Although “‘it is well settled that American courts have the power’ to issue foreign antisuit injunctions, ‘[c]omity dictates that [these injunctions] be issued sparingly and only in the rarest of cases.’”³⁰⁵ Thus, “no mere disagreement with a party’s approach to enforcing or attacking a foreign arbitral award under the Convention should suffice to support an anti-foreign-suit injunction.”³⁰⁶

While cases have held that the New York Convention does not divest U.S. federal courts of their authority to issue an anti-suit injunction, one factor that may be relevant to the anti-suit analysis is whether the U.S. court has primary or secondary jurisdiction over the arbitration.³⁰⁷ Although anti-suit injunctions are seldom granted and are highly suspect in some jurisdictions, one international commentator has taken the position that anti-suit injunctions “are not inconsistent with the New York Convention (because they enforce, rather than breach, international arbitration agreements).”³⁰⁸ Others have argued that “anti-suit injunctions negate the very basis of arbitration, that is, the parties’ consent to submit their disputes to

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

303. See BORN, *supra* note 9, at 1039-40.

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

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

306. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 125 n. 17 (2d Cir. 2007).

307. See *New York Convention*, *supra* note 22; *Karaha Bodas*, 335 F.3d at 365, 368-70 (leaving open the question of whether a court of secondary jurisdiction could enjoin a litigation in the primary jurisdiction). *But see* *General Elec. Co. v. Deutz AG*, 270 F.3d 144, 161-62 (3d Cir. 2001) (failing to consider issues regarding primary and secondary jurisdiction per se, instead focusing on comity analysis).

308. BORN, *supra* note 9, at 1044; see also *New York Convention*, *supra* note 22.

arbitration,” even when anti-suit injunctions are issued with the intent to support international arbitration.³⁰⁹

4. Motions Seeking an Anti-arbitration Injunction

The actions discussed in the preceding three subsections involve a moving party who wants to proceed in arbitration rather than litigation. Sometimes, however, the reverse exists: a demand for arbitration has been made, but the respondent believes that the dispute should be heard in court. Although it is possible for the respondent to lodge an objection with the arbitral tribunal and for the dispute to be returned to court, many parties are skeptical about arbitrators' willingness to deny their own jurisdiction over a dispute. Nevertheless, evidence suggests this result does indeed happen on occasion.³¹⁰ Procedurally, this can be tricky, since parties must be careful that the method by which they object to the jurisdiction of the arbitral tribunal does not waive their right to have the issue heard in front of a judge.³¹¹

In order to avoid these problems, some parties go directly to court to request an anti-arbitration injunction, which is a type of anti-suit injunction meant to stop the initiation or continuation of an arbitration.³¹² Anti-arbitration orders can be directed to a party to the arbitration or to the members of the arbitral tribunal. Such actions to challenge the validity or existence of an arbitration agreement must be considered in light of the principle of *competence-competence*, or the arbitral tribunal's power to rule on its own jurisdiction.³¹³

Anti-arbitration orders are justified on the grounds that allowing an arbitral proceeding to go forward when no valid arbitration agreement exists injures the innocent party.³¹⁴ However, as with anti-suit injunctions, resort to litigation and intervention of national courts can be seen as encroaching on the proper jurisdiction of the arbitral tribunal and interfering with the parties' consent to arbitrate their disputes.³¹⁵ Ultimately, there is not a great deal of authority available on this issue, and questions arise as to whether U.S. courts can issue such an injunction in cases where the arbitration is seated outside the United States.³¹⁶

309. See Gaillard, Reflections, *supra* note 301, at 10-19.

310. See *M&C Corp. v. Erwin Behr GmbH & Co.*, KG, 87 F.3d 844, 847 (6th Cir. 1996); *New Elliott Corp. v. MAN Gutchoffnungshutte AG*, 969 F.Supp. 13, 14 (S.D.N.Y. 1991).

311. See *Orion Pictures Corp. v. Writers Guild of America, West, Inc.*, 946 F.2d 722, 725 (9th Cir. 1991).

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

313. See BORN, *supra* note 9, at 852-83.

314. See *id.* at 1049.

315. See Gaillard, Reflections, *supra* note 301, at 10-19 to 10-21.

316. See *Farrell v. Subway Int'l, B.V.*, No. 11 Civ. 08 (JFK), 2011 WL 1085017, at *2 (S.D.N.Y. Mar. 23, 2011); *URS Corp. v. Lebancose Co. for the Dev. and Reconstr. of Beirut Central District SAL*, 512 F.Supp.2d 199, 208 (D. Del. 2007); *Certain Underwriters at Lloyd's*, 51 F.Supp.2d at 761; BORN, *supra* note 9, at 1049-50.

5. *Motions for Assistance in the Naming of an Arbitrator*

Not all motions made at the preliminary stage of an international commercial arbitration relate to the desire to compel or stay a particular type of proceeding. Sometimes the parties agree that the dispute should be heard in arbitration, but experience difficulties in getting the procedure started.

The most common of these early logistical problems involves the selection of the arbitral tribunal. Several types of difficulty can arise: the parties may not have agreed to a particular method of appointing the arbitrator or arbitrators, one party may be unable or unwilling to exercise its power to appoint an arbitrator, or an appointing agency may fail to act in an expeditious manner.³¹⁷

Quite often, the solution to these problems can be found in the express agreement of the parties (i.e., in the arbitration agreement itself) or in the arbitral rules that the parties have selected to apply to their proceedings, since those rules reflect the parties' implicit agreement regarding procedural matters. In both cases, the FAA empowers U.S. courts to "appoint arbitrators in accordance with the provisions of the agreement."³¹⁸

Sometimes, however, the agreement is silent with respect to the selection of the arbitral tribunal. In these cases, the parties must look to Chapter 1 of the FAA for guidance, since Chapters 2 and 3 of the FAA only address situations where the parties have made provision for the appointment of arbitrators.³¹⁹ Section 5, made applicable to international disputes through the residual application provisions of Chapters 2 and 3, states that if the arbitration agreement makes no provision for the naming of the arbitrators, then:

the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.³²⁰

The FAA's approach to the appointment of arbitrators is consistent with that taken by numerous other national statutes, so there is no danger of the U.S. being out of step with other jurisdictions with respect to U.S. courts' ability to select arbitrators.³²¹ Nevertheless, parties must take care with motions of this type, because this is one of those areas where confusion can arise regarding the proper place to bring a motion for judicial assistance. For example, parties could attempt to seek aid from courts at their places of residence, the place of performance of the contract and/or the place of arbitration. Successful motions in all these locations could result in a superfluity of arbitrators.³²²

The international arbitral community has addressed this issue by taking the view that motions to appoint an arbitrator should only be made in the court with

317. See BORN, *supra* note 9, at 1424-30.

318. 9 U.S.C. §§ 206, 303(a) (2011).

319. See *id.* §§ 1-307.

320. *Id.* § 5; see also *id.* §§ 208, 307.

321. See *id.* §§ 5, 208, 307.

322. See BORN, *supra* note 9, at 1432.

primary jurisdiction. This position is based on treaty language indicating that a party may object to the enforcement of the arbitral award if “[t]he composition of the arbitral authority . . . was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”³²³ Because the default law with respect to the selection of arbitrators is that of the seat of arbitration, it is logical to give jurisdiction over those matters to those courts. Indeed, “[i]t is only in the rarest cases that national arbitration legislation should be interpreted as permitting appointment of arbitrators in an arbitration that does not have its seat in the appointing court’s state.”³²⁴

U.S. courts have recognized their power to appoint arbitrators in international arbitrations seated in the United States when the parties have not agreed to a particular procedure.³²⁵ This is true even if the agreement between the parties indicates that the arbitration may be seated either in the U.S. or elsewhere, so long as the U.S. alternative is chosen.³²⁶

Sometimes the arbitration agreement indicates how arbitrators are to be named. Federal courts will enforce the terms of these types of agreements in a U.S.-seated arbitration.³²⁷ Furthermore, U.S. courts have held that they have the ability to name arbitrators in cases where the parties have not agreed to the place of arbitration, but “only where the second party has expressly consented to a United States forum or has contacts with that forum sufficient to meet the requirements of personal jurisdiction.”³²⁸

The more difficult question arises when the seat of the arbitration is outside the United States, since the FAA’s appointment mechanisms do not differentiate between arbitrations seated in the United States and those seated elsewhere.³²⁹ Very few U.S. courts appear to have addressed this issue, although one older decision suggests in *dicta* that it might have had the ability to name arbitrators in a proceeding seated in Switzerland.³³⁰ However, parties should not attempt to bring an action in U.S. federal court to name an arbitrator in a non-U.S. arbitration, since such requests appear contrary to international law and practice, and could conflict with orders made by the court at the arbitral seat regarding the appointment of arbitrators.

323. New York Convention, *supra* note 22, art. V(1)(d); *see also* Panama Convention, *supra* note 25, art. 5(1)(d).

324. BORN, *supra* note 9, at 1433.

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

326. *See* *Cargill Rice, Inc. v. Empresa Nicaraguense De Alimentos Basicos*, 25 F.3d 223, 224-25 (4th Cir. 1994).

327. *See* 9 U.S.C. §§ 206, 303(a); *Farrell v. Subway Int’l, B.V.*, No. 11 Civ. 08 (JFK), 2011 WL 1085017, at *5 (S.D.N.Y. Mar. 23, 2011).

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

329. *See* 9 U.S.C. §§ 5, 206, 303.

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

6. *Motions for Provisional Aid of Arbitration*

Appointment of arbitrators is only one way that a court can provide early assistance to an international commercial arbitration. Parties may also come to a U.S. judge seeking help with the freezing of assets, protection of property or other forms of preliminary injunctive relief. The international arbitral community considers courts and arbitral tribunals to share concurrent jurisdiction over the granting of provisional relief pursuant to numerous national laws and arbitral rules, which means that these sorts of motions are entirely proper.³³¹ Furthermore, such requests may be made at any time during the arbitral proceedings, although parties are most likely to refer these sorts of requests to a judge in the early stages of a dispute, before the arbitral tribunal has been fully constituted.³³²

While the practice of seeking provisional relief from a court has been accepted as necessary in cases where the tribunal is not yet in place,³³³ the international arbitral community views the need to require the parties to go to court for assistance as conceptually unsatisfactory, given that the parties have clearly contracted for their disputes to be heard in arbitration.³³⁴ Several arbitral institutions have attempted to cure this deficiency by creating various means of providing urgent preliminary relief in arbitration. For example, the ICC has promulgated a separate set of Rules for a Pre-Arbitral Referee Procedure that gives an interim referee the power:

a) to order any conservatory measures or any measures of restoration that are urgently necessary to prevent either immediate damage or irreparable loss and so to safeguard any of the rights or property of one of the parties;

b) to order a party to make to any other party or to another person any payment which ought to be made;

c) to order a party to take any step which ought to be taken according to the contract between the parties, including the signing or delivery of any document or the procuring by a party of the signature or delivery of a document;

d) to order any measures necessary to preserve or establish evidence.³³⁵

The LCIA has provided a similar solution by offering an expedited appointment procedure for constituting a tribunal to deal with urgent preliminary mat-

331. See BORN, *supra* note 9, at 1972-73, 2050.

332. See *id.* at 1973, 2050.

333. LEW ET AL., *supra* note 7, ¶ 23-100.

334. *Id.* ¶¶ 23-122, 23-128.

335. ICC Rules for a Pre-Arbitral Referee Procedure, art. 2.1, effective Jan. 1, 1990, available at http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_prec_arbitral_english.pdf.

ters.³³⁶ Other international institutions have also created their own means of resolving initial requests for preliminary relief.³³⁷

Although the international approach to the availability of provisional relief is relatively clear, U.S. practice is slightly more complicated, due, in part, to the fact that the FAA is silent on the question of provisional measures in arbitration other than in a narrow range of maritime disputes.³³⁸ However, some guidance can be found in case law. For example, courts agree that, absent an agreement between the parties to grant exclusive jurisdiction on this issue to one body or another, both the arbitral tribunal and the court are empowered to provide such relief in domestic arbitration.³³⁹ Furthermore, it is clear that the arbitral tribunal may provide such relief in international arbitration.³⁴⁰ However, courts are split as to whether a U.S. judge can order provisional relief in an international arbitration given mandatory language in the New York Convention indicating that a court “shall . . . refer the parties to arbitration.”³⁴¹

On the one hand, the Second Circuit has held that “entertaining an application for a preliminary injunction in aid of arbitration is consistent with the court’s powers” under section 206 of the FAA and thus the New York Convention.³⁴² This is true even if the arbitration is seated outside the United States.³⁴³ This analytical approach has been applied both to preliminary relief and prejudgment remedies.³⁴⁴

On the other hand, the Third and Ninth Circuits do not permit courts to provide provisional relief in international commercial arbitration, either because the relief requested is available from the arbitral tribunal (a factor that may be particularly important in disputes arising after the tribunal has been constituted or where an arbitral mechanism for urgent preliminary relief exists) or because the New York Convention forbids such actions by requiring courts to refer parties to arbitration as a mandatory matter.³⁴⁵

Of the two approaches, the first seems to be the more prevalent as well as the most consistent with international standards. Indeed, the weight of U.S. authority “rejects the view that Article II(3) of the [New York] Convention precludes court-ordered provisional measures in aid of arbitration,” consistent with “almost all non-U.S. decisions and academic commentary.”³⁴⁶ As a practical matter, this

336. See LCIA Arbitration Rules, *supra* note 32, art. 9.

337. See ICDR International Arbitration Rules, art. 37, *supra* note 32; Netherlands Arbitration Institution Rules, art. 42, effective July 15, 2001, available at <http://www.nai-nl.org/cn/info.asp?id=398>; BORN, *supra* note 9, at 1971-72.

338. See 9 U.S.C. § 8 (2011).

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

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

341. New York Convention, *supra* note 22, art. II(3); see also BORN, *supra* note 9, at 2030-31.

342. See *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990); see also New York Convention, *supra* note 22; 9 U.S.C. § 206.

343. See *Bahrain Telecomm’n Co. v. Discoverytel, Inc.* 476 F.Supp.2d 176, 180-81 (D. Conn. 2007).

344. See *id.* at 182.

345. See *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725 (9th Cir. 1999) (noting preliminary relief was available under arbitral rules); *McCreary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032, 1038 (3d Cir. 1974) (citing Article II(3) of the New York Convention); New York Convention, *supra* note 22, art. II(3).

346. BORN, *supra* note 9, at 2031, 2039; see also New York Convention, *supra* note 22, art. II(3).

makes sense, particularly in the early stages of a dispute, when the tribunal has not yet been constituted.

Although this is an issue that can arise at any stage of the arbitration,³⁴⁷ U.S. courts follow the same basic method of analysis regardless of when the application for assistance is made. First, judges consider whether and to what extent the parties have agreed, implicitly or explicitly, to a particular mode of provisional relief (i.e., whether they have required recourse to a court or a tribunal or permitted access to both).

Second, the court considers other relevant factors. For example, courts in the past have looked at whether the party seeking the assistance has previously demonstrated support of the arbitral proceeding (such as by moving to compel arbitration) and whether the moving party is seeking any relief other than provisional measures.³⁴⁸

Some older authorities suggest that, as a procedural matter, a motion for provisional relief must be accompanied by a motion to compel arbitration or stay litigation.³⁴⁹ Other cases have held that such a narrow reading of the court's powers is inconsistent with the New York Convention's goal of facilitating speedy and effective arbitration.³⁵⁰

B. Role of the Court During Arbitral Proceedings

The preceding subsection addressed motions that are made prior to or at the initiation of arbitration. However, procedural disputes and difficulties also arise while the arbitration is ongoing. Although most of these issues should and will be heard within the confines of the arbitration itself, there are times when a party may seek judicial assistance. Nevertheless, courts in the U.S. and elsewhere agree that restraint is necessary so as to give effect to the principle of judicial non-interference in an on-going arbitral proceeding.³⁵¹

1. Motions for Disclosure or Discovery in Aid of an International Arbitral Proceeding

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

347 See *infra* notes 452-55 and accompanying text.

348. See *Bahrain Telecomms'n*, 476 F. Supp. 2d at 181-82; BORN, *supra* note 9, at 2040-42.

349. See *International Shipping Co., S.A. v. Hydra Offshore, Inc.*, 875 F.2d 388, 391 n.5 (2d Cir. 1988).

350. See *Bahrain Telecomms'n*, 476 F. Supp. 2d at 180; New York Convention, *supra* note 22.

351. See Gary Born, *The Principle of Judicial Non-Interference in International Arbitral Proceedings*, 30 U. PA. J. INT'L L. 999 (2009) (discussing obligation of non-interference under national and international law).

a. Discovery Versus Disclosure

Procedures relating to the discovery or disclosure of information vary greatly, depending on the forum in which the parties find themselves. Each country has adopted its own individual approach to the exchange and presentation of evidence, although certain broad generalizations can be made depending on whether the legal system falls into the common law or civil law tradition.³⁵² International commercial arbitration reflects a third, unique method of taking and presenting evidence, blending elements of both common law and civil law in a process known as “disclosure” rather than “discovery.”³⁵³

The purposes and procedures associated with discovery in U.S. litigation are well known and therefore require little discussion. Because courts are entitled to hear all the facts relevant to a dispute, parties are permitted to make wide-ranging requests for documents and testimony from both litigants and third parties.³⁵⁴ Failure to comply with a discovery request results in judicial sanctions.³⁵⁵ Although efforts have been made to limit the scope of the discovery process, the universe of discoverable information in U.S. litigation remains by far the broadest in the world, even among common law nations that share the same fundamental approach to civil procedure.³⁵⁶

The situation is very different in other jurisdictions, particularly those that follow the civil law tradition. For example, plaintiffs in a civil law litigation often must attach all their relevant documentation to their moving papers, with defendants having a concordant obligation to attach their own documents to their responsive pleadings. Although these submissions provide the primary framework for analysis of the dispute, the parties have several other opportunities to supplement their evidentiary positions, either through formal rebuttal papers or in response to particular matters that arise during a series of interim hearings. Requests to compel the production of documents or other information from another party are virtually unknown. This, of course, differs significantly from the common law method of presenting documents at a single time and in a single hearing at the end of a period of discovery of the other party’s documents. However, the civil law’s more controlled, iterative process allows judges and parties to focus on precise issues that are actually raised rather than trying to anticipate, in the abstract, all possible arguments.

One of the ways in which the civil law influences international commercial arbitration is through the early submission of materials to the tribunal. As a matter of practice, parties in international arbitration frequently attach key documents to their initial pleadings in a manner similar to that found in civil law litigation. However, common law practices are reflected in a limited form of document pro-

352. See ZWEIGERT & KÖTZ, *supra* note 9, at 256-75.

353. See William W. Park, *Arbitrators and Accuracy*, 849 PLI/LIT 279, 290-300 (2011).

354. See S.I. Strong, *Jurisdictional Discovery in U.S. Federal Courts*, 67 WASH. & LEE L. REV. 489, 522-23, 541-53 (2010) (including text of actual U.S. discovery requests) [hereinafter Strong, *Jurisdictional Discovery*].

355. See FED. R. CIV. P. 37.

356. See *id.* R. 26(b); see also Strong, *Jurisdictional Discovery*, *supra* note 354 at 489, 501-03, 509-12 (comparing discovery practices in U.S. and England).

duction³⁵⁷ and the production of a final “bundle” of documents³⁵⁸ that is presented to the tribunal prior to or at the final hearing. This process is much more limited in its scope than U.S.-style discovery, although it nevertheless provides parties with some access to the documents on which their opponents are relying prior to the hearing.³⁵⁹

Although disclosure in international commercial arbitration bears some resemblance to U.S.-style discovery, there are some key differences. For example, parties cannot be formally compelled to produce documents as part of the disclosure process. Although this may appear to allow unscrupulous parties to conceal relevant but damaging documents, any potential benefit associated with self-serving behavior is offset by the fact that an arbitral tribunal may make an adverse inference about facts that are likely to be contained in documents that are believed to exist but that are not produced during the hearing.³⁶⁰

Disclosure differs from discovery in other ways as well. For instance, pre-hearing depositions are virtually unheard-of in international commercial arbitration, as are orders to compel the production of documents from non-parties prior to the hearing.³⁶¹ However, the international arbitral regime has again created mechanisms to make sure the lack of these devices does not work a hardship to the parties. First, witnesses, including non-parties, may be compelled to attend a hearing and bring documents with them.³⁶² Second, an increasing number of witnesses – both fact and expert – produce and exchange extensive written statements in advance of the hearing.³⁶³ These witness statements typically stand as the speaker’s affirmative testimony, which allows counsel sufficient time to prepare for cross-examination at the hearing. Through live cross-examination (another common law contribution to international arbitral proceedings), counsel can identify any inconsistencies or ambiguities in the written statements and establish the credibility of the witnesses.

Procedures relating to disclosure are addressed in various institutional rules on arbitration, but the provisions are often sparse. Traditionally, arbitral tribunals have used their discretionary powers to expand on this basic language and create suitable means for the taking and presentation of evidence in individual dis-

357. Typically parties do not have a right to document production (often referred to as an “exchange of documents”), though such procedures are within the arbitral tribunal’s case management powers. See ICC Arbitration Rules, *supra* note 32, app. IV(d); ICDR Arbitration Rules, *supra* note 32, art. 16; LCIA Arbitration Rules, *supra* note 32, arts. 20.2, 22.1(f).

358. The term “bundle” comes from English litigation practice, where it refers to the documents given to a barrister at the time he or she is engaged (“barrister’s bundle”) or to the court at the time of trial (“litigation bundle”). The term has been making its way across the Atlantic in recent years and can be seen in some U.S. states.

359. In many ways, the scope and method of disclosure in international commercial arbitration resembles English litigation practice. See Civil Procedure Rules (England), Rule 31, available at <http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part31.htm>; Practice Direction 31A, Disclosure and Inspection, available at http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part31a.htm.

360. BORN, *supra* note 9, at 1919-21.

361. Both of these procedures are essentially unique to U.S. litigation practice.

362. See 9 U.S.C. §§ 7, 208 (2011).

363. LEW ET AL., *supra* note 7, ¶¶ 21-48.

putes.³⁶⁴ Although this approach to disclosure appears impossible to predict because issues are resolved privately on a case-by-case basis, a great deal of information on the disclosure process can be found in treatises and published arbitral awards.³⁶⁵ In the last ten years, parties and arbitrator have also come to rely heavily on the IBA Rules on the Taking of Evidence, since these provisions provide detailed guidance on numerous issues and reflect the international arbitral community's consensus on how disclosure should optimally progress.³⁶⁶

Having described the basic parameters of disclosure in international arbitration, it is time to move on to the various issues that arise in U.S. federal court. This discussion is broken into three separate segments: (1) arbitrators' powers to order disclosure and the extent to which courts can or must support arbitral orders; (2) courts' powers to order disclosure in U.S.-seated international arbitrations; and (3) courts' powers to order discovery (not disclosure) in international arbitrations seated outside the United States. Each will be discussed in turn.

b. Arbitrators' Powers to Order Disclosure

"Most disclosure or discovery in international arbitration occurs entirely within the context of the arbitration, under the control of the arbitral tribunal, and only involving the parties to the arbitration (and not third parties)."³⁶⁷ Nevertheless, "international arbitral tribunals are often reluctant to order disclosure as readily, or to the same extent, as in many common law litigations. This is reflected in arbitral awards, where tribunals typically refuse to grant expansive, fishing-expedition discovery requests."³⁶⁸

Although most arbitral rules provide arbitrators with the ability to order disclosure, similar grants of power can also be located in most national statutes on arbitration. In the United States, this issue is addressed in section 7 of the FAA, which applies to international arbitrations through the residual application provisions of Chapters 2 and 3.³⁶⁹ Notably, the arbitrators' power is discretionary, in that the arbitrators simply "may," rather than must, "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."³⁷⁰

Although arbitrators are empowered to summon the attendance of witnesses at a hearing, sometimes a person so summoned does not appear. In those instances, the court at the seat of arbitration "may compel the attendance" of the summoned person or persons "or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States."³⁷¹

364. See ICC Arbitration Rules, *supra* note 32, app. IV(d); ICDR Arbitration Rules, *supra* note 32, art. 16; LCIA Arbitration Rules, *supra* note 32, arts. 20.2, 22.1(f).

365. See BORN, *supra* note 9, at 1739-1939; LEW ET AL., *supra* note 7, ¶¶ 21-1 to 22-106.

366. See IBA Rules on the Taking of Evidence, *supra* note 119.

367. BORN, *supra* note 9, at 1877.

368. *Id.* at 1907 (citations omitted).

369. See 9 U.S.C. §§ 7, 208, 307 (2011).

370. *Id.* § 7.

371. *Id.*

Federal courts can also become involved in disputes regarding the outer boundaries of arbitrator-ordered disclosure. One issue involves the extent to which international arbitral tribunals can order depositions or disclosure from third parties in advance of the arbitral hearing.

Precedents in this area are split.³⁷² This approach is based on the clear language of Section 7 of the FAA as well as the view that arbitrators who feel the need to see certain documents in advance of the final hearing “‘have the power to compel a third-party witness to appear with documents before a single arbitrator, who can then adjourn the proceedings.’” Section 7’s presence requirement, however, forces the party seeking the non-party discovery – and the arbitrators authorizing it – to consider whether production is truly necessary.³⁷³ This technique appears consistent with party expectations regarding both the limited scope of disclosure in international commercial arbitration and the blending of civil law and common law procedures.

A second issue that courts must occasionally address involves the territorial scope of an arbitrator-issued summons. According to the FAA, arbitrator-issued summons “‘shall be served in the same manner as subpoenas to appear and testify before the court.’”³⁷⁴ Because the Federal Rules of Civil Procedure impose geographic limitations on the service of summons, problems can arise if arbitrators attempt to issue summons to witnesses residing beyond those territorial boundaries.³⁷⁵ In particular, questions arise as to whether it is possible for arbitrators to extend their jurisdictional reach through reliance on the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention).³⁷⁶

On its face, this argument is difficult to make, given language restricting use of the Hague Evidence Convention to situations where evidence is sought “‘for use in judicial proceedings.’”³⁷⁷ However, one commentator has suggested that it is “‘plausible that a tribunal could apply to a national court in the arbitral seat and request that it issue a letter of request, which could be executed pursuant to the Hague Evidence Convention.’”³⁷⁸ The Hague Conference on Private International Law has also suggested that recourse may possibly be had to the Hague Evidence Convention in arbitration, in proper circumstances.³⁷⁹ However, the question

372. See *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 215-17 (2d Cir. 2008) (discussing positions held by various circuits). However, the “emerging rule” among federal courts is that the arbitral tribunal does not have the power to compel pre-hearing disclosures from a non-party. See *id.* at 216-17; *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 188 (2d Cir. 1999).

373. *Life Receivables Trust*, 549 F.3d at 218 (citations omitted); see also 9 U.S.C. § 7.

374. 9 U.S.C. § 7.

375. See FED. R. CIV. P. 45(b)(2)-(3); *Dynergy Midstream Service, LP v. Trammochem*, 451 F.3d 89, 96 (2d Cir. 2006); BORN, *supra* note 9, at 1929.

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

377. *Id.* art. I.

378. BORN, *supra* note 9 at 1939.

379. See Hague Conference on Private International Law: Special Commission Report on the Operation of the Hague Service Convention and the Hague Evidence Convention, 28 I.L.M. 1556, 1566-67 (1989); see also Hague Evidence Convention, *supra* note 376.

remains open, since no U.S. court appears to have considered the interplay between arbitration and the Hague Evidence Convention.

c. Courts' Powers to Order Disclosure in a U.S.-seated Arbitration

Although parties might ask a U.S. federal court to oversee and assist with various actions taken by an arbitral tribunal with respect to disclosure, it is also possible for a party to ask a court to undertake certain direct actions of its own. This is not uncommon as a matter of international law and practice, and numerous states allow arbitral tribunals, or parties with the approval of an arbitral tribunal, to seek the assistance of a court in the taking of evidence in an international commercial arbitration.³⁸⁰

The United States follows international norms regarding the ability of courts to order disclosure upon the request of an arbitral tribunal or with the tribunal's approval. However, the U.S. is very much of an outlier in another respect. Unusually, some cases have held that parties themselves can seek disclosure orders from courts even when the arbitral tribunal has not expressly consented to such actions.³⁸¹

This is not to say that U.S. courts grant these motions routinely. Instead, orders of this type, which are considered to be implicitly authorized by section 7 of the FAA and made applicable to international disputes through the residual application provisions of Chapters 2 and 3, are only available in exceptional circumstances.³⁸² Most judges who have considered this issue have required parties to demonstrate a fairly high need for the requested material (such as when the evidence may become unavailable), as well as a showing that the arbitral tribunal is unable to take or safeguard the evidence itself (as might occur if the tribunal has not yet been constituted).³⁸³ Courts take particular care in cases where a party claims the discovery is necessary for a litigation that has been stayed pending an ongoing arbitration, since such tactics could be used to circumvent the arbitration.³⁸⁴

Allowing courts to grant disclosure at the parties' direct request is conceptually problematic, since it appears to "run counter to the parties' agreement to resolve their disputes exclusively by arbitration."³⁸⁵ The only time such relief is truly justifiable as being consistent with the parties' agreement is when the disclosure is necessary to prevent imminent, irreparable harm, which would mean that such relief should usually only be granted prior to the constitution of the arbitral tribunal.³⁸⁶

380. See UNCITRAL Model Arbitration Law, *supra* note 87, art. 27; BORN, *supra* note 9, at 1923.

381. See BORN, *supra* note 9, at 1930.

382. See 9 U.S.C. §§ 7, 208, 307 (2011); BORN, *supra* note 9, at 1930.

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

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

385. BORN, *supra* note 9, at 1931.

386. See *id.* at 1932.

Numerous U.S. circuit courts have approved this highly cautious approach to granting discovery in international arbitrations.³⁸⁷ Indeed, as one circuit court judge has noted, judicial intervention in the arbitral disclosure process:

would create practical difficulties. . . . Since the judge will not be involved in the development of the issues as the case proceeds through the arbitration process, he will lack a basis upon which to make informed rulings on discovery matters. His only options would be to have the parties brief the development of the issues in arbitration or to discuss the current state of the dispute with the arbitrator. Such a litigation model is obviously both inefficient and a waste of judicial resources.³⁸⁸

d. Courts' Powers to Order Discovery in a Foreign-seated Arbitration

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

Furthermore, the principle of primary and secondary jurisdiction states that jurisdiction over procedural matters lies only with the court at the arbitral seat.³⁸⁹ Courts in other countries only have secondary jurisdiction and therefore should, as a matter of international law and practice, decline any invitation to become involved in disputes over procedural concerns.

This approach was uncontroverted for many years, leaving U.S. courts with little or no role to play in disclosure disputes arising out of foreign-seated arbitrations. However, the situation may have changed recently due to a new reading of a federal statute regarding assistance that may be provided by U.S. courts to foreign and international tribunals and to litigants before such tribunals.³⁹⁰

The aim of the statute, which is found in chapter 28 of the U.S. Code at section 1782, is relatively clear.³⁹¹ The text states that:

[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal.³⁹²

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

387. See *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 187 (2d Cir. 1999); *Suarez-Valdez v. Shearson Lehman/American Express, Inc.*, 858 F.2d 648, 649 (11th Cir. 1988); BORN, *supra* note 9, at 1932.

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

389. See *supra* notes 119-24 and accompanying text.

390. See 28 U.S.C. § 1782 (2011).

391. See *id.*

392. *Id.*

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

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.³⁹³

For years, this provision was used only in cases involving litigation located abroad. Recently, however, parties have begun to make applications for assistance relating to international commercial arbitrations seated outside the United States. Results have been mixed, with courts taking opposing views on two key issues.

i. Arbitration as Involving “Foreign or International Tribunals”

First, U.S. courts are divided as to whether the statutory reference to “foreign or international tribunals” includes international commercial arbitrations. Initially courts opposed such a reading, stating that “the fact that the term ‘foreign or international tribunals’ is broad enough to include both state-sponsored and private tribunals fails to mandate a conclusion that the term, as used in § 1782, does include both.”³⁹⁴

However, a 2004 decision of the U.S. Supreme Court opened the door to the use of Section 1782 in arbitration by suggesting a more expansive interpretation of the term “foreign or international tribunals” than had been used up until that date.³⁹⁵ Notably, this case, *Intel Corp. v. Advanced Micro Devices, Inc.*, did not involve international commercial arbitration.³⁹⁶ Instead, the request for information in *Intel* was made in the context of certain competition law investigations that were being made by the European Commission.³⁹⁷ Although the Commission is not normally considered a tribunal, it was acting in this instance as the taker of proof for two judicial bodies (i.e., the Court of First Instance and the European Court of Justice).³⁹⁸ Since those courts did not themselves accept new evidence in matters of this type, the U.S. Supreme Court decided that the Commission was

393. *Id.*

394. *National Broadcasting Co., Inc. v. Bear Stearns & Co., Inc.*, 165 F.3d 184, 188 (2d Cir. 1999).

395. 28 U.S.C. § 1782; *see also Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004).

396. *See Intel*, 542 U.S. at 241.

397. *See id.*

398. *See id.* at 242-243.

acting as a “foreign or international tribunal” within the meaning of Section 1782 in these circumstances.³⁹⁹

One of *Intel*'s key holdings was its explicit recognition that Section 1782 is a discretionary device that does not require a court to order discovery in response to a party's request.⁴⁰⁰ The Supreme Court identified several issues that are relevant to the decision whether to grant the request for disclosure. For example:

when the person from whom discovery is sought is a participant in the foreign proceeding . . . , the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. . . . In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid.⁴⁰¹

Other criteria must also be considered. For example, “a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U.S. federal-court judicial assistance.”⁴⁰² Furthermore, a court “could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.”⁴⁰³ Notably, many of these factors refer to public law-oriented concerns, which could be interpreted as meaning that Section 1782 was not intended to apply to arbitration. However, other criteria could be seen as applying by analogy to private forms of dispute resolution, which could weigh in favor of a more expansive reading of Section 1782.⁴⁰⁴

Intel has created a considerable amount of confusion as to whether Section 1782 applies to international arbitral proceedings.⁴⁰⁵ One court, having analyzed the purpose and history of Section 1782 as well as the decision in *Intel*, concluded that:

after applying a functional analysis of the ICC Panel, the Court finds that it is not a foreign or international tribunal under § 1782. The decisions of the ICC Panel are not judicially reviewable under the criteria established by *Intel*. The ICC Court is itself a creature of contract and may only modify the form of the ICC Panel's award, not its substance. In addition, the ICC Panel is the product of the parties' contractual agreement and its authority to issue binding decisions arises from that contract. The Court

399. 28 U.S.C. § 1782; see also *Intel*, 542 U.S. at 257-58.

400. See *Intel*, 542 U.S. at 264; see also 28 U.S.C. § 1782.

401. *Intel*, 542 U.S. at 264 (citations omitted); see also 28 U.S.C. § 1782.

402. *Intel*, 542 U.S. at 264.

403. *Id.* at 264-65.

404. See Kenneth Beale et al., *Solving the §1782 Puzzle. Bringing Certainty to the Debate Over 28 U.S.C. § 1782's Application to International Arbitration*, 47 STAN. J. INT'L L. 51, 96-108 (2011).

405. See *In re Application of Winning (HK) Int'l Shipping Co. Ltd.*, No. 09-22659-MC, 2010 WL 1796579, at *6-7 (S.D. Fla., April 30, 2010) (noting split of opinion); see also 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241.

finds that § 1782 does not authorize discovery relief in a proceeding such as the ICC Panel, which functions as a contractual alternative to state-sponsored courts, administrative agencies, arbitral tribunals, and quasi-judicial bodies. Thus, the Court is without authority to provide discovery assistance under § 1782.⁴⁰⁶

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

that § 1782 authorizes broader discovery than what is authorized for domestic arbitrations by Federal Arbitration Act § 7. If § 1782 were to apply to private international arbitrations, “the differences in available discovery could ‘create an entirely new category of disputes concerning the appointment of arbitrators and the characterization of arbitration disputes as domestic, foreign, or international.’” We also note[] that empowering parties in international arbitrations to seek ancillary discovery through federal courts could destroy arbitration’s principal advantage as “a speedy, economical, and effective means of dispute resolution” if the parties “succumb to fighting over burdensome discovery requests far from the place of arbitration.” Neither private arbitration nor these questions were at issue in *Intel*.⁴⁰⁷

This is an important issue that will no doubt develop over time.⁴⁰⁸ Going forward, courts will need to consider a variety of factors when determining whether and to what extent Section 1782 applies to international commercial arbitration.⁴⁰⁹ For example, courts not only need to analyze the language of the statute, they also must take into account the effect the various interpretations will have on the international arbitral regime. In particular, it is appropriate to consider whether an expansive interpretation of Section 1782 would contravene U.S. treaty obligations under the New York and Panama Conventions, and whether broad applicability of Section 1782 to international commercial arbitration would promote the kind of “respect for the capacities of foreign and transnational tribu-

406. In re *Operadora DB Mexica, S.A. de C.V.*, No. 6:09-cv-383-Orl-22GJK, 2009 WL 2423138, at *12 (M.D. Fla. Aug. 4, 2009); see also 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241.

407. *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. 31, 34 (5th Cir. 2009) (citations omitted); see also 28 U.S.C. § 1782; *Intel*, 542 U.S. at 241; In re *Application of Caratube Int’l Oil Co., LLP*, 730 F. Supp. 2d 101, 107 (D.D.C. 2010) (concluding that reliance on Section 1782 constitutes “an attempt to circumvent the Tribunal’s control over the arbitration’s procedures, and this factor thus weighs against granting the petition”).

408. See *Bcalc et al.*, *supra* note 404, at 109. Indeed, a large number of federal decisions have been rendered concerning the use of Section 1782 in the context of a complex series of disputes involving Chevron and the Republic of Ecuador. However, those cases are not discussed here because the Section 1782 requests were made in support of several ongoing matters, including those proceeding in both arbitration and litigation, and therefore do not address the specific issues relating to use of Section 1782 in international commercial arbitration. See, e.g., 28 U.S.C. § 1782; In re *Chevron Corp.*, 650 F.3d 276, 278-95 (3d Cir. 2011); *Chevron Corp. v. Berlinger*, 629 F.3d 297, 300-11 (2d Cir. 2011); *Ecuadorian Plaintiffs v. Chevron Corp.*, 619 F.3d 373, 375-80 (5th Cir. 2010); *Republic of Ecuador v. Bjorkman*, 801 F. Supp. 2d 1121 (D. Colo. 2011).

409. See 28 U.S.C. § 1782.

nals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes” that is required by the U.S. Supreme Court.⁴¹⁰ Furthermore, courts evaluating the applicability of Section 1782 may find it useful to recall the differences between international litigation and international arbitration, particularly with respect to the distinction between discovery and disclosure, both as a matter of party expectation and international practice.⁴¹¹ Parties must be sensitive to all these issues when considering whether to pursue or defend an action involving Section 1782.⁴¹²

ii. “Interested Persons” in Arbitration

Although most of the scholarly and judicial attention focuses on whether international commercial arbitration involves “foreign or international tribunals” under Section 1782, difficulties can also arise with respect to who constitutes an “interested person” under the statute.⁴¹³ On one level, the analysis is very straightforward, given the express language of the statute indicating that applications may be made by tribunals or “any interested person.”⁴¹⁴ However, allowing parties to submit discovery applications directly to the court in a Section 1782 proceeding without the approval of the arbitral tribunal runs afoul of the same problems that arise in the context of U.S.-seated arbitration.⁴¹⁵ Although courts have in some cases granted discovery under Section 1782 on the application of a party, there is very little judicial discussion of this particular issue.⁴¹⁶

As this area of law develops, courts will need to investigate more thoroughly the various factors identified by the Supreme Court in *Intel* concerning the exercise of judicial discretion in an action under Section 1782.⁴¹⁷ The most relevant of these may be “whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States.”⁴¹⁸ Certainly it has been suggested that party-initiated requests for judicial assistance in U.S.-seated arbitrations may be an illegitimate means of avoiding the arbitral process.⁴¹⁹ This concern would likely hold equal, if not greater, weight in arbitrations seated outside the United States.⁴²⁰ Judges may also

410. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985); *see also* 28 U.S.C. § 1782.

411. *See* 28 U.S.C. § 1782; *see also supra* notes 352-66 and accompanying text.

412. *See* 28 U.S.C. § 1782.

413. *Id.*

414. *Id.*; *see also Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 257 (2004) (discussing scope of term); *In re Application of Caratube Int’l Oil Co., LLP*, 730 F. Supp. 2d 101, 104 (D.D.C. 2010) (concluding, without analysis, that a party to an international arbitration was an “interested person”).

415. *See* 28 U.S.C. § 1782; *see also supra* notes 380-88 and accompanying text.

416. *See* 28 U.S.C. § 1782; *In re Roz Trading Ltd.*, 469 F. Supp. 2d 1221, 1223 (N.D. Ga. 2006); *Ukrnafta v. Carpatsky Petroleum Corp.*, No. 3:09 MC 265(JBA), 2009 WL 2877156, at *2 (D. Conn. Aug. 27, 2009).

417. *See* 28 U.S.C. § 1782; *Intel*, 542 U.S. at 264-65.

418. *Intel*, 542 U.S. at 264-65; *see also* 28 U.S.C. § 1782.

419. *See In re Application of Caratube*, 730 F. Supp. 2d at 107.

420. *See BORN, supra* note 9, at 1935-36.

wish to consider the effect that broad use of Section 1782 would have on international commercial arbitration generally.⁴²¹

2. Challenges to Arbitrators During Proceedings

As important as discovery and disclosure are, they are not the only matters that can be brought to a court's attention while an arbitration is ongoing. Another relatively common issue involves challenges to sitting arbitrators.

Challenges can be triggered by a variety of circumstances, both inside and outside the arbitral proceedings.⁴²² For example, a comment made by a panelist during a hearing may suggest a lack of impartiality. An arbitrator's recent purchase of stock in one of the parties to the proceeding may call that arbitrator's independence into question. Late discovery of disclosable facts can create concerns about impartiality or independence late in the proceeding, long after the initial disclosure was made.

Because challenges to arbitrators are procedural matters, motions to remove a sitting panelist should only be brought in the arbitral seat. This arrangement respects the principle of primary and secondary jurisdiction and mirrors the approach taken to the selection of arbitrators.⁴²³

Parties contemplating a challenge to an arbitrator must consider two separate issues: (1) the standards that govern the substance of the dispute about the propriety of the arbitrator's continuing to serve and (2) the procedure by which that challenge shall be heard. When addressing these matters, courts look to the parties' agreement, the governing arbitral rules (if any), and the arbitration law of the arbitral seat for guidance.⁴²⁴ The one exception is in situations where the parties specifically address challenges to arbitrators in their contract. In those cases, the national law governing the arbitration agreement controls the interpretation of that issue.⁴²⁵ Notably, the law governing the arbitration agreement is not necessarily the same as the law governing the substance of the dispute; therefore, courts cannot determine the law controlling the construction of the arbitration agreement simply by referring to a general choice of law provision.⁴²⁶

The first issue to consider involves the appropriate procedure. Most arbitral rule sets describe the means by which a party can mount a challenge to one or more arbitrators, and it is clear that the parties must adhere to those procedures whenever they apply.⁴²⁷ Similarly, parties will be held to any challenge procedure they have adopted, even outside the context of one of the institutional rule sets.⁴²⁸ These types of challenges may be brought at any time it is appropriate to do so under the rules or agreed procedures.

421. See 28 U.S.C. § 1782; *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 Fed. Appx. 31, 34 (5th Cir. 2009).

422. See LEW ET AL., *supra* note 7, ¶¶ 13-1 to 13-4.

423. See *supra* notes 317-30 and accompanying text.

424. See LEW ET AL., *supra* note 7, ¶ 13-25.

425. See BORN, *supra* note 9, at 1460 (discussing choice of law issues).

426. See *supra* notes 535-52 and accompanying text.

427. See BORN, *supra* note 9, at 1567-68.

428. See LEW ET AL., *supra* note 7, ¶ 13-32.

However, there are times when the parties have not agreed to a particular mechanism for challenging arbitrators. In these cases, recourse must be had to the national arbitration statute in place at the arbitral seat.⁴²⁹ Most arbitration statutes contain default provisions describing the means by which a party can challenge and remove an arbitrator on an interlocutory basis.⁴³⁰ The United States is unusual in that it strictly limits the courts' ability to hear an interim challenge to an arbitrator.⁴³¹ Indeed, "it is well established that a district court cannot entertain an attack upon the qualifications or partiality of arbitrators until after the conclusion of the arbitration and the rendition of the award."⁴³² This position is based on the fact that the FAA is silent on the issue of interim challenges, instead providing only for vacatur of an award for partiality after the arbitration has concluded.⁴³³ Nevertheless, there are a few exceptions to this general rule where a court has allowed removal of an arbitrator prior to the rendering of the final award.⁴³⁴ Therefore, a party proceeding under U.S. law may have fewer opportunities to challenge an arbitrator than a party proceeding under an arbitral rules set.⁴³⁵

The second question to consider involves the substantive standards to be applied to the question of removal. Although U.S. courts are unlikely to reach this issue at the interlocutory stage, given the U.S. position on interim challenges, the substantive standards are more or less the same regardless of whether the challenge is brought after the arbitration has ended or partway through the proceedings.⁴³⁶ Matters relating to the substantive standard to be used in a challenge procedure will therefore be considered here for ease of discussion, even though U.S. courts are more likely to consider these issues as part of a motion to vacate an award or an objection to enforcement of a foreign award.⁴³⁷

For years, the international arbitral regime has taken the view that arbitrators must be impartial, independent and neutral.⁴³⁸ However, the United States initially embraced a very different approach, based on domestic principles of law indicating that party-appointed arbitrators did not have to be neutral unless the parties agreed otherwise.⁴³⁹

Tensions began to arise in the 1990s, as international commercial arbitration became more popular and the rising need for predictable and consistent standards across the globe made the United States's distinctive approach to arbitrator neutrality increasingly troublesome.⁴⁴⁰ This led to several actions being taken in an

429. *Id.* ¶¶ 13-29 to 13-35.

430. See UNCITRAL Model Arbitration Law, *supra* note 87, art. 13.

431. See BORN, *supra* note 9, at 1567-69 (noting a few exceptional circumstances).

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

433. See 9 U.S.C. § 10(a)(2) (2011); BORN, *supra* note 9, at 1568.

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

435. In this context, the arbitral rules "trump" the default provisions of U.S. law. See *supra* notes 33-63 and accompanying text; see also LEW ET AL., *supra* note 7, ¶¶ 21-6 to 21-11.

436. See LEW ET AL., *supra* note 7, ¶¶ 13-36 to 13-42 (noting some jurisdictions, such as Germany, impose a higher standard after the award has been rendered). Once the proceedings have concluded, the challenge is to the enforcement of the award, not to the arbitrator, who is *functus officio* at this point. See *id.*

437. See *supra* notes 470-97, 510-630 and accompanying text.

438. See LEW ET AL., *supra* note 7, ¶¶ 13-8 to 13-18.

439. See BORN, *supra* note 9, at 1492-98.

440. *Id.* at 1496-97.

attempt to resolve the situation. For example, international organizations like the IBA made the expectation of arbitrator neutrality clear, as a matter of international practice.⁴⁴¹ Furthermore, several U.S.-based arbitral institutions amended their rules and codes of conduct to make their default positions reflect international expectations.⁴⁴² Parties to international disputes also became increasingly vocal about their expectations regarding arbitrator conduct, not only including explicit provisions regarding neutrality in their arbitration agreements, but also demanding acknowledgement of the neutrality of the arbitrators at the appointment stage.⁴⁴³

As a result of these actions, U.S. courts have demonstrated a growing recognition that party-appointed arbitrators in international disputes are expected to adhere to international standards regarding independence, impartiality, and neutrality.⁴⁴⁴ However, this approach has not yet been universally adopted.⁴⁴⁵

Although it is easy to describe the relevant standard of behavior in the abstract, it is much harder to establish precisely how the concepts of independence, impartiality, and neutrality are to be applied in practice. Fortunately, this task has become much easier since the publication of the IBA Guidelines on Conflicts of Interest in International Arbitration.⁴⁴⁶ Although the Guidelines tend to be considered persuasive rather than binding, the provisions are widely relied upon by arbitrators and practitioners in the field.⁴⁴⁷ The Guidelines have also been judicially considered in the United States.⁴⁴⁸ Two older documents – the IBA Rules of Ethics for International Arbitrators and the AAA Code of Ethics for Arbitrators in Commercial Disputes – also discuss relevant standards of behavior, although these instruments' influence has waned in the wake of the IBA Guidelines, which are much more detailed and practically oriented.⁴⁴⁹

Although U.S. courts do not usually remove arbitrators midway through proceedings, a vacancy on a tribunal may nevertheless arise, either because a panelist has been removed by an arbitral institution or because someone has stepped down voluntarily or become unable to continue.⁴⁵⁰ Should this occur, a U.S. court may be asked to help select a new arbitrator. In those instances, the appointment procedure often is the same as it is during the pre-arbitration phase, although some

441. See IBA Guidelines, *supra* note 120, Gen. Std. 1.

442. See ICDR International Arbitration Rules, *supra* note 32, art. 7; AAA Commercial Arbitration Rules, effective June 1, 2009, R-12, R-17, available at <http://www.adr.org/sp.asp?id=22440>; AAA Code of Ethics for Arbitrators in Commercial Disputes, effective Mar. 1, 2004, Canons IX-X, available at <http://www.adr.org/sp.asp?id=32124>; BORN, *supra* note 9, at 1496-99.

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

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

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

446. See IBA Guidelines, *supra* note 120.

447. See *id.*

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

449. See IBA Guidelines, *supra* note 120; see also AAA Code of Ethics, *supra* note 442; IBA Rules of Ethics for International Arbitrations, available at http://www.ibanct.org/Publications/publications_IBA_guides_and_free_materials.aspx#ethics.

450. See LEW ET AL., *supra* note 7, ¶¶ 13-1 to 13-4.

institutional rules allow for a truncated appointment process to avoid delay or obstructionist tactics.⁴⁵¹

3. *Motions in Aid of Arbitration*

Previous sections discussed a number of motions that are commonly made prior to or at the initiation of an international commercial arbitration.⁴⁵² Several of these motions – for example, those requesting an anti-suit injunction or seeking prejudgment attachment – can also be brought while the arbitration is ongoing. For the most part, courts consider these motions using the same criteria that are used during the pre-arbitration phase.⁴⁵³

However, there is one major difference between early- and late-arising motions, and that is the availability of relief in arbitration. Courts and tribunals often have concurrent jurisdiction over the granting of provisional relief by virtue of the applicable national law or arbitral rules, but once an arbitration has begun, there is often less need for the parties to seek judicial relief.⁴⁵⁴ Therefore, parties should be aware that courts often prefer not to interfere with an ongoing arbitration, particularly if the type of relief requested is within the arbitrators' power to grant. Exceptions to this general rule do, of course, exist, and different courts take different views on the availability of judicial forms of provisional relief, as discussed previously.⁴⁵⁵

4. *Motions to Enforce Interim Awards and Provisional Measures*

The final type of interlocutory judicial proceeding to consider involves requests for immediate enforcement of an interim award or provisional measure ordered by the arbitral tribunal. These types of actions are somewhat problematic, for although the law regarding the enforcement of final arbitral awards is well-developed,⁴⁵⁶ it is less clear whether and to what extent interim awards and provisional measures are immediately enforceable.⁴⁵⁷

The difficulty arises because the New York Convention and many national statutes on arbitration have traditionally been interpreted as relating only to the enforcement of final awards, meaning an "award that disposes of either all the parties' claims or all the parties' remaining claims in the arbitration."⁴⁵⁸ However, the enforceability of other types of arbitral awards and procedural orders (including arbitral decisions regarding stays, disclosure, and provisional measures) is much less clear under the relevant statutory provisions.⁴⁵⁹

451. See *id.* ¶¶ 13-53 to 13-66; see also *supra* notes 317-30 and accompanying text.

452. See *supra* notes 256-350 and accompanying text.

453. See *supra* notes 331-50 and accompanying text.

454. See BORN, *supra* note 9, at 1972-2019.

455. See *supra* notes 331-50 and accompanying text.

456. See *infra* notes 510-630 and accompanying text.

457. See LEW ET AL., *supra* note 7, ¶¶ 24-14 to 24-34; James M. Gatis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issues of Interim and Partial Awards in Domestic and International Arbitrations*, 16 AM. REV. INT'L ARB. 1, 45-63 (2005).

458. BORN, *supra* note 9, at 2429-30; see also New York Convention, *supra* note 22, art. V (referring only to "the award").

459. See BORN, *supra* note 9, at 2428, 2354, 2356.

Most of the debate focuses on the distinction between “partial final awards” (sometimes called “partial awards”), which finally dispose of some portion of the parties’ claims in arbitration, and interim awards (sometimes called “interlocutory awards”), which decide a particular issue that is relevant to the final disposition of a claim (such as a determination involving the choice of law) but do not finally dispose of the claim or any part of the claim.⁴⁶⁰ Partial final awards are usually immediately enforceable as a matter of national and international law.⁴⁶¹ Interim awards are less likely to be considered immediately enforceable, even when they provide for provisional relief that appears to finally dispose of the request for such relief.⁴⁶²

The FAA provides little guidance on this issue, since it, like the New York Convention, fails to distinguish between the various types of awards when discussing enforcement and confirmation.⁴⁶³ Thus, Chapter 2 only refers to “an award falling under the Convention” while Chapter 3 discusses “[a]rbitral decisions or awards made in the territory of a foreign state.”⁴⁶⁴ Chapter 1, which is applicable to international disputes by virtue of the provisions on residual application, is slightly broader, to the extent that it states that an appeal may be immediately taken from an order “confirming or denying confirmation of an award or partial award.”⁴⁶⁵

Case law provides some guidance, with U.S. courts adopting a position, consistent with that of courts from other jurisdictions, that provisional or interim measures ordered by an arbitral tribunal can be judicially enforced to the extent that the measure in question constitutes a final disposition of the matter requested.⁴⁶⁶ Furthermore, “although the Federal Arbitration Act uses the word award in conjunction with finality, courts go beyond a document’s heading and delve into its substance and impact to determine whether the decision is final.”⁴⁶⁷

Courts asked to enforce a partial or interim award must also consider the proper procedure to be used. That issue is discussed below,⁴⁶⁸ since the approach used at an interim stage is the same as that used after the arbitration has been completed.

C. Role of the Court After Arbitral Proceedings Have Concluded

Once the arbitrators have issued their final award, including any award as to costs, the tribunal is *functus officio*, which means that it has finished its tasks and has no further jurisdiction over the dispute. However, the conclusion of the arbitration does not necessarily put all issues between the parties to rest, and courts may be asked to address several different types of matters even after the final

460. *See id.* at 2430.

461. *See id.* at 2433.

462. *See id.* at 2434-35.

463. *See* New York Convention, *supra* note 22; 9 U.S.C. §§ 207, 304 (2011).

464. 9 U.S.C. §§ 207, 304.

465. 9 U.S.C. § 16(a)(1)(D); *see also* 9 U.S.C. §§ 208, 307.

466. *See* Arrowhead Global Solutions, Inc. v. Datapath, Inc., 166 Fed. Appx. 39, 41 (4th Cir. 2006) (confirming interim award).

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

468. *See infra* notes 510-630 and accompanying text.

arbitral award has been rendered. Notably, this is a time period where judicial assistance may be sought in several jurisdictions simultaneously.⁴⁶⁹

1. Motions to Vacate an Arbitral Award

One type of judicial proceeding that may arise after the conclusion of an international commercial arbitration involves a motion to vacate an arbitral award. Although U.S. courts often address these sorts of motions in the domestic context, international disputes give rise to several unique issues.

The first matter to be addressed is whether and to what extent a U.S. court is the proper venue in which to bring a motion to vacate an arbitral award. As a matter of U.S. law and practice, an award may only be set aside (i.e., vacated) in the place of arbitration or the country under whose laws the award was made (which will in most cases be the arbitral seat).⁴⁷⁰

Courts that only have secondary jurisdiction over the arbitration may not set aside an award arising out of that proceeding. Instead, these courts are limited to denying recognition or enforcement of the award, as discussed below.⁴⁷¹ The distinction between setting aside an award, on the one hand, and recognizing and enforcing an award, on the other, is critical because different standards and procedures may apply to the two actions. The two procedures also yield different effects.

Therefore, the only time that a U.S. court may hear a motion to vacate an arbitral award is when the underlying arbitration is seated in the United States. If the arbitration is seated elsewhere, the U.S. court only has jurisdiction to consider whether to recognize or enforce the award.

Just because the arbitration is seated in the United States does not mean all parties reside there. As a result, it may be necessary to serve notice of a motion to vacate an award on a foreign party. Some question has arisen as to whether the Hague Convention on the Service Abroad of Extra-Judicial and Judicial Documents (Hague Service Convention) is applicable in these circumstances.⁴⁷²

This issue has not yet been fully resolved, although the time periods associated with the service of process under the Hague Service Convention would make application of the Convention to arbitration extremely problematic, since the three-month deadline for service of process under the FAA is the minimum amount of time recommended for service of process under the Hague Service Convention.⁴⁷³ However, concerns about timing may not exist in all cases, such

469. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 369 (5th Cir. 2003) (noting “multiple judicial proceedings on the same legal issues are characteristic of the confirmation and enforcement of international arbitral awards under the Convention”).

470. See New York Convention, art. V(I)(e); BORN, *supra* note 9, at 2337. This is a classic example of the U.S. principle of primary jurisdiction at work. See FOUCHARD GAILLARD GOLDMAN, *supra* note 138, ¶ 1178. See also *supra* notes 222-55 and accompanying text. However, the concept of primary and secondary jurisdiction is a U.S. creation.

471. See BORN, *supra* note 9, at 2338; see also *infra* notes 510-630 and accompanying text.

472. See Hague Convention on the Service Abroad of Extra-Judicial and Judicial Documents, opened for signature, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 [hereinafter *Hague Service Convention*]; *Argentine Republic v. National Grid PLC*, 637 F.3d 365, 366-67 (D.C. Cir. 2011).

473. See *Hague Service Convention*, *supra* note 472; 9 U.S.C. §§ 12, 208, 307 (2011); *Republic of Argentina v. BG Group PLC*, 715 F. Supp. 2d 108, 120 n. 10 (D.D.C. 2010).

as when service by mail is permitted under the Hague Service Convention.⁴⁷⁴ This is a developing area of law that will bear further attention in the future.

The second major matter to consider involves the standards to be used to vacate an arbitral award in an international arbitration. There is a growing international trend toward having the grounds for setting aside an arbitral award in the place where it was rendered mirror the grounds for non-enforcement of a foreign award under the New York Convention.⁴⁷⁵ Nevertheless, some countries still allow vacatur on grounds additional to or different than those relating to non-enforcement of an award under the New York Convention.⁴⁷⁶ Although the number of states that have adopted this approach is diminishing, the practice remains relatively common, even though it “produces anomalous results which are very difficult to justify in light of the Convention’s overall structure and purposes.”⁴⁷⁷

Interestingly, this is a subject on which U.S. courts are split. For example, the Seventh and Eleventh Circuits have ruled that parties may only rely on the grounds relating to non-enforcement under Article V of the New York Convention, even in actions to vacate an award arising out of an arbitration seated in the United States.⁴⁷⁸ The rationale in these cases is that the New York Convention applies to both “foreign” awards (i.e., those seated outside the United States) and “non-domestic” awards (i.e., those seated within the United States but falling within the scope of the Convention by virtue of Section 202 of the FAA) by virtue of the express language of Article I(1) of the Convention.⁴⁷⁹ This appears to be the approach taken in the draft *Restatement on the U.S. Law of International Commercial Arbitration* as of January 2012, although the Reporters have cautioned that all drafts are to be considered tentative until the entire project has been completed, since revisions, some significant, are entirely likely during the drafting process.⁴⁸⁰

An alternative position is enunciated by the Second Circuit, which takes the view that the New York Convention does not impose any limits on the grounds upon which vacatur is allowed.⁴⁸¹ Courts adopting this approach allow parties seeking to set aside an arbitral award rendered in the United States to rely on domestic principles of law. In this analysis, courts would look to Section 10 of the FAA for the appropriate criteria for vacatur, which is said by advocates of this

474. See Hague Service Convention, *supra* note 472; *Int’l Transactions, Ltd. v. Embotelladora Agral Regionmontana SA de CV*, 277 F. Supp. 2d 654, 662 (N.D. Tex. 2004).

475. See New York Convention, *supra* note 22, art. V; UNCITRAL Model Arbitration Law, *supra* note 87, art. 34; BORN, *supra* note 9, at 2553.

476. See New York Convention, *supra* note 22, art. V; BORN, *supra* note 9, at 2553.

477. BORN, *supra* note 9, at 2555-56.

478. See New York Convention, *supra* note 22, art. V; *Industrial Risk Ins. v. MAN Guetchhoffnungshütte GmbH*, 141 F.3d 1434, 1440-41, 1445 (11th Cir. 1998); *Lander Co., Inc. v. MMP Inv., Inc.*, 107 F.3d 476, 481-82 (7th Cir. 1997).

479. See New York Convention, *supra* note 22, art. I(1); 9 U.S.C. § 202 (2011); *Industrial Risk Ins.*, 141 F.3d at 1440-41, 1445; *Lander*, 107 F.3d at 481-82; see also *supra* notes 143-201 and accompanying text.

480. See American Law Institute, *supra* note 8.

481. See New York Convention, *supra* note 22; *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 22-23 (2d Cir. 1997). But see *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 221-22 (2d Cir. 2002) (calling *Toys “R” Us* into question regarding reliance on Section 10 of the FAA).

position to be applicable to international arbitrations by virtue of the residual application provisions of Chapters 2 and 3.⁴⁸² Section 10(a) states:

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

- (1) where the award was procured by corruption, fraud, or undue means;
- (2) where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.⁴⁸³

Notably, these provisions are broadly similar to the standards for non-enforcement described in the New York Convention.⁴⁸⁴ Consequently, there at first appears to be little conflict between the international arbitral regime and the United States's statutory scheme. However, some people take the view that domestic U.S. law also recognizes certain common law bases for the setting aside of an arbitral award, and that is where the real debate exists, both with respect to whether these additional grounds of vacatur still exist and whether they apply to international disputes.

Two of these non-statutory grounds for vacatur – public policy and non-arbitrability – are also found in the New York Convention and are, therefore, not problematic as a conceptual matter, although the standards applicable to international disputes may differ slightly from those applicable to domestic cases.⁴⁸⁵ Instead, it is the third non-statutory ground for vacatur – manifest disregard of law – that causes difficulties in international circles.⁴⁸⁶

It is extremely rare for a party to establish a manifest disregard of law, and “examples of manifest disregard . . . tend to be extreme, such as ‘explicitly reject[ing] controlling precedent’ or otherwise reaching a decision that ‘strains cre-

482. See 9 U.S.C. §§ 10, 208, 307.

483. *Id.* § 10(a).

484. See New York Convention, *supra* note 22, art. V; 9 U.S.C. § 10(a).

485. See New York Convention, *supra* note 22, art. V(2); BORN, *supra* note 9, at 2622 (noting the content of international public policy), 2637.

486. See BORN, *supra* note 9, at 2639-46.

dulity' or lacks even a 'barely colorable' justification."⁴⁸⁷ The status of manifest disregard as a matter of domestic U.S. law is less than clear, despite several recent U.S. Supreme Court pronouncements on the subject.⁴⁸⁸ However, even if manifest disregard survives as a viable ground for vacatur, the doctrine only applies in a very narrow range of cases where the arbitrators were cognizant of controlling legal authority and deliberately disregarded it.⁴⁸⁹ As a practical matter, claims of manifest disregard of law very seldom result in the setting aside of an award.⁴⁹⁰

However, the doctrine of manifest disregard encompasses a substantive review of the merits of an award, and, as such, is contrary to the modern expectation in international arbitration that arbitral awards are not judicially reviewable on matters of substance.⁴⁹¹ Use of manifest disregard of law is particularly problematic in international disputes that are governed by something other than U.S. law, since U.S. judges are not well-placed to determine whether, in those instances, there is a "clearly defined governing legal principle" that has been ignored.⁴⁹²

Although much could be said about each of the various grounds for vacatur, that discussion will be set to one side, given the lack of consensus on whether Section 10 even applies to disputes arising under Chapter 2 and 3 of the FAA.⁴⁹³ Notably, even if Section 10 is determined to apply to international disputes, the various provisions should be read in an international light.⁴⁹⁴ Thus, for example, debates concerning the "evident partiality" of a particular panelist would need to consider international standards regarding independence, impartiality, and neutrality of arbitrators.⁴⁹⁵

The final issue to consider involves the effect of a decision to vacate an arbitral award arising out of an international dispute seated in the United States. Although there are some parallels to what occurs in the domestic context, international arbitrations give rise to some additional considerations.

In a domestic dispute, the decision to vacate an arbitral award forecloses all future opportunities to recover on the award. This is not the case in an international dispute. In international commercial arbitration, a decision to vacate an award bars recovery on the award in the jurisdiction where the court is seated, but does not necessarily preclude enforcement of the award in other (i.e., secondary) jurisdictions. Indeed, the New York Convention explicitly states that a court sitting in a secondary jurisdiction may still enforce an award even if that award has been set aside in the primary jurisdiction.⁴⁹⁶ However, a court in a secondary

487. *Telenor Mobile Commc'n AS v. Storm LLC*, 584 F.3d 396, 407 (2d Cir. 2009) (citations omitted).

488. *See Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1768 n. 3 (2010); *Hall St. Ass'n, LLC v. Mattel, Inc.*, 552 U.S. 576, 584-85 (2008).

489. *See BORN, supra* note 9, at 2641.

490. *See Telenor Mobile*, 584 F.3d at 407.

491. *See UNCITRAL Model Arbitration Law, supra* note 87, art. 34; *BORN, supra* note 9, at 2638, 2649; Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT'L L.J. 449, 509 (2005).

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

493. *See* 9 U.S.C. §§ 10, 208, 307 (2011).

494. *See id.* § 10.

495. *Id.* § 10(a)(2); *see also supra* notes 422-51 and accompanying text.

496. *See* New York Convention, *supra* note 22, art. V(1)(c).

jurisdiction can take the fact that the award has been set aside into account during an enforcement proceeding.⁴⁹⁷

2. *Motions to Confirm an Arbitral Award*

Another action that can be brought after the conclusion of an arbitration is a motion to confirm an arbitral award. There is no need to bring an action of this nature as a matter of international law, since one purpose of the New York Convention was to abolish the practice of double *exequatur*, which at one time required parties to confirm the award at the place where it was rendered before taking it to another location for enforcement.⁴⁹⁸ Furthermore, there is no need to confirm an award to trigger the obligation of the non-prevailing party to comply with the terms of the award, since an arbitral award has legal effect immediately upon being rendered.⁴⁹⁹

Nevertheless, a prevailing party might wish to bring a confirmation proceeding so as to transform the award into a civil judgment and facilitate enforcement of the award domestically.⁵⁰⁰ (Since enforcement of foreign arbitral awards is usually easier than enforcement of foreign judgments, parties would seldom want to confirm an award so as to obtain international enforcement of the resulting judgment.)⁵⁰¹ Even if a party does not intend to enforce the award in the arbitral seat immediately, it may be wise to confirm the award as soon as possible after the conclusion of the arbitration so as to protect the award for future use. This is particularly true in jurisdictions that only allow confirmation within a certain time period.⁵⁰²

Confirmation of arbitral awards in the United States is a relatively straightforward process.⁵⁰³ A party may only object to confirmation of the award on grounds used for non-enforcement of a foreign arbitral award under the New York or Panama Convention.⁵⁰⁴ Parties to an award that falls under the New York or Panama Convention have three years in which to bring a motion to confirm the award, which is considerably longer than the one-year period for confirming a domestic award.⁵⁰⁵

There is one aspect of U.S. practice relating to the confirmation of arbitral awards that can lead to confusion in international disputes. Some authorities suggest that the parties' underlying arbitration agreement must include language to the effect that "judgment upon the award may be entered by Court having jurisdiction hereof" for the award to be confirmable.⁵⁰⁶ Adherence to this requirement,

497. *See id.*; *see also infra* notes 577-605 and accompanying text.

498. *See* New York Convention, *supra* note 22; BORN, *supra* note 9, at 2338 (noting neither the New York nor the Panama Convention requires double *exequatur*).

499. *See* BORN, *supra* note 9, at 2343; *see also infra* notes 631-45 and accompanying text.

500. *See supra* notes 20-31 and accompanying text.

501. *See* BORN, *supra* note 9, at 91-101.

502. *See id.* at 2329.

503. *See* 9 U.S.C. §§ 207, 302 (2011); BORN, *supra* note 9, at 2712-25, 2727-28.

504. *See id.*

505. *See* 9 U.S.C. §§ 9, 207, 302.

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

which has been characterized as “archaic,” is problematic in international disputes, however, since it imposes a form requirement that is not reflected elsewhere in the New York Convention.⁵⁰⁷ Because Chapter 1 of the FAA does not apply to international disputes to the extent that the relevant provisions are inconsistent with the New York Convention, the better practice would be to consider language ostensibly required under Section 9 regarding the entry of judgment to be unnecessary or inapplicable.⁵⁰⁸ Another alternative is to allow the requirement of Section 9 to be met by implication, as numerous U.S. cases, including those in the international realm, have already done.⁵⁰⁹

3. Motions to Enforce a Foreign Arbitral Award

Perhaps the most common action to be brought in U.S. court after the conclusion of an international commercial arbitration is a motion to enforce a foreign arbitral award. Motions to enforce foreign awards can be brought in any secondary jurisdiction in the world, although parties tend to choose places where the non-prevailing party has assets that can be used to satisfy the award.

The vast geographic scope of the New York and Panama Conventions means that virtually all enforcement proceedings brought in a U.S. court will fall under one of these two instruments.⁵¹⁰ Although parties may enforce arbitral awards outside the treaty framework, this happens only rarely in the United States.⁵¹¹ Therefore, for reasons of space, this discussion focuses exclusively on treaty mechanisms.

Before beginning, it is useful to clear up the differences between the “recognition” and “enforcement” of a foreign arbitral award under the New York and Panama Conventions.⁵¹² “Recognition” of an award gives the award the status of a national court judgment in that state.⁵¹³ However, most parties want more than just a simple judgment; they want the court to use its coercive power to give effect to the terms of the award. In those cases, parties seek to have the award “enforced.”⁵¹⁴ Because the procedures for recognition and enforcement are the same, the following discussion will simply use the term “enforcement” to refer to both types of action.

The New York Convention reflects a strong presumption in favor of the enforcement of foreign arbitral awards as a result of mandatory language indicating that “[e]ach Contracting State shall recognize arbitral awards as binding and en-

507. BORN, *supra* note 9, at 2788-89; *see also* 9 U.S.C. § 207 (noting the only grounds for non-confirmation are those contained in the New York Convention).

508. *See* New York Convention, *supra* note 22; 9 U.S.C. §§ 9, 208, 307.

509. *See* 9 U.S.C. § 9; Daihatsu Motor Co., Ltd. v. Terrain Vehicles, Inc., 13 F.3d 196, 199-203 (7th Cir. 1993); BORN, *supra* note 9, at 2788.

510. *See* New York Convention, *supra* note 22; Panama Convention, *supra* note 25; New York Convention Status, *supra* note 23; SICE, *supra* note 29.

511. *See* Weizmann Inst. of Sci. v. Neschis, 421 F. Supp. 2d 654, 674 (S.D.N.Y. 2005) (concerning an award rendered in Liechtenstein prior to Liechtenstein’s adherence to the New York Convention).

512. *See* New York Convention, *supra* note 22; Panama Convention, *supra* note 25.

513. *See* LEW ET AL., *supra* note 7, ¶¶ 26-9 to 26-12. Technically, an award may also be “recognized” at the arbitral seat, although that process is usually referred to in the United States as “confirmation.” *See* BORN, *supra* note 9, at 2398.

514. *See* LEW ET AL., *supra* note 7, ¶¶ 26-9 to 26-12.

force them.”⁵¹⁵ A party may object to the enforcement of a particular award, but only on the grounds listed in Article V of the Convention, which are to be construed narrowly.⁵¹⁶ Other possible reasons for non-enforcement, such as rationales based on Section 10 of the FAA or developed through the common law, are inapplicable in an action to enforce a foreign arbitral award.⁵¹⁷

Procedures for enforcing foreign arbitral awards are meant to be relatively straightforward, and the New York Convention itself imposes few requirements other than the production of an original or duly certified copy of both the award and the underlying arbitration agreement as well as certified translations, if necessary.⁵¹⁸ Other than that, contracting states are free to adopt their own procedural mechanisms for enforcing arbitral awards, although “[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies.”⁵¹⁹ The FAA’s enforcement provisions are relatively straightforward and have led to few controversies.⁵²⁰

Although the party that prevailed in the arbitration brings the motion to enforce an award, the non-prevailing party can enter one or more objections to enforcement. The various grounds for objection are listed in the seven subsections of Article V of the New York Convention.⁵²¹ Each subsection is introduced briefly below along with a discussion of some of the more contentious issues that can arise under each heading. Notably, the nature of this Article permits only a cursory discussion of each of the various objections. Numerous other issues can and will arise, although some of these matters can be addressed through three preliminary observations.

First, the New York Convention specifically states that non-enforcement is discretionary rather than mandatory.⁵²² Therefore, U.S. courts are not obliged to refuse enforcement just because the criteria contained in one of the provisions of Article V have technically been met.⁵²³ Instead, judges are free to give effect to the general pro-enforcement policy underlying the New York Convention as a whole and enforce the award as a matter of discretion.⁵²⁴

Second, Article V is broken into two major subsections.⁵²⁵ Objections under Article V(1) may only be made by a party, whereas objections under Article V(2) may be raised *sua sponte* by the enforcing court.⁵²⁶ This distinction arises because Article (V)(2) addresses two questions that are of particular significance to states:

515. New York Convention, *supra* note 22, art. III; *see also* Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1292 n. 3 (11th Cir. 2004).

516. *See* New York Convention, *supra* note 22, art. V; Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier (RATKA), 508 F.2d 969, 973-74 (2d Cir. 1974).

517. *See* 9 U.S.C. § 10 (2011); Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 90, 92 (2d Cir. 2005).

518. *See* New York Convention, *supra* note 22, art. IV.

519. *Id.* art. III.

520. *See* 9 U.S.C. §§ 204 (regarding venue); *see also id.* § 207 (regarding enforcement procedures).

521. *See* New York Convention, *supra* note 22, art. V.

522. *See id.* (noting enforcement “may be refused”).

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

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

525. *See* New York Convention, *supra* note 22, art. V.

526. *See id.*

whether the subject matter of the dispute is capable of settlement by arbitration under the national law of the enforcing country (i.e., arbitrability in the international sense) and whether enforcement of the award is contrary to the public policy of the enforcing country.⁵²⁷ By allowing courts to raise these concerns on their own initiative, the drafters of the New York Convention avoided the possibility of parties colluding to evade mandatory provisions of law applicable in the enforcing state.⁵²⁸

Third, Article V contains several provisions regarding the law that is to apply to any particular issue.⁵²⁹ For example, objections arising under Article V(1) are largely considered pursuant to the law that has been chosen by the parties, either explicitly in their agreement or implicitly through the choice of the arbitral seat.⁵³⁰ This means that the law relevant to inquiries under Article V(1) may be different than that of the enforcing court.⁵³¹ However, objections under Article V(2) are explicitly made subject to the law of the enforcing court.⁵³² Parties must keep these distinctions in mind when making their various objections.

Before discussing each of the individual objections to enforcement under the New York Convention, it is useful to present Article V in its entirety.⁵³³ It reads as follows:

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

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

528. *See id.*

529. *See id.* art. V.

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

531. *See id.*

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

533. *See id.* art. V.

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

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

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.⁵³⁴

Now it is time to discuss each of the individual subsections in turn.

a. Article V(1)(a) – Incapacity of the Parties or Invalidity of the Agreement

The first means of objecting to enforcement of a foreign arbitral award under the New York Convention involves the incapacity of the parties or the invalidity of the agreement.⁵³⁵ Notably, either or both of these issues may have been raised earlier in the proceeding. The matter may have been determined in a U.S. or other court, or it may have been considered by the arbitral tribunal, depending on how questions regarding *competence-competence* and gateway issues played out.⁵³⁶

Although the parties are free to raise this issue again at the time of enforcement, a U.S. judge may conclude that an earlier judicial determination on this issue, by a U.S. or other court, precludes a similar objection in an enforcement proceeding.⁵³⁷ The enforcing court may also choose to defer to the arbitral tribunal on this issue, although the amount of deference given to the arbitrators' decision may depend on whether the parties agreed to have matters such as these determined by the arbitrators.⁵³⁸

The most difficult issue arising under Article V(1)(a) involves the determination of the applicable law.⁵³⁹ Parties very seldom designate the law under which

534. *Id.*

535. *See id.* art. V(1)(a).

536. *See supra* notes 256-88 and accompanying text.

537. *See Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr, S.A.*, 377 F.3d 1164, 1171-72 (11th Cir. 2004); BORN, *supra* note 9, at 2794-95, 2919-29.

538. *See Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661-62 (2d Cir. 2005); *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1293 (11th Cir. 2004); *Telenor Mobile Comm. AS v. Storm LLC*, 524 F. Supp. 2d 332, 350-51 (S.D.N.Y. 2007), *aff'd*, 584 F.3d 396 (2d Cir. 2009); BORN, *supra* note 9, at 2790-91.

539. *See New York Convention*, *supra* note 22, art. V(1)(a).

the arbitration agreement is to be construed, although they often include a general choice of law provision elsewhere in the contract.⁵⁴⁰ The question, therefore, becomes whether a general choice of law provision should be construed to govern issues relating to incapacity or invalidity in an Article V(1)(a) analysis.⁵⁴¹

U.S. courts have responded to this question in a variety of ways. Some judges apply the law designated in the general choice of law provision to questions arising under Article V(1)(a) while others apply federal common law in an attempt to ensure uniformity of treatment across the nation.⁵⁴²

Both approaches are problematic. First, using the law designated in the general choice of law provision fails to take heed of the principle of separability.⁵⁴³ Indeed, the U.S. Supreme Court has stated in a similar context that “the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration; neither sentence intrudes upon the other.”⁵⁴⁴ Therefore, general choice of law provisions should be construed to apply only to substantive issues, absent the parties’ agreement to the contrary.

Second, it is difficult to justify the application of federal common law to the question of validity and incapacity simply because the motion to enforce the arbitral award is before a U.S. court.⁵⁴⁵ Indeed, to do so ignores the express language of Article V(1)(a), which states that issues of invalidity or incapacity should be determined by the law of the arbitral seat when the parties have not agreed on an applicable law to address that issue.⁵⁴⁶ Since the arbitral seat is different than the place of enforcement, U.S. law cannot apply to these issues.

Of these various options, the best approach is to follow the express language of Article V(1)(a) and apply the law of the arbitral seat to questions involving incapacity and invalidity, unless the parties have very clearly designated another law to address that specific issue.⁵⁴⁷ Furthermore, the court has the discretion to enforce the award, even if the objecting party has met the technical requirements of Article V(1)(a).⁵⁴⁸

540 See BORN, *supra* note 9, at 443-46; FOUCHARD GAILLARD GOLDMAN, *supra* note 138, ¶ 425.

541. See New York Convention, *supra* note 22, art. V(1)(a).

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

543. See *supra* notes 256-88 and accompanying text.

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

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

546. See New York Convention, *supra* note 22, art. V(1)(a) (referring to “the law to which the parties have subjected [the issue] or, failing any indication thereon, under the law of the country where the award was made”); BORN, *supra* note 9, at 453.

547. See New York Convention, *supra* note 22, art. V(1)(a); *AO Techsnabexport v. Globe Nuclear Serv. & Supply, Ltd.*, 656 F. Supp. 2d 550, 558 (D. Md. 2009), *aff’d*, 404 Fed. Appx. 793 (4th Cir. 2010) (applying Swedish law to validity questions relating to arbitration seated in Sweden); *Spier v. Calzaturificio Tecnica, SPA*, 71 F. Supp. 2d 279, 283 (S.D.N.Y. 1999) (applying Italian law to validity questions relating to arbitration seated in Italy).

548. See New York Convention, *supra* note 22, art. V(1)(a); *Four Seasons Hotel & Resorts, B.V. v. Consorcio Barr, S.A.*, 533 F.3d 1349, 1352 n. 5 (11th Cir. 2008).

Some debate exists regarding the burden of demonstrating the existence of a valid arbitration agreement in disputes arising under Article V(1)(a).⁵⁴⁹ In particular, questions arise as to whether the award-debtor or the award-creditor has the burden of meeting the form requirements reflected in Article II of the New York Convention.⁵⁵⁰ However, the language of Article V(1) clearly puts the burden of proving the grounds for objection on the award-debtor, stating “[r]ecognition . . . may be refused, at the request of the party against whom [the award] is invoked, only if that party furnishes . . . proof” that one of the various bases for objection is met.⁵⁵¹ Thus, most national courts and commentators take the view that award-debtor has the burden of proof regarding the form requirements of Article II of the Convention, with the award-creditor simply being required to provide a document purporting to be the agreement in writing referred to in Article IV.⁵⁵²

b. Article V(1)(b) – Notice and Presentation of One Party’s Case

The second ground for objection under article V of the New York Convention involves violations of core due process rights concerning notice and the ability to present one’s case.⁵⁵³ Unlike Article V(1)(a), Article V(1)(b) does not indicate the country whose law is to control this issue.⁵⁵⁴ Thus, commentators have taken the position that “Article V(1)(b) is best viewed as providing the basis for uniform international standards of procedural fairness,” which is to be “applied in light of the Convention’s general pro-enforcement objectives.”⁵⁵⁵

This is not to say that some U.S. courts have not looked to domestic notions of due process when considering objections made under Article V(1)(b), for they have.⁵⁵⁶ However, the character of the arbitration as an international proceeding must be considered, even when domestic legal principles are taken into account.⁵⁵⁷ Therefore, it is enough if the broad principles of due process and procedural fairness are met, even if the precise means by which these objectives are fulfilled differ from procedures used in U.S. courts.⁵⁵⁸ Indeed, the fact that “[t]he Convention is a global, international instrument, to which states with widely-divergent domestic litigation systems are party . . . leaves no room for individual Contracting States to impose their domestic litigation procedures as requirements of procedural fairness under Article V(1)(b).”⁵⁵⁹ Therefore, this objection is to be viewed from more of an international perspective, rather than a national one.

549. See New York Convention, *supra* note 22, art. V(1)(a).

550. See *id.* art. II; BORN, *supra* note 9, at 2705-06.

551. New York Convention, *supra* note 22, art. V(1).

552. See *id.* arts. II, IV; BORN, *supra* note 9, at 2706.

553. See New York Convention, *supra* note 22, art. V(1)(b).

554. See *id.* art. V(1)(a)-(b).

555. BORN, *supra* note 9, at 2738; see also New York Convention, *supra* note 22, art. V(1)(b).

556. See New York Convention, *supra* note 22, art. V(1)(b); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 298 (5th Cir. 2004).

557. See *Emp’rs. Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 943-44 (7th Cir. 1999).

558. See *id.*; BORN, *supra* note 9, at 2744.

559. BORN, *supra* note 9, at 2744; see also New York Convention, *supra* note 22, art. V(1)(b).

c. Article V(1)(c) – Difference Not Contemplated By or Within the Terms of the Submission of Arbitration or Beyond the Scope of the Submission to Arbitration

The third ground for objection to the enforcement of foreign arbitral awards under the New York Convention focuses on whether the tribunal has in some way exceeded or abused its jurisdiction, either by going beyond the matters that were submitted to arbitration (an act considered to be *extra petita* or *ultra petita* in the international realm) or by failing to address the matters that were submitted to arbitration (an act considered to be *infra petita*).⁵⁶⁰ Although the authorities are split as to whether the New York Convention addresses acts that are *infra petita*, Article V(1)(c) is a relatively straightforward provision leading to few conceptual difficulties.⁵⁶¹

Most U.S. courts construe the language narrowly, since arbitral tribunals are presumed to have acted within the scope of their duties.⁵⁶² This is consistent with party expectation and international practice, since “most arbitration agreements and institutional rules leave the arbitral tribunal substantial discretion in implementing their terms.”⁵⁶³

One source of potential confusion involves challenges to awards “based on objections to the arbitrators’ substantive contract interpretations or legal conclusions, or to the arbitrators’ procedural rulings.”⁵⁶⁴ Neither allegation can properly be made under Article V(1)(c), since substantive objections to the award cannot be made anywhere under Article V and arguments about the fairness of the arbitral procedure should more properly be made under Articles V(1)(b) or V(1)(d).⁵⁶⁵

d. Article V(1)(d) – Composition of the Tribunal or Arbitral Procedure

The fourth ground for objection to enforcement of a foreign arbitral award under the New York Convention is one of the most important.⁵⁶⁶ This provision deals with the composition of the tribunal and the arbitral procedure, both issues that are considered fundamental to the concept of international commercial arbitration.⁵⁶⁷

Application of Article V(1)(d) is relatively straightforward in cases where the parties have agreed to have their arbitration governed by a set of institutional rules.⁵⁶⁸ In those instances, the relevant standards regarding arbitral procedure and the composition of the arbitral tribunal are typically stated in the relevant

560. See New York Convention, *supra* note 22, art. V(1)(c); BORN, *supra* note 9, at 2798-99.

561. See New York Convention, *supra* note 22, art. V(1)(c).

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

563. BORN, *supra* note 9, at 2800.

564. *Id.*

565. See New York Convention, *supra* note 22, art. V.

566. See *id.* art. V(1)(d); see BORN, *supra* note 9, at 2764-74; LEW ET AL., *supra* note 7, ¶¶ 26-94 to 26-97.

567. See New York Convention, *supra* note 22, art. V(1)(d).

568. See *id.*

rules.⁵⁶⁹ When considering whether and to what extent the underlying arbitration complied with the various provisions, courts can look not only to the language of the rules themselves, but also to previously published arbitral awards (particularly those construing the rules in question, although analogies can be drawn from similar provisions from other arbitral institutions).⁵⁷⁰ It is also possible for courts to consider scholarly commentary, since these sources provide important insights into how arbitral tribunals and institutions – who are the entities entrusted by the parties to make these procedural decisions and who know the rules best – view the issues at stake.⁵⁷¹

The situation is slightly more complicated when the parties have neither agreed to abide by any particular set of arbitral rules nor explicitly addressed the disputed issue in their arbitration agreement.⁵⁷² In these instances, questions regarding the arbitral procedure and composition of the arbitral tribunal are governed by the law of the arbitral seat.⁵⁷³ Notably, this means enforcing courts should look to the arbitration law in place at the seat of arbitration, not its national rules of civil procedure, which are not applicable in arbitration absent very clear party agreement.⁵⁷⁴ Thus, the law of the enforcing court is irrelevant to the determination of these issues.

To be actionable, a procedural irregularity must be relatively egregious. Indeed, some U.S. courts faced with objections to enforcement of an arbitral award under Article V(1)(d) have stated that “because of the clear ‘pro-enforcement bias’ of the New York Convention, it is appropriate to set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party.”⁵⁷⁵ Furthermore, U.S. courts give a high degree of deference to the decisions of the arbitrators.⁵⁷⁶

569. See BORN, *supra* note 9, at 2765.

570. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (noting arbitrators are “comparatively better able to interpret and to apply” the rules of their arbitral institution than are courts); *China Minmetals Materials Import & Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 288-89 n. 14 (2d Cir. 2003) (considering similarities between different rule sets); see also STRONG, *supra* note 7, at 83-84; Strong, Research, *supra* note 1, at 142-45.

571. See *Howsam*, 537 U.S. at 85; see also STRONG, *supra* note 7, at 71-137; Strong, Research, *supra* note 1, at 142-45.

572. See *Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc.*, 403 F.3d 85, 90, 91 (2d Cir. 2005) (upholding parties’ agreement in case where no institutional rules applied); BORN, *supra* note 9, at 2770-74.

573. See New York Convention, *supra* note 22, art V(1)(d); *Pactrans Air & Sea, Inc. v. China Nat’l Chartering Corp.*, No. 3:06-cv-369/RS-EMT, 2010 WL 1332085, at *1-2 (N.D. Fla. Mar. 29, 2010).

574. See *Matter of Arbitration Between InterCarbon Bermuda, Ltd. and Caltex Trading & Transport Corp.*, 146 F.R.D. 64, 72 (S.D.N.Y. 1993).

575. *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936, 945 (S.D. Tex. 2001); see also New York Convention, *supra* note 22, art. V(1)(d).

576. See *Lagstein v. Certain Underwriters at Lloyd’s, London*, 607 F.3d 634, 643-44 (9th Cir. 2010) *cert. denied* 131 S.Ct. 832 (2010); *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, No. 90-0169, 1992 WL 122712, at *5 (D.D.C. May 29, 1992) (stating that “[t]he Court does not believe that section 1(d) of Article V was intended, as CBG argues, to permit reviewing courts to police every procedural ruling made by the Arbitrator and to set aside the award if any violation of ICC procedures is found”); BORN, *supra* note 9, at 2768.

*e. Article V(1)(e) – Award Not Yet Binding or Set Aside by a
Competent Authority*

The final ground for objection under Article V(1) of the New York Convention involves an award that is not yet binding or that has been set aside by a competent authority.⁵⁷⁷ In general, an award is generally considered “‘binding’ for the purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being ‘binding.’”⁵⁷⁸

Concerns about awards being “not yet binding” can arise in the context of motions to enforce partial or interim awards.⁵⁷⁹ The analysis in these cases focuses on whether immediate enforcement is necessary to protect the final award or whether the parties have expressed an interest in immediate resolution of this particular issue.⁵⁸⁰ In determining whether an award should be considered final, courts typically look past the nomenclature of “partial” or “interim” awards and focus on the substance of the award.⁵⁸¹

The second element of Article V(1)(e) addresses whether the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”⁵⁸² This language is familiar as the genesis for the U.S. distinction between courts with primary and secondary jurisdiction, and for the conclusion that only courts of primary jurisdiction are considered capable of setting aside an arbitral award.⁵⁸³ This means that decisions rendered by courts with secondary jurisdiction have no effect elsewhere in the world, and enforcing courts should give those decisions no regard in the enforcement analysis.⁵⁸⁴

As with all other grounds for non-enforcement, Article V(1)(e) is framed in discretionary terms.⁵⁸⁵ Questions therefore arise as to the criteria that should be used to determine whether an award that has been set aside in the primary jurisdiction should nevertheless be enforced in the United States. These factors may also play into whether a U.S. court considers it proper to stay enforcement proceedings pending a decision by a court with primary jurisdiction on a motion to vacate.⁵⁸⁶

The New York Convention provides no guidance on the issues that should be considered in an Article V(1)(e) determination.⁵⁸⁷ Furthermore, no consensus

577. See New York Convention, *supra* note 22, art. V(1)(e).

578. *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 958 (S.D. Ohio 1981) (citation omitted); see BORN, *supra* note 9, at 2818-19.

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

580. See *id.* at 719-20.

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

582. New York Convention, *supra* note 22, art. V(1)(e).

583. See *supra* notes 222-55 and accompanying text.

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

585. See New York Convention, *supra* note 22, art. V(1)(e) (noting recognition and enforcement “may be refused”).

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

587. See *id.* art. V(1)(e).

exists internationally as to how enforcing courts should treat an award that has been set aside by a competent court.⁵⁸⁸

U.S. courts demonstrate some consistency in this area, although a few outlying opinions exist. The first U.S. case to deal with this issue was *Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt*, which ultimately enforced an Egyptian arbitral award notwithstanding the fact that an Egyptian court had nullified the award on the grounds that the arbitral tribunal had misapplied Egyptian law.⁵⁸⁹ The U.S. judge pointed to several aspects of the Egyptian judicial process that raised concerns about the legitimacy of the order nullifying the award. For example, the Egyptian decision appeared to espouse a “suspicious view of arbitration” that reflected “precisely the type of technical argument that U.S. courts are not to entertain when reviewing an arbitral award.”⁵⁹⁰ Furthermore, the Egyptian court’s decision was made in spite of a contractual provision stating that Egypt would not seek review of the award.⁵⁹¹ This suggested that non-enforcement of the award by the U.S. court “would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under” the laws and courts of the arbitral seat.⁵⁹²

Because the Egyptian court acted in manner contrary to both a fundamental U.S. public policy prohibiting substantive judicial review of arbitral awards as well as the parties’ express agreement waiving any such review, the court in *Chromalloy* held that the decision to set aside the award at the place where it was rendered was not a sufficient reason to block enforcement of the award in the United States.⁵⁹³ Instead, the U.S. court exercised its discretionary power and allowed enforcement of the award, despite the fact that the objection technically met the criteria for non-enforcement outlined in Article V(1)(e).⁵⁹⁴

One important aspect of *Chromalloy* was its emphasis on the fact that a court faced with an objection under Article V(1)(e) of the Convention has the discretion to enforce or not to enforce the award.⁵⁹⁵ Other U.S. courts have also recognized this discretionary power, which is explicitly reflected in Article V(1)(e).⁵⁹⁶

One U.S. court took the unusual view that there is a mandatory duty to deny enforcement of an award that has been set aside at the arbitral seat.⁵⁹⁷ Not only does this case contravene the express provisions of the New York Convention and the weight of U.S. authority, but its central holding that an award that has been set aside no longer “exists” to be enforced elsewhere has been expressly denied by

588. See BORN, *supra* note 9, at 2677.

589. 939 F. Supp. 907, 911 (D.D.C. 1996); BORN, *supra* note 9, at 2683-84.

590. See *Chromalloy*, 939 F. Supp. at 911.

591. See *id.*

592. *Id.*

593. See *id.*

594. See New York Convention, *supra* note 22, art. V(1)(c); *Chromalloy*, 939 F. Supp. at 912.

595. See *id.*

596. See New York Convention, *supra* note 22, art. V(1)(c) (stating enforcement “may be refused”); *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 367 (5th Cir. 2003); *Baker Marine Ltd. v. Chevron Ltd.*, 191 F.3d 194, 197 n.3 (2d Cir. 1999); BORN, *supra* note 9, at 2684-85.

597. See *Termorio S.A. E.S.P. v. Eltranta S.P.*, 487 F.3d 928, 936 (D.C. Cir. 2007).

other judicial authorities.⁵⁹⁸ Notably, the rationale enunciated by the court in *Termorio* has not been adopted elsewhere in the United States.⁵⁹⁹

Thus, the question remains as to the criteria that should be used to determine whether an award that has been set aside at the arbitral seat should be enforced in the United States. *Chromalloy* suggests that judges considering this issue may find it useful to consider the grounds upon which the set-aside was founded.⁶⁰⁰ If the reason for the set-aside is reflected in Article V of the New York Convention, then it may be appropriate to deny enforcement in the United States as well.⁶⁰¹ On the other hand, annulments that appear to be based on “parochial” or self-protective rationales might not be considered sufficient grounds for non-enforcement elsewhere.⁶⁰² Highly technical readings of national law that do not involve “substantial prejudice to the complaining party” might also be deemed insufficient grounds for non-enforcement in the United States.⁶⁰³

Only allowing non-enforcement in cases where the set-aside is based on an Article V rationale is particularly useful because it does not allow one state to hold the entire international arbitral regime hostage.⁶⁰⁴ It also supports the notion that international enforcement may take place immediately upon the award’s being rendered, without the need for confirmation or *exequatur* from the court at the arbitral seat, a concept that is central to the regime created by the New York Convention.⁶⁰⁵

f. Article V(2)(a) – Subject Matter Not Capable of Settlement by Arbitration

The preceding five subsections focused on objections to enforcement arising under Article V(1) of the New York Convention, all of which may be raised by “the party against whom [the award] is invoked.”⁶⁰⁶ Parties may also make objections under Article V(2), although enforcing courts may also raise these issues *sua sponte*.⁶⁰⁷ The court’s power to deny enforcement of a foreign arbitral award under Article V(2) is again discretionary, rather than mandatory.⁶⁰⁸

598. See New York Convention, *supra* note 22, art. V(1)(c); Judgment of 14 January 1997, 1997 REV. ARB. 395 (Paris Cour d’appel), Note, Fouchard, *as quoted in* BORN, *supra* note 9, at 2679.

599. See *Termorio*, 487 F.3d at 936. Furthermore, the Colombian court that nullified the original award is no longer able to take this sort of action, based on changes to the Colombian law of international arbitration. See Strong, Colombia, *supra* note 78, at 103.

600. See *Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt*, 939 F. Supp. 907, 911-12 (D.D.C. 1996).

601. See New York Convention, *supra* note 22, art. V; *Spier v. Calzaturificio Tecnica, SPA*, 71 F. Supp. 2d 279, 287 (S.D.N.Y. 1999) (denying enforcement where the underlying award was determined to be in excess of jurisdiction); BORN, *supra* note 9, at 2685.

602. See *Chromalloy*, 939 F. Supp. at 911-12.

603. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936, 945 (S.D. Tex. 2001) (concerning Article V(1)(d)).

604. See New York Convention, *supra* note 22, art. V.

605. See *id.*; see also BORN, *supra* note 9, at 2826; *supra* notes 498-509 and accompanying text.

606. New York Convention, *supra* note 22, art. V(1).

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

608. See *id.* (stating enforcement “may . . . be refused”).

The first of the two grounds for non-enforcement found in Article V(2) deals with arbitrability in the international sense.⁶⁰⁹ As discussed above, the international definition of arbitrability focuses on whether a particular country permits certain types of disputes to be resolved in arbitration.⁶¹⁰ Article V(2)(a) therefore protects the national interests of both the enforcing state and the non-prevailing party by allowing non-enforcement of an award in cases where “the subject matter of the difference is not capable of settlement by arbitration” under the law of the enforcing state.⁶¹¹

The language of Article V(2)(a) bears a striking resemblance to that found in Article II(1), which contains contracting states’ affirmative obligation to recognize arbitration agreements “concerning a subject matter capable of settlement by arbitration.”⁶¹² The two provisions’ linguistic similarities have led authorities to conclude that questions of arbitrability should be addressed in a parallel manner.⁶¹³ In other words, if the subject matter of an arbitration agreement cannot support a motion to compel arbitration, it cannot support a motion to enforce an award arising out of an arbitration based on that agreement, and vice versa.

Article V(2)(a) recognizes a concern voiced by critics of international commercial arbitration that the procedure allows parties to circumvent mandatory provisions of law simply by seating their arbitrations in other countries.⁶¹⁴ By allowing judges to consider foreign arbitral awards in light of the enforcing state’s own national laws regarding arbitrability, Article V(2)(a) provides courts with an important protective mechanism.⁶¹⁵

Nevertheless, the New York Convention reflects a strong bias towards enforcement of arbitral awards, which means that this provision is to be construed narrowly, as are other grounds for objection to enforcement under the New York Convention.⁶¹⁶ Furthermore, “it is essential . . . to distinguish between matters which are non-arbitrable in a domestic context and those which are non-arbitrable in an international context. In many jurisdictions, non-arbitrability rules are broader in domestic than in international matters.”⁶¹⁷ Indeed, the U.S. Supreme Court has recognized that there are times when it is “necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.”⁶¹⁸ Restrictions on arbitrability are usually outlined in the national law on arbitration. However, the FAA is silent on this point, which means that federal judges must look to case law, policy and substantive statutes to discern the arbitrability of various matters.⁶¹⁹

As it turns out, case law demonstrates a clear and consistent approach to arbitrability, with all claims being deemed arbitrable unless Congress “expressly di-

609. See *id.* art. V(2)(a); see *supra* notes 256-88 and accompanying text.

610. See *supra* notes 256-88 and accompanying text.

611. New York Convention, *supra* note 22, art. V(2)(a).

612. *Id.* arts. II(1), V(2)(a).

613. See BORN, *supra* note 9, at 2863.

614. See New York Convention, *supra* note 22, art. V(2)(a).

615. See *id.*

616. See *id.*; Saudi Iron & Steel Co. v. Stmcor USA Inc., No. 97 CIV 5976(DLC), 1997 WL 642566, at *3 (S.D.N.Y. Oct. 17, 1997); BORN, *supra* note 9, at 2730.

617. BORN, *supra* note 9, at 775.

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

619. See 9 U.S.C. §§ 1-307 (2011); BORN, *supra* note 9, at 781.

rected” a contrary result.⁶²⁰ Furthermore, enforcement of arbitration agreements and awards may be appropriate in the international realm “even assuming that a contrary result would be forthcoming in a domestic context.”⁶²¹ Therefore, to be non-arbitrable under Article V(2)(a), matters must reflect a “special national interest vested in their resolution.”⁶²²

Together, these and other precedents indicate that a vast array of types of disputes are considered arbitrable in the United States. Indeed, the United States is known as reflecting one of the broadest approaches to arbitrability in the world.⁶²³

g. Article V(2)(b) – Public Policy

The final ground for non-enforcement of a foreign arbitral award under the New York Convention is one of the most cited as well as one of the least successful.⁶²⁴ Article V(2)(b) allows (but does not require) courts to refuse recognition and enforcement of foreign arbitral awards based on the public policy of the state where enforcement is sought.⁶²⁵

In the United States, as elsewhere, the public policy exception is given a narrow reading.⁶²⁶ Furthermore, even though the Convention refers clearly to the public policy of the enforcing state:

it has been a consistent theme of recognition decisions under Article V(2)(b) to interpret national public policies in a manner that is consistent, insofar as possible, with the objectives of the Convention and the public policies and interests of other Contracting States. This approach has manifested itself in two principal ways: (1) the application of “international” public policies, rather than domestic public policies, under Article V(2)(b), and (b) the exercise of a substantial degree of restraint and moderation in the application of public policies under Article V(2)(b).⁶²⁷

Thus, U.S. courts have noted that:

[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of “public policy.” Rather, a circumscribed public policy doctrine was contemplated by the Convention’s

620. See *Mitsubishi Motors*, 473 U.S. at 639-40 n. 21.

621. See *id.* at 627.

622. *Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier (RATKA)*, 508 F.2d 969, 975 (2d Cir. 1974); see New York Convention, *supra* note 22, art. V(2)(a).

623. See *supra* notes 256-88 and accompanying text.

624. See New York Convention, *supra* note 22.

625. See *id.* art. V(2)(b); BORN, *supra* note 9, at 2827-28.

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

627. BORN, *supra* note 9, at 2833; see also New York Convention, *supra* note 22, art. V(2)(b).

framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this *supranational* emphasis.⁶²⁸

Other U.S. courts have limited application of Article V(2)(b) to “only those circumstances ‘where enforcement would violate our most basic notions of morality and justice.’”⁶²⁹ Notably, Article V(2)(b) does not permit non-enforcement based on “erroneous legal reasoning or misapplication of law.”⁶³⁰

4. Preclusive Effects of an Arbitral Award

The preceding subsections discuss motions to vacate, confirm, and enforce arbitral awards, which are perhaps the most common types of judicial proceeding to arise after the conclusion of an arbitration. However, these are not the only matters that can be brought to the attention of a U.S. court after an international arbitral proceeding ends. For example, questions may exist about the preclusive effects of issues that have been addressed in an international arbitration.

The matter can arise in one of two ways: either under the doctrine of *res judicata* (claim preclusion) or under principles relating to issue preclusion.⁶³¹ The classic formulation of these concepts operate between the original parties to the suit, with *res judicata* forbidding the relitigation of a particular claim between the parties and issue preclusion preventing the relitigation of a particular issue of law or fact. However, issue preclusion may also be asserted, offensively or defensively, in disputes involving a non-party to an arbitration.

Although principles of preclusion clearly operate in international commercial arbitration, there is no consensus on the precise rules that apply. The New York Convention is silent on this issue, although it is certain that an award should be given some preclusive value, given language indicating that Contracting States are not only to “enforce” arbitral awards but that such awards are to be recognized as “binding.”⁶³² The FAA also fails to address this matter, leaving U.S. courts to rely primarily on case law.⁶³³

Although there is not great deal of authority in this area of law, analogies are often made to preclusive principles developed in litigation. Thus, for example, “[u]nder [the doctrine of] issue preclusion, also known as collateral estoppel, ‘once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.’”⁶³⁴ This proposition applies equally in

628. *Parsons & Whittemore Overseas Co. v. Societe Generale De L’Industrie Du Papier (RATKA)*, 508 F.2d 969, 974 (2d Cir. 1974) (emphasis added); see also New York Convention, *supra* note 22, art. V(2)(b).

629. *Telcelor Mobile Commc’n AS v. Storm LLC*, 584 F.3d 396, 411 (2d Cir. 2009) (citation omitted); see also New York Convention, *supra* note 22, art. V(2)(b).

630. *Karaha Bodas Co.*, 364 F.3d at 306; see also New York Convention, *supra* note 22, art. V(2)(b).

631. See BORN, *supra* note 9, at 2883.

632. New York Convention, art. III; BORN, *supra* note 9, at 2891.

633. See 9 U.S.C. §§ 1-307 (2011).

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

the arbitral realm, since “an arbitrator generally has the power to determine whether a prior award is to be given preclusive effect.”⁶³⁵

In proper circumstances, an arbitral award may have preclusive effect over a non-party.⁶³⁶ Furthermore, there is no requirement that the award be confirmed, nor that the tribunal have resolved every outstanding issue, so long as the award is sufficiently final for issue preclusion purposes.⁶³⁷ Even if an award does not have preclusive power, it may still be persuasive in a later dispute.⁶³⁸

Issue preclusion is not the only type of preclusion that can arise in the arbitral realm. Arbitral awards are regularly considered to have *res judicata* effect as to all claims heard by the arbitrator.⁶³⁹ Indeed, such an approach is required if arbitration is to constitute a final and binding dispute resolution mechanism. However, granting an award *res judicata* status does not mean that a party may not object to the enforcement of that award under the New York Convention.⁶⁴⁰

Although courts recognize the *res judicata* value of an arbitral award, the principle of claim preclusion does not operate in precisely the same way in arbitration that it does in litigation. This distinction relates to the fact that arbitration, unlike litigation, is a contractual construct that can limit the claims brought in a particular proceeding.⁶⁴¹ Nevertheless, courts have applied the concept of claim preclusion in the arbitral context.⁶⁴²

Finally, there is some debate in the international arbitral community as to whether an arbitral award has preclusive effect immediately upon its being rendered by an arbitral tribunal or whether some judicial action must first take place. In the United States, an award would certainly have preclusive effect after being confirmed under the FAA, since the award would then hold the status of a civil judgment as well as an arbitral award.⁶⁴³ At one time, courts appeared hostile to granting *res judicata* value to anything other than a confirmed award.⁶⁴⁴ However, that approach seems to have changed, such that even an unconfirmed award can now have preclusive effect in U.S. courts.⁶⁴⁵

635. *Id.* (citation omitted) (noting some exceptions, as in cases where the underlying award is being used in support of a matter involving public policy).

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

637. See *Asahi Glass Co., Ltd. v. Toledo Eng’g Co., Inc.*, 505 F. Supp. 2d 423, 430-31 & n. 2 (N.D. Ohio 2007) (involving an ICC arbitration and discussing both claim and issue preclusion).

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

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

640. See New York Convention, *supra* note 22; *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992).

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

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

643. See 9 U.S.C. §§ 207, 302 (2011).

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

645. See *id.* at 267-68; *Asahi Glass Co., Ltd. v. Toledo Eng’g Co., Inc.*, 505 F. Supp. 2d 423, 430-31 & n. 2 (N.D. Ohio 2007); BORN, *supra* note 9, at 2897.

V. SPECIAL ISSUES REGARDING PARTIES TO INTERNATIONAL COMMERCIAL ARBITRATION

The preceding section focused on the various types of actions that can be taken before, during, and after an international commercial arbitration. However, some types of legal issues cannot be tied to specific procedural motions. This is the case with questions regarding who may be named as a proper party to an international commercial arbitration. While these sorts of issues often arise when a proceeding is being initiated, they are perhaps equally likely to be raised during or after the conclusion of the arbitration. The following discussion therefore addresses special problems associated with actions involving non-signatories, multi-party arbitrations, and state actors.

A. Non-signatories

Many lawyers are already familiar with issues regarding non-signatories in arbitration as a result of debates arising in domestic disputes. The basic principle that only those who have signed the arbitration agreement will be bound to its terms is the same regardless of whether the arbitration is national or international in scope.⁶⁴⁶ However, putting this principle into practice can be somewhat difficult,⁶⁴⁷ and international proceedings give rise to a few unique quirks that need to be discussed.

Disputes involving non-signatories always begin by asking whether the alleged non-signatory has signed the relevant document or documents. Under the New York Convention, an arbitration agreement is only enforceable if it involves an “agreement in writing.”⁶⁴⁸ This term is further defined as “includ[ing] an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”⁶⁴⁹

As straightforward as this definition may seem, U.S. circuit courts have split sharply on issues relating to the writing requirement in international commercial arbitration.⁶⁵⁰ For example, circuits take different approaches to the question of whether the relevant document or documents need to be signed by both parties.⁶⁵¹ Additional confusion exists as to whether and to what extent the parties can rely on the definition of a written agreement that is reflected in Chapter 2 of the FAA rather than the definition contained in Article II(2) of the New York Convention.⁶⁵²

646. See BORN, *supra* note 9, at 1142.

647. See *id.*

648. New York Convention, *supra* note 22, art. II(1).

649. *Id.* art. II(2).

650. See Strong, Writing, *supra* note 168, at 52-70.

651. Compare Kahn Lucas Lancaster, Inc. v. Lark Int'l, Ltd., 186 F.3d 210, 218 (2d Cir. 1999), *partially abrogated on other grounds*, Sarhank Grp. v. Oracle Corp., 404 F.3d 657, 660 n.2 (2d Cir. 2005) with Sphere Drake Ins. PLC v. Marine Towing, Inc., 16 F.3d 666, 669 (5th Cir. 1994); see also Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 92 (2d Cir. 1999).

652. See New York Convention, *supra* note 22, art. II(2); 9 U.S.C. §§ 2, 202 (2011); Sourcing Unlimited, Inc. v. Asimco Int'l, Inc., 526 F.3d 38, 45 (1st Cir. 2008); Strong, Writing, *supra* note 168, at 52-70.

Interestingly, the United States is not the only country to struggle with the writing requirement under the New York Convention.⁶⁵³ Inconsistencies abound across national borders, although the U.S. approach shows perhaps the widest degree of variation within a single country.⁶⁵⁴ Given the high need for predictability in this area, the international arbitral community has attempted to resolve a number of issues relating to the writing requirement through a formal recommendation issued by UNCITRAL in 2006 (UNCITRAL Recommendation).⁶⁵⁵ In drafting this document, UNCITRAL took a variety of factors into account, including the increasing prevalence of electronic commerce, communications and signatures, and recognized that the drafters of the New York Convention had taken the view that “greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes.”⁶⁵⁶ The UNCITRAL Recommendation, therefore, suggests a variety of measures that can be taken by courts to harmonize the way in which the Convention’s writing requirement is interpreted worldwide.⁶⁵⁷

In many ways, the UNCITRAL Recommendation is consistent with practices already advocated by some U.S. courts.⁶⁵⁸ However, explicit reliance on the UNCITRAL Recommendation in the future would not only comply with international legal norms but with U.S. Supreme Court precedent indicating that it is appropriate, when construing an international treaty that has been incorporated into domestic U.S. law, to consider “‘the postratification understanding’ of signatory states.”⁶⁵⁹

Regardless of what analytic approach is ultimately used, it will sometimes be the case that the party whose participation is under scrutiny will be unable to meet the necessary requirements regarding an “agreement in writing.”⁶⁶⁰ However, it is still possible for such a party to be brought into an arbitration proceeding.

Domestic U.S. law has addressed this issue with some frequency, and U.S. courts have developed a variety of methods of allowing or requiring entities who are not formal signatories to an arbitration agreement to rely on the terms of that agreement. These measures include theories involving “agency (actual and apparent), alter ego, implied consent, ‘group of companies,’ estoppel, third-party beneficiary, guarantor, subrogation, legal succession and ratification of assumption.”⁶⁶¹

653. See New York Convention, *supra* note 22, art. II(2).

654. See Note by the Secretariat, UNCITRAL, Working Group II (Arbitration), Settlement of Commercial Disputes: Preparation of Uniform Provisions on Written Form for Arbitration Agreements, U.N. Doc. A/CN.9/WG.II/WP.139 (14 Dec. 2005) ¶¶ 11-21; Strong, Writing, *supra* note 168, at 72-73.

655. See UNCITRAL, Recommendation Regarding the Interpretation of Article II, Paragraph 2, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/61/7 (July 7, 2006) [hereinafter UNCITRAL Recommendation].

656. *Id.*; see also New York Convention, *supra* note 22.

657. See UNCITRAL Recommendation, *supra* note 655.

658. Compare *id.* (suggesting, *inter alia*, that that “the circumstances described” in Article II(2) regarding the definition of an “agreement in writing” not be considered “exhaustive”) with *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, No. 3:95CV2362, 2000 WL 435566, at *11 (D. Conn. Mar. 14, 2000) (noting Article II(2) should be read broadly to effectuate the purpose of the Convention).

659. *McDellin v. Texas*, 552 U.S. 491, 507 (2008) (citation omitted); see also UNCITRAL Recommendation, *supra* note 655; Strong, Writing, *supra* note 168, at 85.

660. See New York Convention, *supra* note 22, art. II(2).

661. *Thomson-CSF, SA v. American Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995); BORN, *supra* note 9, at 1137-38, 1142-1211.

A number of these concepts have been considered in international disputes as well.⁶⁶² Although other nations have used these and other methods of binding non-signatories to arbitration, the United States is one of the most lenient jurisdictions in the world when it comes to joining non-signatories to arbitration.⁶⁶³ As such, U.S. courts need to be careful not to extend domestic jurisprudence too far into the international realm, for although other countries agree, as a general proposition, that the benefits and burdens of an arbitration agreement can apply to persons other than those named in the document, problems can arise if the United States deviates too far from international norms.

Difficulties would typically arise at the time of enforcement. For example, if a U.S. court compels arbitration with a non-signatory, a court in another country could take the view that the agreement in question did not constitute an “agreement in writing” vis-à-vis the non-signatory and that the New York Convention, therefore, does not apply to any award arising out of that agreement.⁶⁶⁴ That could leave the prevailing party without the means of enforcing the award in that country and possibly other countries as well.

Objections could also be raised under Article V(1)(d) of the New York Convention.⁶⁶⁵ For instance, a court in another country could take the view that arbitration with the non-signatory was contrary to the arbitral procedure agreed to by the parties.⁶⁶⁶ There may be some leeway here if the arbitration took place in the United States, since objections under Article V(1)(d) of the Convention are considered “in accordance with the law of the country where the arbitration took place” whenever the parties have not agreed otherwise.⁶⁶⁷ However, U.S. courts technically have the ability to compel arbitrations seated both in the United States and elsewhere, and the law at the arbitral seat may not be as liberal toward non-signatories as U.S. law is. This could lead to additional problems at the initiation stage, since the court at the arbitral seat might forbid arbitration of the dispute, thus opening the parties up to inconsistent judicial orders. Therefore, U.S. courts should be very cautious about compelling arbitration with non-signatories lest the award be rendered unenforceable.⁶⁶⁸

Although the international arbitral community recognizes that there can never be any guarantee that an award will be enforceable in every possible jurisdiction, significant problems arise if an award is not enforceable anywhere. In those cases, the prevailing party is left without any possibility of relief, since the award cannot be enforced within the existing arbitral regime, nor can the matter be litigated, since principles of preclusion forbid rehearing the same issues in court.⁶⁶⁹ While arguments can be made about estopping a party from denying the enforcea-

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

663. See BORN, *supra* note 9, at 1142-1205.

664. See New York Convention, *supra* note 22, art. II(2).

665. See *id.* art. V(1)(d).

666. See *id.*

667. *Id.*

668. See Strong, Writing, *supra* note 168, at 88.

669. See *Dedon GmbH v. Janus et Cie*, No. 10 Civ. 04541(CM), 2011 WL 666174, at *3-4 (S.D.N.Y. Feb. 8, 2011) (noting that unenforceability under the New York Convention does not mean an agreement to arbitrate does not exist); see also Martin Platte, *An Arbitrator's Duty to Render Enforceable Awards*, 20 J. INT'L ARB. 307 (2003); *supra* notes 631-45 and accompanying text.

bility of an arbitral award while simultaneously relying on its terms for *res judicata* purposes, the end result is excessive and inappropriate litigation.

This is obviously a difficult question that requires great sensitivity to international legal norms and practices. Ultimately, however, when considering the standards that should apply to non-signatories in international commercial arbitration:

[t]he touchstone should be whether the parties intended that a non-signatory be bound by and benefit from the arbitration clause. Answering that question cannot be achieved through abstract generalizations, but requires focused consideration of the arbitration clause's language and the relations and dealings among the parties in a specific factual setting.⁶⁷⁰

B. Multiparty Arbitration

Another issue that is appearing in international arbitration with increasing frequency involves multiparty proceedings. Indeed, a significant proportion of the case load of several international arbitral institutions involves multiparty proceedings.⁶⁷¹ Multiparty proceedings arise in a variety of contexts, including consolidation of proceedings, joinder and intervention of parties, and class or collective arbitration.⁶⁷²

Notably, multiparty disputes often include debates about non-signatories, since the party who is to be brought into an existing bilateral arbitration may not have signed the same arbitration agreement as the other parties.⁶⁷³ However, multiparty arbitrations can also arise in situations where all the parties have signed the same arbitration agreement.⁶⁷⁴ Therefore, the multiparty analysis must be conducted separately from the non-signatory analysis, even if both issues arise in a particular dispute and even if certain legal theories – such as that involving groups of companies – are used to justify both the inclusion of a non-signatory and the use of a multiparty procedure.

Neither the New York nor the Panama Convention deals expressly with the issue of multiparty arbitration.⁶⁷⁵ However, these conventions apply equally to

670. BORN, *supra* note 9, at 1206.

671. See LEW ET AL., *supra* note 7, ¶ 16-1 (noting the percentage of multiparty arbitrations administered by the ICC rose from 20% to 30% during the period 1995 to 2001); Martin Platte, *When Should an Arbitrator Join Cases?* 18 ARB. INT'L 67, 67 (2002) (noting more than 50% of LCIA arbitrations reportedly involve more than two parties).

672. See BERNARD HANOTIAU, *COMPLEX ARBITRATIONS: MULTIPARTY, MULTICONTRACT, MULTI-ISSUE AND CLASS ACTIONS* (2005); LEW ET AL., *supra* note 7, ¶¶ 16-39 to 16-61; Platte, *supra* note 671, at 67.

673. See LEW ET AL., *supra* note 7, ¶¶ 16-7 to 16-33; S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* Stolt-Nielsen, AT&T and a Return to First Principles, 17 HARV. NEGOT. L. REV. (forthcoming 2012) [hereinafter Strong, First Principles].

674. See LEW ET AL., *supra* note 7, ¶¶ 16-34 to 16-38; Strong, First Principles, *supra* note 673.

675. See New York Convention, *supra* note 22; Panama Convention, *supra* note 25.

multiparty and bilateral arbitration, at least to the extent that multiparty proceedings are seen as arising out of the agreement of the parties.⁶⁷⁶

Consent to multiparty proceedings may be implied as a matter of international law and practice.⁶⁷⁷ However, U.S. law is in something of a state of flux on this issue, due to several recent Supreme Court decisions on class arbitration. Although class arbitration is not entirely analogous to other types of multiparty arbitration, there are sufficient similarities that some of the precedents relating to class arbitration apply equally to other forms of multiparty arbitration and vice versa.⁶⁷⁸

Because the FAA is silent on the issue of multiparty arbitration, U.S. courts must look to case law for guidance.⁶⁷⁹ The first question is who is to decide whether multiparty treatment is permitted. Ever since the U.S. Supreme Court decision in *Green Tree Financial Corp. v. Bazzle*, U.S. courts have taken the view that this task falls to the arbitrators, unless the parties have agreed otherwise.⁶⁸⁰ This approach has been followed both in class disputes and other kinds of multiparty proceedings, such as consolidation.⁶⁸¹

In 2010, the U.S. Supreme Court cast some doubt on this interpretation of *Bazzle*, although the Court did not provide an alternate reading of the case.⁶⁸² In the absence of a definitive ruling it is likely that courts will continue to recognize the ability of arbitrators to decide the proper procedure to be followed in multiparty proceedings.⁶⁸³

Multiparty arbitration not only gives rise to questions about who is to decide whether multiparty proceedings are proper, but also about how the decision-maker is to determine whether multiparty treatment is permitted. The Supreme Court also addressed this issue recently in the context of class arbitration, stating that the question of whether a class proceeding is proper must be determined by reference to the parties' intent, even in cases of contractual silence or ambiguity.⁶⁸⁴ Some commentators have suggested that this decision requires parties to demonstrate express consent to class arbitration, based on language in the opinion indicating that "we see the question as being whether the parties *agreed to authorize* class arbitration" and that "[a]n implicit agreement to authorize class-action arbitration

676. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F. Supp. 2d 936, 946 (S.D. Tex. 2001); BORN, *supra* note 9, at 2073-74 (citing Articles II(1) and II(3) of the New York Convention); LEW ET AL., *supra* note 7, ¶¶ 16-94 to 16-99.

677. See Platte, *supra* note 671, *passim*.

678. See *Abaclat (formerly Beccara) v. Argentine Republic*, ICSID Case No. Arb/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion dated October 28, 2011, ¶¶ 150, 152, 172, 237, available at http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf; S.I. Strong, *The Sounds of Silence. Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?* 30 MICH. J. INT'L L. 1017, 1038-43 (2009) [hereinafter Strong, *Silence*].

679. See 9 U.S.C. §§ 1-307 (2011).

680. 539 U.S. 444 (2003) (plurality opinion); Strong, *First Principles*, *supra* note 673, at 451-52.

681. See *Certain Underwriters at Lloyd's London v. Westchester Fire Ins. Co.*, 489 F.3d 580, 586-87 (3d Cir. 2007).

682. See *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1770-72 (2010).

683. See *Safra Nat'l Bank of New York v. Penfold Inv. Trading, Ltd.*, No. 10 Civ. 8255(RWS), 2011 WL 1672467, at *3-5 (S.D.N.Y. Apr. 20, 2011); Strong, *First Principles*, *supra* note 673.

684. See *Stolt-Nielsen*, 130 S.Ct. at 1775-76.

... is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."⁶⁸⁵

However, the majority opinion does not go as far as those commentators claim. Instead, the Supreme Court indicates that consent to class procedures can be demonstrated implicitly, stating that when the parties have not "reached any agreement on the issue of class arbitration, the arbitrators' proper task [is] to identify the rule of law that governs in that situation."⁶⁸⁶ This statement obviously negates the proposition that the parties must expressly consent to class arbitration, since there would be no need to identify the applicable rule of law to determine that issue if consent had to be express.⁶⁸⁷

The problem is that the Supreme Court failed to give any clear guidance on what must be shown in the way of implicit consent, stating instead that it had "no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration."⁶⁸⁸ However, the majority did suggest that recourse might properly have been had to "either to the FAA itself or to one of the two bodies of law that the parties claimed were governing, i.e., either federal maritime law or New York law."⁶⁸⁹

It is unclear as of yet whether *Stolt-Nielsen* truly signals any real change in the realm of class arbitration.⁶⁹⁰ Even more importantly, it is unclear what impact the decision will have outside class proceedings, given that multiparty analyses are conceptually and procedurally similar regardless of whether they are in the class or non-class context. Although it is too soon to make a firm conclusion, early decisions suggest that *Stolt-Nielsen* has not altered the analysis regarding multiparty arbitration much, if at all, particularly outside the realm of class disputes.⁶⁹¹

This means that the analytical approach to multiparty arbitration remains very much what it was prior to *Stolt-Nielsen*.⁶⁹² The standard view in the United States has long been that arbitrators are competent to resolve questions involving the propriety of multiparty proceedings, even in the case of contractual silence or ambiguity.⁶⁹³ Because the decision to allow multiparty proceedings is procedural in nature, this issue falls firmly within the discretion and jurisdiction of the arbitral tribunal.⁶⁹⁴ When deciding whether to allow multiparty treatment of whatever kind, arbitrators consider the language contained in the agreement between the

685. *Id.* (emphasis in original); see Gary B. Born & Claudio Salas, *The U.S. Supreme Court and Class Arbitration: A Tragedy of Errors*, 2012 J. DISP. RESOL. 21 (2012).

686. *Stolt-Nielsen*, 130 S.Ct. at 1768.

687. See Strong, First Principles, *supra* note 673.

688. *Stolt-Nielsen*, 130 S.Ct. at 1776 n. 10.

689. *Id.* at 1768.

690. See *id.* at 1758.

691. See *id.* at 1758; *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113, 118-21 (2d Cir. 2011) (discussing class arbitration), *cert. denied*, 132 S. Ct. 1742 (2012); *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 462, 477-78 (S.D.N.Y. 2010) (reviewing partial award concerning consolidation of arbitrations involving 38 parties in wake of fraud perpetrated by Bernard Madoff).

692. See *Stolt-Nielsen*, 130 S.Ct. at 1758; Strong, First Principles, *supra* note 673.

693. See Strong, Sounds of Silence, *supra* note 678, at 1059-83.

694. See *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 47 (2003) (plurality opinion).

parties as well as the governing law and arbitral rules so as to determine whether the parties have demonstrated the requisite consent to multiparty arbitration.⁶⁹⁵

Notably, this approach is consistent with international practice.⁶⁹⁶ Furthermore, this type of purposive interpretive analysis has been said to be preferable to strict contractual interpretation. This is because strict constructionism is “based on the idea that an arbitration agreement constitutes an exception to the principle of the jurisdiction of the courts, and that, as laws of exception are strictly interpreted, the same should apply to arbitration agreements. This view is not consistent” with the notion that arbitration is a reputable means of resolving a wide variety of disputes.⁶⁹⁷

C. State Parties

The final matter to consider involves international arbitral proceedings brought by or against states or state-affiliated entities. These are not treaty-based arbitrations, such as those discussed above,⁶⁹⁸ nor are they state-to-state proceedings. Instead, these disputes involve states and state agencies or instrumentalities that are behaving essentially as private commercial actors.⁶⁹⁹

These sorts of transactions give rise to several unique issues in the international realm. As a practical matter, private commercial actors typically refuse to conduct business with a public entity unless they can be sure that they have the right to pursue the same kinds of legal action against the state party as against a private party.⁷⁰⁰ Although increased acceptance of the restricted view of sovereign immunity took care of a number of concerns,⁷⁰¹ problems still existed with respect to the proper forum for resolution of these sorts of disputes. For example, foreign states were often not comfortable acting as private litigants in the national courts of another country.⁷⁰² However, private actors dealing with a foreign state often felt that they would not be given a fair hearing in the courts of that nation.⁷⁰³ The solution to this dilemma was international commercial arbitration.⁷⁰⁴

Disputes involving public actors give rise to the same kinds of issues and problems as arise in purely private disputes. However, there is one clear distinction, in that foreign states, agencies, and instrumentalities may sometimes try to object to the jurisdiction of a U.S. court on the grounds of sovereign immunity.⁷⁰⁵

Claims of foreign sovereign immunity give rise to a wide range of issues that are beyond the scope of this guide. However, analyses are simplified in matters

695. See *Anwar*, 728 F. Supp. 2d at 477-78 (noting an agreement to allow multiparty proceedings can be implied, based on, among other things, contractual provisions and structure); BORN, *supra* note 9, at 2083-85; LEW ET AL., *supra* note 7, ¶ 16-8.

696. See Strong, Silencce, *supra* note 678, at 1059-83.

697. FOUCHARD GAILLARD GOLDMAN, *supra* note 138, ¶ 480.

698. See *supra* notes 13-19 and accompanying text.

699. See LEW ET AL., *supra* note 7, ¶¶ 27-1 to 27-83.

700. See *id.* ¶ 27-3.

701. See Pauline Whittinghill Klyce Pennoyer, Note, *A New Frontera: Foreign Sovereign Immunity, Arbitral Awards and a Wave Goodbye to Assets*, 49 COLUM. J. TRANSNAT'L L. 115, 148 (2010).

702. See LEW ET AL., *supra* note 7, ¶ 27-3.

703. See *id.*

704. See *id.*

705. See 28 U.S.C. § 1603 (2011) (defining a foreign state); LEW ET AL., *supra* note 7, ¶¶ 27-35 to 27-53.

involving arbitration because of a specific exception to immunity contained in the Foreign Sovereign Immunities Act (FSIA).⁷⁰⁶ That provision states:

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

...

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.⁷⁰⁷

Therefore, foreign states that are parties to an arbitration agreement typically may not successfully invoke their status as sovereigns as means of blocking an enforcement action in a U.S. court in an action relating to that arbitration.

Because the statute only mentions motions to compel arbitration and motions to enforce arbitral awards, some questions exist as to whether a U.S. court has jurisdiction over a foreign state or state agency in a proceeding involving a motion for provisional relief. There is very little authority on this issue, although courts have accepted jurisdiction over a foreign state in cases involving enforcement of an interim order regarding prejudgment security.⁷⁰⁸ Alternatively, it appears that a motion by a state actor to stay an improperly initiated arbitration will not necessarily result in loss of sovereign immunity.⁷⁰⁹

706 See 28 U.S.C. § 1603 *et seq.*

707. *Id.* § 1605(a)(6); see also *id.* § 1605(a)(1) (waiving jurisdictional immunities in cases “in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver). Prior to the passage of subsection (6), U.S. courts addressed all FSIA cases involving arbitration under the waiver exception reflected in subsection (1). See *id.* § 1605(a); S.I. Strong, *Enforcement of Arbitral Awards Against Foreign States and State Agencies*, 26 NW. J. INT’L L. 335, 337, 343-45 (2006). It is of course also possible to assert that the foreign entity who has engaged in business akin to a private commercial actor falls under what is known as the commercial exception in the Foreign Sovereign Immunities Act, but the arbitration exception tends to be easier to prove. See 28 U.S.C. § 1605(a)(3); LEW ET AL., *supra* note 7, ¶¶ 27-54 to 27-81.

708. See *Banco de Seguros del Estado v. Mutual Marine Offices, Inc.*, 230 F. Supp. 2d 362, 374 (S.D.N.Y. 2002).

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

For the most part, international commercial arbitration treats state actors exactly the same as non-public parties. Thus, for example, a state entity can be brought into an arbitration as a non-signatory, despite some courts' reluctance to do so.⁷¹⁰

However, there is one way in which foreign states and state agencies are distinguishable from private parties. Several recent decisions have held that "foreign states are not 'persons' entitled to rights under the Due Process Clause" of the U.S. Constitution.⁷¹¹ This means that parties bringing a motion to compel arbitration or enforce an arbitral award against a foreign state do not have to demonstrate that a U.S. court has personal jurisdiction over the foreign state in the constitutional sense (i.e., that the minimum contacts test has been met).⁷¹²

At this point it is unclear whether and to what extent this principle extends to other state-affiliated entities, such as state-owned foreign corporations.⁷¹³ Notably, these developments do not affect the constitutional requirements for personal jurisdiction over private parties, which still must be met regardless of the parties' location and regardless of their status as legal or natural persons.

VI. CONCLUSION

As the preceding discussion has shown, international commercial arbitration is a complicated area of law requiring detailed knowledge not only of domestic legal principles but also of international law and practice. International commercial arbitration holds a unique position in the world of dispute resolution, requiring courts to show great deference to international norms in order to ensure the kind of consistency and predictability that is vital to the effective functioning of the global economy.⁷¹⁴

Parties, arbitrators and counsel entering the realm of international commercial arbitration must be prepared for a steep learning curve, not only with respect to the concepts involved but also with respect to the types of legal authorities that are commonly used in this field. Because so much of what goes on in international commercial arbitration needs to be placed in comparative context, parties need to rely on foreign statutes and judicial opinions, arbitral rules and awards, and scholarly treaties and commentary in addition to more familiar sources such as treaties, statutes, and case law.

Although many of the legal principles that apply to domestic arbitration apply equally to international disputes, parties cannot assume that the two mechanisms are completely analogous. A significant number of procedures, practices, and

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

711. *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 400 (2d Cir. 2009); see also U.S. CONST. amend. V; *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005).

712. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408, 414-15 (1984); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

713. See *Frontera Res.*, 582 F.3d at 401.

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

policies are entirely unique to international commercial arbitration. What is more, all of these procedures, practices or policies are constantly being reviewed by both courts and members of the international arbitral community so as to ensure the smooth resolution of international commercial disputes. Although it can be challenging to keep up with current developments, those who wish to practice in this field will find it a rewarding and challenging area of specialization.⁷¹⁵

715. Those who wish to familiarize themselves with the resources in this area of law can consult the bibliography of recent monographs, treatises, specialty journals and arbitral reporters found in STRONG, *supra* note 7. Readers may also consult some of the treatises and specialty journals mentioned earlier. *See supra* note 141. Finally, those who aspire to practice in this area of law should consider joining one of the various international organizations specializing in international commercial arbitration so as to keep abreast of current events in the field. Some good starting points include the American Bar Association's Section of International Law, the Chartered Institute of Arbitrators' North American Branch, the International Bar Association's Arbitration Committee and the London Court of International Arbitration's (LCIA) North American Branch