ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES

Studies in Law and Practice

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THE NEW YORK CONVENTION AND THE INTERNATIONAL CURRENCY OF AWARDS

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Introduction

No discussion of the interaction of courts and arbitrators would be complete without mention of the role of the New York Convention. In 137 countries,[1] agreements to arbitrate are enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[2] Usually called the "New York Convention" by virtue of its city of adoption (or sometimes the "United Nations Convention" after the sponsoring organization), this treaty implements business managers' agreements to waive recourse to otherwise competent national courts in favor of binding private dispute resolution. The Convention gives effect to both the arbitration clause and the resulting award even in countries that have resisted analogous treaties to enforce court selection agreements and foreign judgments.

[1] Twenty-four countries originally signed the Convention, and the rest have joined by accession or succession. Recent adherents include Liberia, Afghanistan, and Pakistan.

[2] 330 U.N.T.S. 38, 21 U.S.T. 2517, T.I.A.S. No. 6997 (1958). See generally Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981); W. Laurence Craig, William W. Park, & Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000), Chapter 37. The European Convention on International Commercial Arbitration (Geneva 1961) supplements the New York Arbitration Convention as to relationships between parties resident in its contracting states. In Latin American and Caribbean jurisdictions, the Inter-American Arbitration Convention (Panama 1975) mirrors much of the New York, but provides that execution and recognition of an award "may" be ordered, as contrasted with the New York Arbitration Convention's mandatory language that a contracting state "shall" recognize and enforce awards.

A. Treaty Framework

More than a half century ago, the International Chamber of Commerce (ICC) issued a report underscoring the commercial community's need for arbitral awards that are transportable from one country to another,[3] to liberate foreign arbitral awards from burdensome "double exequatur" enforcement procedures which had required judicial recognition orders in both the country where the award was made and the enforcement forum.[4] Thus an award rendered in Boston would have had to be confirmed by a court in Massachusetts before enforcement in Montréal.

The ICC proposed streamlining award enforcement, shifting key burdens of proof from the party seeking award enforcement to the party resisting its recognition. For example, under the prior treaty the party relying on the award had to present documentary evidence that the award had not been annulled where rendered.[5] In contrast, the ICC draft treaty required that award annulment be invoked by the party resisting recognition.[6]

In its final form, the New York Convention operates both to enforce arbitration agreements and to promote recognition of awards at the place where the loser has assets. The Convention requires courts of contracting states to refer the parties to arbitration when a dispute is subject to a written arbitration agreement that is not "null and void, inoperative or incapable of being performed."[7] Although this duty to refer the parties to arbitration will apply to judicial actions, the arbitration clause will not necessarily bar administrative proceedings.[8]

In addition, courts must recognize foreign awards "in accordance with the rules of procedure of the territory where the award is relied upon"[9] and subject to conditions no more onerous than those imposed on domestic awards. Thus the Convention's practical effectiveness can depend on national arbitration law.

In this connection, recent Court of Appeals decisions show just how troublesome national arbitration law can be. On *forum non conveniens* grounds the Second Circuit refused to confirm an award rendered in Moscow,[10] while the Ninth Circuit has invoked absence of

[3] International Chamber of Commerce, Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention, ICC Brochure No. 174 (1953), reprinted in U.N. Doc. E/C.2/373 and in 9 ICC Bull. 32 (May 1998).

[4] See Convention on the Execution of Foreign Arbitral Awards (Geneva 1927), 92 L.N.T.S. 301 ("1927 Geneva Convention"), which applied to awards made in pursuance to an agreement covered by the 1923 Geneva Protocol on Arbitration Clauses, 27 L.N.T.S. 157. The party relying on the award had to provide documentary evidence that the award "not be considered . . . open to *opposition, appel* or *pourvoi en cassation*" and that there exist no pending "proceedings for the purpose of contesting the validity of the award are pending." See Geneva Convention Article 4(2), with cross-reference to the requirements of Convention Article 1(d).

[5] 1927 Convention Article 4(3), with cross reference to requirements of Article 2(a).

[6] See Article IV of the Preliminary Draft Convention.

[7] New York Arbitration Convention Article II (3).

[8] See *Farrel Corp. v. United States ITC*, 949 F. 2d 1147 (Fed. Cir. 1991). Although judicial proceedings were dismissed, the plaintiff was allowed to file a complaint with the International Trade Commission (ITC) alleging trade secret misappropriation.

[9] New York Arbitration Convention Article III.

[10] See *Monégasque de Réassurances SAM (Monde Re) v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377 (S.D.N.Y. 2001), affirmed 311 F. 3d 488 (2002). The *Monde Re* award was rendered in connection with a gas pipeline in Ukraine. A reinsurance company based in Monaco (subrogated to the rights of a Russian

"minimum contacts" to deny recognition to a London award.[11] The Second Circuit invoked the above-cited Convention language ("rules of procedure of the territory where the award is relied upon") as an escape hatch from enforcement obligations, while the Ninth Circuit focused on Constitutional notions of the "due process" and personal jurisdiction (as understood in American law) as preconditions for award enforcement.[12] Significantly, both decisions note an absence of identifiable property within the jurisdiction,[13] which reduces grounds for criticism by those who read the Convention reference to local procedural law as including only minor matters such as filing requirements and fees.[14]

B. Scope of Convention Coverage

Nationality generally irrelevant

There is no requirement that the litigants come from different states, or that the party seeking to enforce an award be from a country that has adhered to the Convention. Citizenship

company) sought recognition of an $88 million award against the defaulting party. Complicating factors in the case include the fact that one respondent (Ukraine) was both a sovereign state and a non-signatory to the arbitration agreement. While theories exist under which non-signatories of arbitration clauses may be bound (such as agency, *alter ego*, and estoppel), the Second Circuit noted that application of any of these principles would require extensive discovery of documents outside the United States, and most probably a trial. *Ibid.* at 500.

[11] *Glencore Grain Rotterdam BV v. Shivnath Rai Harnarain*, 284 F. 3d 1114 (9th Cir. 2002) (London Rice Brokers' Ass'n arbitration; sales in California not sufficient to establish jurisdiction over transaction involving a Dutch grain trader and an Indian rice exporter). See also *CNA Reinsurance Co. v. Trustmark Ins.*, 2001 Westlaw 648948 (N.D. Ill. 2001). The Third and Fourth Circuits reached similar results in cases bearing the same name relating to attempts to enforce the same award, arising out of contracts between a Guernsey metals trader and a Russian mining company. See *Base Metal Trading v. OJSC Novokuznetsky Aluminum Factory*, 283 F. 3d 208 (4th Cir. 2002) and *Base Metal Trading v. OJSC Novokuznetsky Aluminum Factory*, 2002 WL 31002609 (3rd Cir. 2002), finding a lack of the "minimum contacts" with the United States required by due process.

[12] See generally William W. Park, Jack Coe, & Andrea Bjorklund, *International Commercial Dispute Resolution*, 37 Int'l Lawyer 445 (2003); Linda Silberman, *International Arbitration: Comments from a Critic*, 13 Am. Rev. Int'l Arb. 9 (2002); S.I. Strong, *Invisible Barriers to Enforcement of Foreign Arbitral Awards in the United States*, 21 (6) J. Int'l Arb. 479 (2004). See also Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards*, 36 Inter-American Law Rev. 23 (2004), suggesting that *Base Metals* is "simply a mistake" (since some property was present within the jurisdiction) and *Monégasque* was correctly decided on "unusual facts" (sovereign immunity issues related to a foreign state emanation).

[13] In *Monégasque de Réassurances*, the district court stated that "it is not clear that Naftogaz has any assets in the United States from which Monde Re could recover" 158 F. Supp. 2d 377, at 386; the Second Circuit stated that "the jurisdiction provided by the [New York] Convention is the only link between the parties and the United States." 311 F. 3d 488, at 499. In *Glencore* the Ninth Circuit stated that "Glencore fails to identify any property owned by Shivnath Rai in the forum against which Glencore could attempt to enforce its award." 284 F. 3d 1114, at 1128. The presence of property would seem relevant in light of the decision in *Shaffer v. Heitner* making a distinction between jurisdiction on the merits of a dispute and jurisdiction to enforce judgment. See 433 U.S. 186 (1977), at footnote 36 ("Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not the State would have jurisdiction to determine the existence of the debt as an original matter.") For a subsequent analysis the *Shaffer v. Heitner* pronouncements, see *Burnham v. Superior Court of California*, 495 U.S. 604 (1990) (California jurisdiction to serve New Jersey resident in context of divorce petition).

[14] To apply an admittedly imperfect analogy, while in the United States local law generally determines grounds for revocation of arbitration clauses, a state may not impose legal obstacles that sabotage the pro-arbitration policy of the Federal Arbitration Act (FAA). See *Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265 (1995); *Southland Corp. v. Keating*, 465 U.S. 1 (1984);

is relevant to Convention coverage only indirectly, when the parties' different nationalities add an element indicating an award is "not domestic," as discussed below.[15]

Awards

Geography is the principal trigger for application of the Convention, which covers primarily foreign awards.[16] Under this test, an award rendered in New York would be covered by the Convention when presented for enforcement against assets in Zürich, Paris, or London, but not when recognition is sought before courts in Atlanta or Los Angeles.

Inability to meet the geographical test, however, does not mean the award creditor is entirely out of luck. The Convention will also apply to "awards not considered as domestic," a subtle and multifaceted notion. Thus in the above scenario, a New York award might be considered by a United States court as "not domestic" if the factual configuration of the case contained foreign parties or other significant cross-border elements.

The concept of a non-domestic award was given a wide scope in a decision holding that United States courts could apply the Convention to awards rendered in the United States in disputes entirely between United States corporations.[17] Part of the contract was to be performed abroad, leading the court to consider the dispute within the scope of the Convention.

Agreements

For better or for worse, the Convention is less precise with respect to its coverage of arbitration agreements than awards. The Convention requires only that the agreement to arbitrate be in writing, and that it cover disputes "in respect to a defined legal relationship" (whether or not contractual) concerning a "subject matter capable of settlement by arbitration."[18]

Securities Industry Ass'n v. Connolly, 883 F. 2d 1114 (1st Cir. 1989). The power of states to affect the validity of arbitration clauses derives from 9 U.S.C. § 2, which provides that an arbitration agreement is valid "save upon such grounds as exist at law or in equity for the revocation of any contract." Since the United States has no federal common law of contracts, grounds for revocation derive from state law. See *First Options v. Kaplan*, 514 U.S. 938 (1995).

[15] In some countries, however, national legislation implementing the Convention might restrict its application as between citizens of the same country. See e.g. 9 U.S.C. § 202.

[16] The first sentence of Convention Article I(1) refers to awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought."

[17] See *Lander Co. v. MMP Invs.*, 107 F. 3d 476 (7th Cir. 1997), cert. denied 139 L. Ed. 2d 19 (1997) (ICC arbitration in New York arising from contract between two United States businesses to distribute shampoo products in Poland), extending the principle endorsed earlier in *Bergesen v. Joseph Muller Corp.*, 710 F. 2d 928 (2nd Cir. 1983) (award in New York between two foreign parties). For an unusual approach to Convention coverage, see *Cavalier Construction Co. v. Bay Hotel & Resort* (S.D. Fla 1998), 1998 WL 961281. Offshore companies contracted for construction of a hotel in Turks & Caicos Islands, stipulating that disputes would be arbitrated in Miami. The court refused to apply the Convention because it deemed a Miami award not to be made "in the territory of *another* Contracting State." (Emphasis added.) On this issue *Lander* took a more reasonable view, noting that the awkward reference to "another contracting state" indicated simply a Convention state (like the U.S.) as opposed to a country that had failed to adhere to the Convention.

[18] New York Convention Article II(2).

Whether through design or inadvertence, the Convention drafters did not indicate further limitations on the type of arbitration agreements covered. Commentators have suggested, however, that Convention coverage of arbitration agreements should be interpreted consistently with its scope as to awards.[19] Applying by analogy the general provisions on Convention coverage of awards, the Convention would apply to agreements (i) providing for foreign arbitration (in a country other than the one in which the arbitration clause is invoked) or (ii) sufficiently international to be "not domestic."

Written form and signature

Although the New York Convention requires that an agreement to arbitrate must be memorialized in writing, this does not mean that it must always be signed.[20] Article II of the New York Convention defines an agreement in writing to include "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Thus the Convention coverage includes at least three categories of commitments: (i) an arbitral clause in a contract, (ii) a stand-alone agreement to arbitrate, and (iii) an exchange of letters or telegrams.

While a stand-alone agreement to arbitrate clearly requires signature, an "exchange" between the parties may create the duty to arbitrate regardless of whether signed. Thus Convention coverage has been extended to a dispute arising out of an oil purchase through telexes exchanged between buyer and seller referring to the latter's standard contract terms, which provided for arbitration.[21]

Whether the New York Convention requires signature of contracts containing arbitral clauses (as opposed to stand-alone agreements or exchanges) remains open to debate. Some American courts have required signature[22] while others have not.[23]

The nub of discord centers on punctuation, with the focus of attention on the comma preceding the phrase "signed by parties." Should the signature requirement be interpreted to apply only to the words "an arbitration agreement" found just before the comma? Or should the signature requirement apply to everything in the early part of the sentence, including reference to arbitral clauses in contracts? The answer may be significant in situations where, for whatever reason, the Convention provides the only basis for federal courts to exercise jurisdiction.[24]

[19] See e.g. Albert Jan van den Berg, *The New York Arbitration Convention of 1958*, § I-2.1, 57 (1981).

[20] The term "non-signatories" remains useful shorthand to designate those persons (whether individuals or corporate entities) whose relationship to the arbitration may at first blush be unclear. Such litigants cannot easily be called "non-parties," given that their status as "party" is exactly what is asserted, often successfully through theories such as agency. A more accurate expression might be "un-mentioned" parties, although that locution likewise has limits.

[21] See *Bomar v. ETAP, Cour de Cassation* (Cass. 1ère civ., 9 November 1993), 1994 Rev. Arb. 108, note Catherine Kessedjian.

[22] See *Kahn Lucas Lancaster v. Lark Int'l Ltd.*, 186 F. 3d 210 (2nd Cir. 1999), interpreting the comma after "an arbitration agreement" in New York Convention Article II(2). The Court found that "signed by the parties" applied to arbitral clauses encapsulated in broader contracts, as well as separate arbitration agreements.

[23] The Fifth Circuit in *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F. 3d 666, 669 (5th Cir. 1994) held that an arbitral clause in a contract need not be signed.

[24] See 9 U.S.C. § 203.

The New York Convention's definition of an agreement in writing does not always run parallel to the provisions of national law. Most arbitration statutes,[25] including those based on the UNCITRAL Model Law,[26] contain some sort of writing requirement. Some statutes, however, may be more generous than the New York Convention in recognizing arbitration agreements.

For example, Section 2 of the Federal Arbitration Act (FAA) makes no mention of signature, requiring only a "written provision in . . . a contract" to settle a future dispute, or an "agreement in writing" to submit an existing controversy to arbitration.[27] Under the FAA, therefore, a duty or right to arbitrate may be imposed according to ordinary principles of contract and corporate law,[28] such as incorporation by reference, assumption, agency, piercing the veil, estoppel, and third-party beneficiary.[29] At least one court has upheld an electronic arbitration clause in an internet site download of software.[30]

A claimant may attempt to join a non-signatory "offensively," to include a defendant's parent with a deep financial pocket. A respondent, however, might seek "defensive" joinder, in the hope of making the award *res judicata* against the parent and thus forestalling a risky jury trial. The absence of a signature requirement under the FAA does not mean that American courts will easily compel arbitration by a person that did not agree to arbitrate. As one First Circuit judge has remarked, it remains an "abecedarian tenet that a party cannot be forced to arbitrate if it has not agreed to do so."[31]

While corporate relationships sometimes lead courts to allow or to compel related companies to join an arbitration,[32] joinder is by no means automatic.[33] Even in a

[25] See e.g. § 5 of English Arbitration Act of 1996, Article 178 Swiss *Loi fédérale sur le droit international privé (LDIP)*, and § 2 of United States FAA.

[26] Article 7(2) of the UNCITRAL Model Law provides that arbitration agreements must be "contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another."

[27] For a comment on judicial interpretation of the writing requirement, see Paul D. Friedland, *U.S. Courts' Misapplication of the "Agreement in Writing" Requirement for Enforcement of an Arbitration Agreement Under the New York Convention*, 13 Int'l Arb. Rep. 21 (May 1998).

[28] For cases exploring the duty of non-signatories to arbitrate, see *A/S Custodia v. Lessin International, Inc.*, 503 F. 2d 318 (2nd Cir. 1974); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F. 3d 1060, 1064 (2nd Cir. 1993); *McAllister Bros., Inc. v. A&S Transp. Co.*, 621 F. 2d 519, 524 (2nd Cir. 1980); *Fisser v. International Bank*, 282 F. 2d 231, 233 (2nd Cir. 1960); *Okcuoglu v. Hess, Grant & Co.*, 580 F. Supp. 749, 750 (E.D. Pa. 1984).

[29] See *Thomson–CSF v. American Arbitration Association*, 64 F. 3d 773 (2nd Cir. 1995). See generally Carolyn B. Lamm & Jocelyn A. Aqua, *Defining the Party*, 34 Geo. Wash. Int'l L. Rev. 711 (2003); John M. Townsend, *Nonsignatories and Arbitration: Agency, Alter Ego and Other Identity Issues*, 3 ADR Currents 19 (Sept. 1998). See also *1 Domke on Commercial Arbitration* § 10:00 ("A non-signatory to an arbitration agreement may nonetheless be bound by the agreement under an accepted theory of agency or contract law.").

[30] *In re Realnetworks, Inc., Privacy Litigation*, 2000 WL 631341 (N.D. Ill. 2000).

[31] See *Intergen v. Grina*, 344 F. 3d 134 (1st Cir. 2003) (Selya J.).

[32] See e.g. *Dale Metals Corp. v. Kiwa Chemicals Industry Co.*, 442 F. Supp. 78 (S.D.N.Y. 1977). The federal district court held that a stay of litigation was appropriate even against companies that had not signed the arbitration agreement. The claims before the court and the claims subject to arbitration were substantially similar, and court proceedings had been commenced by a corporate affiliate of the entity that had agreed to arbitration.

[33] See *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F. 3d 315 (5th Cir. 1997), rehearing *en banc*, 145 F. 3d 211 (5th Cir. 1998), reversed and remanded, 119 S. Ct. 1563 (1999), action dismissed, 182 F. 3d 291

parent–subsidiary relationship, the burdens and benefits of an arbitration clause will be extended only when there is justification for piercing the corporate veil or finding agency. A high standard will also be required to bind a government based solely on an arbitration clause signed by a state-owned corporation.[34]

Courts will, however, enforce awards against related companies when good reason exists to do so. In *Carte Blanche (Singapore) v. Diners Club International*,[35] a franchisee brought an action to enforce an award against assets of the franchisor's parent corporation, Diners Club. Allowing enforcement the court noted that the parent had taken over all functions of its subsidiary, ignoring corporate formalities.[36] Likewise, in *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[37] an arbitration agreement was enforced as to a sister corporation on the basis that its interests were "directly related to" the conduct of the signatory.[38] In all events, the success of motions to pierce the veil will be highly fact-dependent, requiring close attention to the procedural posture of the case.[39]

Theories of equitable estoppel have been pressed into service when legal and factual issues are substantially the same in related disputes, and it is unfair to allow one side to pick and choose between judicial proceedings and arbitration with respect to related adverse parties. For example, in *Roberson v. The Money Tree of Alabama, Inc.*[40] the plaintiffs alleged that several defendants had acted in concert fraudulently to compel them to buy unnecessary loan insurance. Ordering the plaintiffs to arbitrate their claims against a defendant who had not

(5th Cir. 1999). *Amicus* brief filed on behalf of defendant, 9 World Arb. & Mediation Rep. 137 (1998), argued for broad scope for arbitration clause. American company claimed to have been fraudulently induced to invest in North Sea gas venture; removal of case from state to federal court under 9 U.S.C. § 205 depended on whether dispute was covered by arbitration clause signed by subsidiary of American plaintiff. The Circuit Court's first decision (later vacated) found that alleged fraud was independent of the contract containing the arbitration agreement. The Court subsequently held that German defendant lacked "minimum contacts" with forum necessary to justify court's personal jurisdiction. For another case finding lack of minimum contacts in the context of international arbitration, see *Creighton Ltd. v. Government of Qatar*, 181 F. 3d 118 (D.C. Cir. 1999).

[34] See *Bridas v. Government of Turkmenistan*, 345 F. 3d 347 (5th Cir. 2003).

[35] 2 F. 3d 24 (2nd Cir. 1993).

[36] *Ibid.* at 28. The court stated "[U]nder New York's law of piercing the corporate veil [enforcement of judgment against Diners Club] is not only appropriate, it is manifestly required in this case."

[37] 7 F. 3d 1110 (3rd Cir. 1993).

[38] *Ibid.* at 1122. The dispute arose out of a financial consultant's unauthorized purchase of risky investments for a pension plan. The non-signatories whom the court ordered to arbitration were the financial consultant, and the sister corporation of the brokerage firm for whom the financial consultant worked.

[39] See e.g. *Ceska Sporitelina v. Unisys Corporation* 1996 U.S. Dist. LEXIS 15435 (E.D. Pa. 10 October 1996), aff'd without opinion, 116 F. 3d 467 (3rd Cir. 1997), cert. denied, 118 S. Ct. 739 (1998) (court refused to disregard the corporate structure when Unisys petitioned for arbitration pursuant to an agreement signed between a Czech financial institution and a Dutch subsidiary of Unisys); *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F. 3d 1287 (3rd Cir. 1996), amended, on reh'g, 1996 U.S. App. LEXIS 18266 (3rd Cir. Pa. 24 July 1996), cert. denied 117 S. Ct. 583 (1996) (finding that unless an agency theory applied, only signatories could be bound by the arbitration and forum selection clauses). In another case a court refused to compel a corporate parent to arbitrate, but went on to suggest that an award might be enforced against the parent either "as a guarantor . . . or on an *alter ego* theory." The court speculated that American construction companies might be bound by the results of an arbitration brought against a foreign subsidiary by subcontractors on a Singapore construction project. See *Builders Federal (Hong Kong), Ltd. v. Turner Constr. Co.*, 655 F. Supp. 1400 (S.D.N.Y. 1987).

[40] 954 F. Supp. 1519 (M.D. Ala. 1997).

signed the loan agreement, the court reasoned that the claims against the non-signatory were inextricably bound up with the loan agreement.[41]

Some arbitrators have joined related parties to proceedings on the basis of the so-called "group of company theory." Perhaps the most well known of these awards was rendered in a Paris arbitration based on a contract signed by Dow Chemical (Switzerland).[42] The tribunal rejected requests that other Dow entities be dismissed as parties.

Across the Channel, however, English case law has soundly rejected the "group of companies" doctrine. Unambiguous evidence of agency will be required before related corporate entities can be bound to arbitrate in England.[43]

In Switzerland, courts have given a wide scope to the writing requirement in a case where an agreement to arbitrate was contained in a bill of lading signed only by the carrier. The *Tribunal fédéral* held the clause valid on the basis of a long course of dealing between the parties. The shipper of goods had brought a court action in Geneva, even though the bill of lading provided for arbitration in London.[44]

Some commentators question the obligation of a writing.[45] On balance, however, it would seem reasonable to require business managers to memorialize stipulations as important as a waiver of the right to go to court.

Reservations

The Convention allows contracting states to make two reservations.[46] The first is a requirement of territorial reciprocity, which applies the treaty only to awards rendered in another

[41] 954 F. Supp. at 1528. See also *J.J. Ryan & Sons v. Rhone Poulenc Textile*, 863 F. 2d 315 (4th Cir. 1988), deciding that arbitration clauses contained in distribution agreements with corporate affiliates required that charges against the parent should be referred to arbitration "[w]hen charges against a parent company and its subsidiary are based on the same facts and are inherently inseparable." When Rhone Poulenc Textile decided to have its affiliates distribute their own products it offered to buy Ryan. They were unable to decide upon a price because Ryan rejected Rhone Poulenc's valuation of its good will. Ryan alleged that Rhone Poulenc then influenced its affiliates to terminate their agreements with Ryan. See also *Lawson Fabrics, Inc. v. Akzona, Inc.*, 355 F. Supp. 1146 (S.D.N.Y. 1973); *Sam Reisfeld & Son Import Co. v. S.A. Eteco*, 530 F. 2d 679 (5th Cir. 1976); *Universal Am. Barge Corp. v. J-Chem, Inc.*, 946 F. 2d 1131 (5th Cir. 1991) (action concerning fumigation liability for damage cargo; possible that arbitral award collaterally estopped action against non-party fumigator); *Usina Costa Pinto v. Louis Dreyfus Sugar Company*, 933 F. Supp. 1170 (S.D.N.Y. 1996) (sugar trading company allegedly defrauded manufacturers before substituting in its place another company); *American Bureau of Shipping v. Tencara Shipyard*, 170 F. 3d 349 (2nd Cir. 1999) (yacht owners required to arbitrate under arbitration clause in shipbuilder's contract with ship classification society).

[42] See *Isover St. Gobain v. Dow Chemical France et al.*, ICC Case 4131 (1982); reprinted in *Collection of Arbitral Awards*, vol. I: 1974–85 (Sigvard Jarvin & Yves Derains, eds., 1990). The decision was upheld by the Paris *Cour d'appel*, 21 October 1983, 1984 Rev. arb 98. English language extracts can be found in IX *ICCA Yearbook of Commercial Arbitration* 132 (1984). See generally W. Laurence Craig, William W. Park, & Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd edn, 2000), Section 5.09, at 75–76.

[43] *Peterson Farms Inc. v. C&M Farming Ltd.* [2004] EWHC 121, [2004] 1 Lloyd's Rep 603, 2004 WL 229138 (4 February 2004, Hon. Justice Langley, High Court of Justice, Queens Bench Division, Commercial Court). See also Sonia Patil Woodhouse, *Group of Companies Doctrine and English Arbitration Law*, 20 Arb. Int'l 435 (2004).

[44] *Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company) S.A.*, ATF 121 II 38 (16 January 1995); 13 ASA Bull. 503 (1995).

[45] See Neil Kaplan, *Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?*, 12 Arb. Int'l 27, 29 (1996).

[46] New York Convention Article I (3).

Convention country. Thus the winner of an arbitration in Iran (which to date has not adhered to the Convention) could not use the Convention to enforce an award in the United States, which has taken the reciprocity reservation. A contracting state may also reserve Convention application to differences arising exclusively out of commercial relationships.

C. Defenses to Enforcement

A court of a Convention country may refuse recognition and enforcement to awards only on the basis of a limited list of procedural defenses. Divided into two groups, these defenses allow courts to avoid lending their power to support awards that result from unfair proceedings or which contravene the forum's fundamental notions of public policy.

The first group of defenses includes an invalid arbitration agreement, lack of opportunity to present one's case, arbitrator excess of jurisdiction, and irregular composition of the arbitral tribunal.[47] These defenses must be asserted and proven by the party resisting the award. In addition, a court on its own motion, without any proof by the party resisting the award, may refuse to enforce an award whose subject matter is not arbitrable or which violates the forum's public policy (*ordre public*).[48] While the first set of Convention defenses are intended to safeguard the parties against injustice, the second set serve as an explicit catchall for the enforcement country's own vital interests and policies.

In the United States, New York Arbitration Convention defenses have traditionally been given a narrow scope,[49] with the Convention's public policy defense interpreted to include only violations of the "most basic notions of morality and justice."[50] Many other nations have recognized that a broad interpretation of "public policy" would defeat one of the principal purposes of international arbitration, which is to permit business managers from different countries to secure some measure of neutral dispute resolution.[51]

[47] New York Arbitration Convention Article V(1).

[48] New York Arbitration Convention Article V(2).

[49] See Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 460–61 (3rd edn, 1999). See also Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981).

[50] See *Parsons & Whittemore Overseas Co. v. Societé Générale de l'Industrie du Papier (RAKTA)*, 508 F. 2d 969, 974 (2nd Cir. 1974) (rejecting a public policy defense related to a rupture in diplomatic relations between Egypt and the United States). The public policy defense was also dismissed in *Fertilizer Corp. of India v. IDI Management, Inc.*, 530 F. Supp. 542 (S.D. Ohio 1982) (arbitrator's lack of independence from one party); *Antco Shipping Co. v. Sidermar*, 417 F. Supp. 207 (S.D.N.Y. 1976) (participation in the Arab boycott of Israel); *Biotronik GmbH v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 139 (D.N.J. 1976) (passively misleading the arbitral tribunal did not trigger public policy defense, although dictum suggested that active fraud such as perjury might violate public policy). For one aberrant case in which an award *was* refused enforcement on public policy grounds (where French law called for a particularly high interest rate on late payment) see *Laminoirs S.A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980).

[51] See Redfern & Hunter, *supra* n. 49 at 430–2.

D. Recognition of Awards Set Aside where Rendered

Overview

Annulment at the arbitral situs gives the loser a powerful argument for resisting the award's enforcement.[52] As the place where an award is "made" for purposes of the New York Convention,[53] the arbitral situs can impair, but not necessarily destroy, the award's international currency by its vacatur of an award.[54]

Although the New York Arbitration Convention permits member states to refuse recognition to an award set aside where rendered, the Convention establishes no criteria for proper or improper vacatur at the arbitral situs.[55] Therefore judicial review of an award at the place where made will be governed by the local arbitration law there in force.[56]

Models of judicial review

Several models have emerged for review of awards at the arbitral seat.[57] The most popular paradigm gives losers a right to challenge awards for excess of authority[58] and basic procedural defects such as bias or denial of due process,[59] but does not permit judges to second-guess arbitrators on the legal and factual merits of the dispute. Another paradigm

[52] See generally William W. Park, *Duty and Discretion in International Arbitration*, 93 Am. J. Int'l L. 805 (1999).

[53] Occasionally there may be divergence between the arbitral seat and the place the award is deemed made. See *Hiscox v. Outhwaite* [1991] All ER 641, where an award signed in Paris was considered made in France under the New York Convention, while the seat of the arbitration remained in England for purposes of appeal. The result of this case has been overruled by the 1996 English Arbitration Act. For an early foreboding of the problems that might arise from disassociating the arbitral seat from the place of making the award, see Francis A. Mann, *Where Is an Award Made?*, 1 Arb. Int'l. 107 (1985).

[54] New York Arbitration Convention Article V(1)(e) provides that an award *may* be refused recognition and enforcement if set aside "by a competent authority of the country in which . . . that award was made." However, as discussed *infra*, New York Arbitration Convention Article VII preserves the right to rely on awards under the local law of the enforcement forum, whatever that law might be.

[55] Compare the approach of the European Arbitration Convention (Geneva 1961), which in Article IX defines acceptable grounds for award annulment that will justify non-recognition.

[56] For a survey of the national models for judicial review of awards at the arbitral situs, see W. Laurence Craig, *Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 Tex. Int'l L. J. 1 (1995).

[57] See William W. Park, *Why Courts Review Arbitral Awards*, in *Recht der Internationalen Wirtschaft und Streiterledigung im 21. Jahrhundert: Liber Amicorum Karl-Heinz Böckstiegel* 595 (R. Briner, L. Y. Fortier, K.-P. Berger, & J. Bredow, eds., 2001).

[58] In some cases duly appointed arbitrators may overreach their mandates. In other cases, absent a valid a arbitration clause covering the controverted event, the excess of authority may be that of an unauthorized meddler. 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 (1996); William W. Park; *Determining Arbitral Jurisdiction: Allocation of Tasks Between Courts and Arbitrators*, 8 Am. Rev. Int'l Arb. 133 (1997). For several recent cases addressing arbitral jurisdiction in the United States, see William W. Park, *The Contours of Arbitral Jurisdiction: Who Decides What?*, 3 Int'l Arb. News 2 (ABA, Summer 2003), reprinted in 18 Int'l Arb. Rep. 21 (Aug. 2003).

[59] See e.g. FAA §10; French *NCPC* art. 1502; Swiss *LDIP* art. 190; UNCITRAL Model Law art. 34. While these last three statutes do not enumerate bias explicitly, other bases for vacatur could serve to deal with this defect. For example *LDIP* includes in its list of award defects both unequal treatment of the parties (art. 190(2)(d)) and violation of public policy (art. 190(2)(e)).

supplements scrutiny of an arbitration's procedural fairness with a right to appeal an award's substantive legal merits.[60]

"Manifest disregard of the law"

Certain arbitral regimes provide hybrid grounds for vacatur, such as "manifest disregard of the law"[61] or "arbitrariness,"[62] implying something beyond a simple mistake but not necessarily clear excess of authority. Such annulment standards have a significant potential to disrupt award enforceability.[63]

In the United States, the importance of "manifest disregard" for international arbitration derives from the fact that the FAA has been interpreted in some circuits to permit vacatur of awards in an international arbitration on the same grounds available in domestic cases.[64] Thus a litigant unhappy with an arbitrator's decision gets a chance to reargue the case by alleging that the arbitrator made a mistake.[65]

Some interpretations of "manifest disregard" take a restrictive view, building on notions of "excess of authority"[66] to limit the principle to decisions that ignore the contract or require parties to violate the law.[67] Other courts, however, have taken a more expansive view,

[60] See 1996 English Arbitration Act §§ 67–69. See William W. Park, *The Interaction of Courts and Arbitrators in England*, [1998] Int'l Arb. L. Rev. 5, reprinted in 13 Mealey's Int'l Arb. Rep. 21 (June 1998).

[61] See discussion *infra* of the *dictum* in *Wilko v. Swan*, 346 U.S. 427 (1953).

[62] Swiss *Concordat intercantonal sur l'arbitrage*, art. 36(f) (defining arbitrariness to include "evident violations of law or equity").

[63] See discussion *infra* of *Westerbeke v. Daihatsu Motor Co., Ltd.*, 304 F. 3d 200 (2nd Cir. 2002), rev'g 162 F. Supp. 2d 278 (2001). For other recent cases rejecting second-hand justice in the form of judicial review of an award's legal merits, see *Lummus Global Amazonas SA v. Aguaytra Energy de Peru*, 2002 WL 31401996 (S.D. Tex. 2002) (confirming in part an award arising from construction of a natural gas pipeline in Peru) and *Westinghouse International Service Co. v. Merilectrica, D. Mass.* (27 September 2001), reprinted in 16 Int'l Arb. Rep. C-1 (Oct. 2001) (confirming an award arising from a power plant construction in Colombia).

[64] *Alghanim v. Toys 'R' Us*, 126 F. 3d 15 (2nd Cir. 1997). For a contrasting view, see *Industrial Risk Insurance*, 141 F. 3d 1434, 1441–42 (11th Cir. 1998), involving an AAA arbitration in Florida between a German corporation and a U.S. insurer. The dispute arose from malfunction of a "tail gas expander," a turbine generating electricity from waste gasses in nitric acid manufacture. Giving a broad scope to the concept of "non-domestic" arbitration award, the court held that an award made in the United States falls within the purview of the New York Convention, and is thus governed exclusively by Chapter 2 of the FAA. *Ibid.* at 1441. See also *Four Seasons Hotels and Resorts B.V. v. Consorcio Barr S.A.*, 267 F. Supp. 2d 1335 (S.D. Fla. 2003).

[65] In prohibiting arbitration of broker–customer securities disputes, the U.S. Supreme Court added "manifest disregard of the law" as a basis for award vacatur. See *Wilko v. Swan*, 346 U.S. 427 (1953). In declaring securities cases non-arbitrable the Court declared (rightly or wrongly) that "manifest disregard of the law" provided the only avenue for judicial scrutiny of an arbitrator's legal mistake, and then declared that this was not adequate to permit protection of public interests. While the holding of *Wilko* has been overruled, the "manifest disregard" dictum has taken on a life of its own. Some interpretations give a restrictive application, building on notions of "excess of authority" that limit "manifest disregard" to awards which ignore the contract or require violation of law. See *Advest, Inc. v. McCarthy*, 914 F. 2d 6 (1st Cir. 1990). Other courts, however, take a more expansive perspective, effectively including simple mistake as a ground for vacatur. See discussion *infra* of *Halligan v. Piper Jaffray*, 148 F. 3d 197 (2nd Cir. 1998), cert. denied, 526 U.S. 1034 (1999), vacating an award denying an age discrimination claim.

[66] See 9 U.S.C. § 10(4) (2003).

[67] See e.g. *Advest, Inc. v. McCarthy*, 914 F. 2d 6, 10–11 (1st Cir. 1990) (Selya J.) (affirming a lower court's refusal to vacate an award in a case wherein an investor alleged that a broker wrongfully liquidated his holdings). The Court held that an honest failure of interpreting the law is not enough to justify vacatur, which

effectively including mistakes of law[68] and moving well beyond the consumer and employment context for which the doctrine had been conceived.

Yet another approach to "manifest disregard" has been suggested in *Williams v. CIGNA Financial Advisors Inc.*[69] and *Bridas S.A.P.I.C. v. Government of Turkmenistan.*[70] In these decisions, the Fifth Circuit followed a two-prong inquiry in which it determined first whether it was manifest that the arbitrators disregarded applicable law. Thereafter, the court considered whether the award would result in "significant injustice" under the circumstances of the case. Even if there was "manifest disregard," an award would be upheld as long as no injustice resulted.

The problem is not necessarily in the "manifest disregard" doctrine itself, which properly applied may have a salutary effect where a special need exists for greater judiciary supervision. Rather, the difficulty lies in the doctrine's potential for mischief and misuse in large international cases, when zealous litigators may be tempted to press "manifest disregard" into service as a proxy for attack on the substantive merits of an award.

Thankfully for the health of international arbitration, the Court of Appeals has recently reversed a district court vacatur of an award arising from an international arbitration in New York.[71] In *Westerbeke v. Daihatsu* a Japanese manufacturer had given an American distributor an exclusive right to sell certain contractually defined categories of engines. If the manufacturer wanted to market a new line of products, the sales agreement gave the distributor a right of first refusal during a period of six months.

requires a decision "contrary to the plain language" of the agreement or an indication that the arbitrator "recognized the applicable law and then ignored it." *Ibid.* at 8. *Cf. Watt v. Tiffany & Co.*, 248 F. 3d 577, 580 (7th Cir. 2001). In *Watt*, Judge Easterbrook (for better or for worse) aligned the concept with public policy, which in an international context might diverge from applicable law. For example, an employment agreement to be performed abroad might discriminate on the basis of gender or religion in a way acceptable under the applicable foreign law. The court stated, "If manifest legal errors justified upsetting an arbitrator's decision, then the relation between judges and arbitrators . . . would break down." *Ibid.* at 579. Judge Easterbrook interpreted the test for vacatur as simply that "an arbitrator may not direct the parties to violate the law." *Ibid.* at 580.

[68] See *Halligan v. Piper Jaffray*, 148 F. 3d 197, 203–04 (2nd Cir. 1998), cert. denied, 526 U.S. 1034 (1999) (reversing decision that refused to vacate award denying age discrimination claim). See also *Westerbeke v. Daihatsu*, 304 F. 3d 200 (2nd Cir. 2002) discussed *infra*. Only a few years ago one of the finest U.S. arbitration scholars described the elements that a losing party must prove to demonstrate "manifest disregard," and then concluded, "[t]his will never happen in our lifetimes." Alan Scott Rau, *The New York Convention in American Courts*, 7 Am. Rev. Int'l Arb. 214, 238 (1996). Professor Rau not only feels that "manifest disregard" is a dead letter, but "in operation the review standards of the Convention and the FAA will be identical." *Ibid.* at 236.

[69] *Williams v. CIGNA Financial Advisors Ind.*, 197 F. 3d 752, 760–61 (5th Cir. 1999). *Williams* involved an age discrimination employment case arbitrated under National Association of Securities Dealers (NASD) rules. See generally Noah Rubins, *"Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 Am. Rev. Int'l Arb. 363 (2001).

[70] *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 2003 WL 22077651 (5th Cir. 2003). Here, an Argentinian corporation sought to confirm an ICC award rendered in Houston (the parties having agreed to abandon Stockholm, the contractually stipulated situs) under English law against the government of Turkmenistan and a government-owned oil company. Not only did it refuse to find any "manifest disregard" of the law, the court also refused to vacate the award for excess of jurisdiction and held that the government itself could not be forced to arbitrate as the oil company's alter ego. *Ibid.* at 13–14.

[71] *Westerbeke v. Daihatsu Motor Co., Ltd.*, 304 F. 3d 200 (2nd Cir. 2002), rev'g 162 F. Supp. 2d 278 (2001).

Ultimately the deal went sour over a new product line that the manufacturer began offering through another North American distributor. The parties ended up in arbitration pursuant to provisions of the 1952 Japan–U.S. Trade Arbitration Agreement referenced in their contract. The arbitrator awarded the distributor more than $4 million, having found the sales agreement to constitute a binding contract with a condition precedent in the form of a requirement that new lines of engines were subject to a right of first refusal. The manufacturer brought a motion to vacate the award, arguing that the parties had reached only a "preliminary agreement to agree." Without a binding contract, the manufacturer argued, there could be no recovery for expectancy damages (purchase of substitution goods and lost profits), which of course is exactly what had been granted in the arbitration.[72]

To complicate matters, the arbitration had been bifurcated. A liability phase looked at whether the new product was indeed an engine within the terms of the contract. Then a subsequent stage assessed the claimant's damages. Unfortunate language in the Interlocutory Award on liability (which arguably had *res judicata* effect when it came time to draft the final decision) gave rise to an argument that the arbitrator had decided that the manufacturer owed no more than a duty to negotiate in good faith.

The district court disagreed, and vacated the award on the basis that the arbitrator had misapplied the New York law on damages. A year later the Second Circuit reversed, upholding the award of lost profits. In deciding whether there had been "manifest disregard" the Court of Appeals announced a two-prong test. An objective element required inquiry into whether the relevant law was "well defined, explicit and clearly applicable." A subjective component of the test involved examination of whether the arbitrator intentionally ignored the law.

Applying this approach, the Court of Appeals looked first at New York law on damages, which it considered to be consistent with the arbitrator's award on the facts of the case. The Court then proceeded to examine the arbitrator's intent, and found no evidence of knowing refusal to apply the governing law. Finally, the Court addressed the alleged inconsistency between the Interlocutory and Final Awards. Giving the arbitrator the benefit of the doubt, the Court interpreted ambiguous language in the Interlocutory Award in light of what the Court called a "clarification" in the Final Award, which had found the sales agreement to constitute a contract with conditions precedent rather than simply an "agreement to agree."[73]

The case points to at least one aspect of American arbitration law in need of reform if the United States wishes to remain attractive as a situs for international arbitration, along with the concomitant fees to lawyers, arbitrators, and expert witnesses. Although the case itself had a happy ending for the arbitration's prevailing party, the process involved

[72] By contrast, "reliance damages" would have been limited to amounts actually expended by reason of depending on the seller's promise, rather than the "benefit of the bargain" of expected profits.

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costly appellate briefing and argument. The Court of Appeals had to examine the New York law on calculation of damages and the difference between a "preliminary agreement," on the one hand, and a binding contract with condition precedent, on the other. The Court also had to examine standards for finding "manifest disregard," and investigate the facts that might give an indication of the arbitrator's state of mind when deciding the case.

The availability of a right to attack awards for "manifest disregard" gives losing parties the opportunity to disrupt the arbitral process, whatever the ultimate outcome of a challenge might be. Hanging like a sword of Damocles over the arbitration, "manifest disregard" serves as a vehicle for attempts to renege on the bargain to have a dispute decided by arbitrators. The result is to give the United States a competitive disadvantage compared to arbitral venues where judicial intervention is limited to matters related to fundamental procedural integrity. In response, some observers have proposed that for international arbitration the FAA should be modified to provide a more laissez-faire vacatur regime, removing the temptation of aggressive litigation tactics in the arbitration end game.[74]

Opting in and out of annulment standards

Some countries allow a choice between more than one alternative,[75] and/or permit litigants to "opt in"[76] or to "opt out"[77] of appeal on the substantive merits of the case. By statute at least two countries (Switzerland and Belgium) allow exclusion of all judicial review in arbitration between foreign parties.[78] At least one Canadian jurisdiction has arrived at the same result.[79]

[74] See William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 Vanderbilt J. Transnational L. 1241 (2003).

[75] Switzerland offers a choice among (i) federal standards limited to procedural integrity and public policy under *LDIP* Article 190, (ii) more expansive scrutiny under cantonal standards that include vacatur for "arbitrariness" under the Intercantonal Arbitration Concordat, and (iii) exclusion of all judicial scrutiny if neither party has a Swiss residence or place of business.

[76] Cases allowing contractual expansion of grounds for vacatur include *Gateway Technologies v. MCI Telecommunications Corp.*, 64 F. 3d 993 (5th Cir. 1995); *Syncor International Corp. v. David L. McLeland*, 120 F. 3d 262 (4th Cir. 1997); *Fils et Cables d'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984); *New England Utilities v. Hydro-Quebec*, 10 F. Supp. 2d 53 (D. Mass. 1998). By contrast, expansion of judicial review has been denied in *Kyocera Corp. v. Prudential Bache Trade Servs.*, 391 F. 3d 987 (9th Cir. 2003) (overruling *en banc* the 1997 decision in *Lapine Technology Corp. v. Kyocera Corp.*, 130 F. 3d 884), *Chicago Typographical Union v. Chicago Sun-Times*, 935 F. 2d 1501 (7th Cir. 1995), and *Bowen v. Amoco Pipeline Co.*, 254 F. 3d 295 (10th Cir. 2001). See generally Christopher R. Drahozal, *Standards for Judicial Review of Arbitral Awards in the United States: Mandatory Rules or Default Rules?*, 16 Int'l Arb. Rep. 27 (Sept. 2001).

[77] See 1996 English Arbitration Act §69 (requiring exclusion of appeal on questions of English law).

[78] See e.g. Swiss *LDIP* Article 192, which allows exclusion of all judicial scrutiny, assuming neither party has a Swiss residence or place of business, the parties may conclude an explicit exclusion agreement (*déclaration expresse/ausdrückliche Erklärung*). In 1998 Belgium amended its arbitration statute to follow the Swiss model. See *Code judiciaire* Article 1717.

[79] See *Noble China v. Lei*, 42 Ontario Reports (3d) 69 (1998). The court noted that had there been evidence of unfairness (bias) the result might be different.

By contrast, courts in the United States[80] and France[81] have generally held that grounds for vacatur under applicable national arbitration statutes provide mandatory norms from which the parties may not derogate.[82] Only one American decision has suggested (in ill-reasoned dictum) that there exists a right to discard the minimum grounds for vacatur under the FAA.

Effect of vacatur

Under the Convention, the effect of an award set aside at the arbitral situs will depend on the attitudes of the enforcement forum toward annulled awards. The English text of Convention Article V(1)(e) provides an award "may" be refused recognition if set aside where the award was made.[83] Moreover, any interested party may still rely on an annulled award under the domestic law of the enforcement forum, whatever that law might turn out to be in any given case.[84] Imagine, for example, that an award rendered in London was set aside by an English judge. A United States court asked to enforced the award against the loser's bank account in Boston would be permitted, but not required, to defer to the London nullification. Thus annulment will not necessarily uproot an award so as to make it invalid in all places and at all times, but rather may impair its effectiveness depending on where enforcement is sought.

French case law has long held that a foreign award may be recognized under French domestic law, irrespective of foreign annulment.[85] As illustrated in the *Hilmarton* saga,[86] French

[80] See e.g. *Hoeft v. MVL Group, Inc.*, 343 F. 3d 57 (2003) (holding that a federal court is not deprived of the power to review an award for "manifest disregard of law" because the parties have provided that the award "shall not be subject to any type of review or appeal whatsoever"); *M & C Corp. v. Erwin Behr GmbH*, 87 F. 3d 844, 847 (6th Cir. 1996), stating that contract language purporting to waive judicial review "merely reflect a contractual intent that the issues joined and resolved in the arbitration may not be tried de novo in any court."

[81] Attempts to waive *NCPC* Article 1504 were dismissed in *Diseno v. Société Mendes*, 27 October 1994, *Cour d'appel de Paris*, 1995 Rev. arb. 263. See generally Philippe Fouchard, Emmanuel Gaillard, & Berthold Goldman, *Traité de l'arbitrage commercial international* §1597, at 931 nn. 142–46 (1996).

[82] See *Roadway Package System, Inc. v. Kayser*, 257 F. 3d 287 (3rd Cir 2001), suggesting at 293 that parties could "opt out of the FAA's off-the-rack vacatur standards." Surprisingly, the court cited cases (*Lapine* and its progeny) relating not to exclusion of any review, but to an expansion of court scrutiny.

[83] The equally authoritative French version lends itself to a more forceful interpretation, providing that "la reconnaissance et l'exécution de la sentence ne seront refusées que si la sentence . . . a été annulée ou suspendue."

[84] New York Arbitration Convention Article VII provides that the Convention would not "deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon."

[85] See *Pabalk v. Norsolor* in which the French *Cour de cassation* held that the award set aside in Vienna qualified for enforcement under French law notwithstanding the annulment in Austria. *Cour de cassation*, 9 October 1984, *Cass. 1ére civ.*, reprinted in 1985 Rev. Arb. 431, note Berthold Goldman; 112 JDI 679 (1985), note Philippe Kahn.

[86] In *Hilmarton v. OTV* a French court recognized an award that had been annulled by a Geneva cantonal court, whose decision in turn was upheld by the Swiss *Tribunal fédéral*. The arbitrator had improperly invoked Swiss public policy to justify refusal to enforce an otherwise valid contract. See 1993 Rev. arb. 315 (*Cour de justice du Canton de Genève*, 17 November 1989) and 322 (*Tribunal fédéral*, 17 April 1990); *Cour de cassation*, 23 March 1994, reprinted in 1994 Rev. arb. 327, note Charles Jarrosson.

courts may enforce an annulled award even in preference to a subsequent inconsistent award which has not been vacated.[87]

Although one American court has been willing to enforce an annulled award,[88] the recent trend has gone in the other direction. The Second Circuit refused to enforce an award vacated in Nigeria,[89] and the Southern District of New York followed suit with an award vacated in Italy.[90] While the results in these later cases seems correct, the reasoning by which the earlier case was distinguished may not be entirely satisfying.[91]

The potential complications arising from recognition of annulled awards has led some commentators to argue that an enforcement forum should generally defer to award annulment at the arbitral situs.[92] Others, however, have commended court decisions that recognize awards vacated at the arbitral situs.[93]

The 1998 German arbitration statute wisely provides that courts can refuse recognition to an award set aside abroad even after it has been confirmed in Germany,[94] thus denying *res judicata* effect to vacated awards. Conversely, if a vacated foreign award is later "rehabilitated" by a higher jurisdiction in its country of origin, German courts will reverse a prior refusal of recognition.[95]

[87] A second arbitral tribunal in the same matter issued an award for the claimant, which also received recognition in France. See 1995 Rev. arb. 639. Ultimately the French *Cour de cassation* vacated the lower court decision recognizing the second award, reasoning that under the principle of *res judicata* ("autorité de la chose jugée") the existence of the earlier French judgment recognizing the annulled award prevented later recognition of an incompatible decision. See 1997 Rev. arb. 376, note Philippe Fouchard; Eric Schwartz, *French Supreme Court Renders Final Judgment in the* Hilmarton *Case,* (1997) (Issue 1) Int'l A.L.R. 45.

[88] See *Chromalloy Aeroservices v. Arab Republic*, 939 F. Supp. 907 (D.D.C. 1996), where a United States federal court confirmed an award annulled by a Cairo court; the arbitral tribunal had decided in favor of a company that had contracted for the maintenance of helicopters belonging to the Egyptian Air Force. See Gary Sampliner, *Enforcement of Foreign Arbitral Awards after Annulment in Their Country of Origin*, 11 Int'l Arb. Rep., Commentary at 22 (Sept. 1996); Eric Schwartz, *A Comment on* Chromalloy: Hilmarton *à l'Américaine*, 14 J. Int'l Arb. 125 (1997).

[89] *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F. 3d 194 (2000).

[90] *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999), motion for reargument denied, 77 F. Supp. 2d 405 (S.D.N.Y. 1999).

[91] The court in *Baker Marine* distinguished *Chromalloy* on the basis (i) that the contract involved an American citizen and (ii) that Egypt had promised that the award would be final. With respect to the first matter, it is hard to see how citizenship is in any way relevant to award enforcement in this context. With respect to award finality, the condition has consistently been interpreted to indicate that the award will be final insofar as local law allows exclusion of challenge. See *M & C Corp. v. Erwin Behr GmbH*, Federal Court of Appeals, 87 F. 3d 844 (6th Cir. 1996), subsequent appeal, 143 F. 3d 1033 (1998), finding that under 9 U.S.C. § 10 the right to challenge an award in the United States cannot be abrogated by the parties.

[92] See articles by Dana Freyer & Hamid Gharavi, Richard Hulbert, Jean-François Poudret, Eric Schwartz, Gary Sampliner, and Albert Jan van den Berg, cited in William W. Park, *Duty and Discretion in International Arbitration*, 93 Am. J. Int'l L. 805 (1999). For an earlier suggestion in this direction, see William W. Park, *National Law and Commercial Justice*, 63 Tul. L. Rev. 647 (1989).

[93] See Philippe Fouchard, *La Portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, (1997) Rev. arb. 329; Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9 ICC Bull. 14 (May 1998).

[94] *ZPO* Article 1061(3) provides that "[i]f an award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made." ("Wird der Schiedsspruch, nachdem er für vollstreckbar erklärt worden ist, im Ausland aufgehoben, so kann die Aufhebung der Vollstreckbarerklärung beantragt werden.")

[95] See *Bundesgerichtshof* Order (*Beschluss*) of 22 February 2001 (III *ZB* 71/99). The *BGH* reversed the decision of a lower court (the Rostock *Oberlandesgericht*) which had refused to recognize a vacated Moscow

From a practical perspective, reliable cross-border dispute resolution calls for common sense and balance, with sensitivity to the goals of both efficiency and fairness.[96] Disregard of foreign annulment orders would seem justified on the same basis as disregard of foreign awards, which is to say, when they have been procured by undue means or violate basic notions of international public policy.

In some cases deference to foreign annulment furthers the same interests as award enforcement itself: respect for the parties' mutual expectations at the time they entered into the contract.[97] Moreover, routine disregard of annulment orders means that a victim of a procedurally defective arbitration must resist enforcement of the annulled award in every country where the award's *res judicata* effect would put assets at risk.

Tinkering with the arbitral situs

The legal significance of the arbitral situs to award vacatur interacts with other legitimate expectations of the business community that underpin arbitration's treaty framework. The place of the arbitration has particular significance in international arbitration. And traditionally judges held the parties to their contract.

A recent line of American cases, however, has called this principle into question, both as the agreed place for the proceedings and the implied forum for any annulment action.[98] Some courts in the United States have not only compelled arbitration outside the contractually selected venue,[99] but have suggested that awards may be vacated at places other than where made.[100] The result is to encourage a race to the courthouse to gain precedence with

award that was later held valid by the Russian court of final instance. Thanks are due to Dr. Jens Bredow and the Deutsche Institution für Schiedsgerichtsbarkeit for bringing this decision to the author's attention.

[96] See Jean-François Poudret, *Quelle solution pour en finir avec l'affaire* Hilmarton?, 1998 Rev. arb. 7 (1998); W. Michael Reisman, *Systems of Control in International Adjudication and Arbitration* (1992); Pierre Karrer, *Judicial Review of International Arbitration Awards: Who Needs It?*, in Table Talk at 9 (International Arbitration Club, London, 1998); Michael Mustill, *Too Many Laws*, 63 Arbitration 248 (1997).

[97] Litigants who choose London arbitration can by agreement exclude the default rule of merits appeal on English points of law. See § 69 of 1996 English Arbitration Act. When appeal has not been excluded, to honor English court orders does no more than hold the parties to their bargain.

[98] See generally William W. Park, Jack Coe, & Andrea Bjorklund, *International Commercial Dispute Resolution*, 37 Int'l Lawyer 445 (2003).

[99] See *Indian Harbor Ins. Co. v. Global Transport Systems Inc.*, 197 F. Supp. 2d 1 (S.D.N.Y. 2002). In a dispute involving insurance, the district court under FAA § 4 compelled arbitration in New York notwithstanding the parties' agreement to arbitrate in Puerto Rico. See also *Textile Unlimited Inc. v. A. B.M.H. & Co. Inc.*, 240 F. 3d 781 (9th Cir. 2001), permitting an action in California to enjoin arbitration at the contractually designated situs in Georgia.

[100] See *Vulcan Chemical Technologies, Inc. v. Barker*, 297 F. 3d 332 (4th Cir. 2002), in which the federal district court in the Western District of Virginia vacated an award made in California and attempted to enjoin confirmation proceedings in California state court. The Fourth Circuit declared that Virginia court had jurisdiction to hear the action to vacate the California award, although in the instant case the Court of Appeals held that the court in Virginia should have exercised discretion to abstain from exercising jurisdiction in light of the California action under principles announced in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). See also *Smart v. Sunshine Potato Flakes*, 2002 WL 31235498 (8th Cir. 2002) (North Dakota confirmation of award made in New Mexico); *Theis Research Inc., v. Brown and Bain*, 240 F. 3d 795 (9th Cir. 2001) (in the context of motion to vacate, Ninth Circuit directs California district court to asses the validity of award made in District of Columbia).

a "first-filed" motion.[101] The reasoning of these cases (likely to delight those wishing to portray the United States as an unfriendly place to arbitrate) rests on a decision by the U.S. Supreme Court allowing vacatur in any district proper under the general federal venue statute, including the place of defendant's residence.[102] In *Cortez Byrd* the Court interpreted as merely permissive FAA language stating that an award may be vacated by the federal court "in and for the district wherein the award was made."[103]

Such a free-for-all might not matter in the situations such as the case in which the Court announced the rule, which involved competing actions in Alabama (the arbitral situs) and Mississippi (the losing party's residence). However, in a case implicating cross-border business, a practice of vacating foreign awards could disrupt the reliability of international arbitration established over four decades under the New York Arbitration Convention.[104] If a Massachusetts seller and a French buyer agree to arbitrate in London, they normally expect proceedings in England, subject to judicial review by English courts, rather than having one side's home-town judges disregard the contractually selected venue in order to compel arbitration or to vacate an award in Paris or Boston.[105]

E. The Role of the New York Convention in Promoting Reliability

While some countries benefit from comprehensive treaties for enforcing court selection clauses and the resulting judgments,[106] not all parts of the world are blessed with such a

[101] On the "first to file" rule, see, e.g., *Orthmann v. Apple River Campground Inc.*, 765 F. 2d 119, 121 (8th Cir. 1985), stating that in cases of concurrent federal jurisdiction, "the first court in which jurisdiction attaches has priority to consider the case." For international transactions, this and related question are often addressed under the rubric *lis pendens, lis alibi pendens*, or *litispendence*. See e.g. Laurent Lévy & Elliot Geisinger, *Applying the Principle of Litispendence*, [2000] Int. A.L.R. (Issue 4) at N-28.

[102] *Cortez Byrd Chips Inc. v. Bill Harbert Construction Company*, 529 U.S. 193 (2000), applying the general venue provisions of 28 U.S.C. § 1391. The Contractor moved to confirm an award in Alabama, after the project owner a few days earlier had filed a motion to vacate in Mississippi. Reversing a decision in the Northern District of Alabama upheld by the Eleventh Circuit, the U.S. Supreme Court gave priority to the first filed motion in Mississippi. Ironically, the Supreme Court supported its holding by stating that a restrictive reading (limiting vacatur to the award situs) would "preclude any action [in courts of the United States] to confirm, modify or vacate awards rendered in foreign arbitrations not covered by [the New York or Panama Conventions]."

[103] 9 U.S.C. § 10. Moreover, the New York Arbitration Convention emphasizes the primacy of the place of arbitration by providing that Convention states need not recognize an award "set aside or suspended by a competent authority of the country in which . . . that award was made." Article V(1)(e), Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 U.N.T.S. 38, 21 U.S.T. 2517, T.I.A.S. No. 6997 (1958).

[104] Vacatur of foreign awards would also be contrary to sound prior case law. See *International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Commercial*, 745 F. Supp. 172 (S.D.N.Y. 1990) (holding that the FAA did not allow vacatur of a Mexican award even if the merits of the dispute were to be decided under New York law).

[105] See generally William W. Park, Jack Coe, & Andrea Bjorklund, *International Commercial Dispute Resolution*, 37 Int'l Lawyer 445 (2003).

[106] See e.g. Bruxelles Convention on Jurisdiction and Judgments in Civil and Commercial Matters, applicable among members of the European Union, signed 27 September 1968, and the parallel treaty extending similar principles to the European Free Trade Association, signed at Lugano on 16 September 1988. Except in consumer transactions, the Conventions generally enforce court selection clauses and require contracting states to recognize and execute each other's judgments. See Convention Articles 13–17 and 25–49.

dependable framework for dealing with jurisdiction and judgments. Thus the New York Convention can be of special significance in business transactions in which enforcement of a court selection clause might be problematic.

For example, to date the United States has not concluded a single treaty on foreign judgments.[107] Even its closest allies and trading partners have refused to enter into such treaties from fear of punitive damages, strict product liability, civil juries, and other aspects of the United States' civil justice system unfamiliar in more civilized lands.[108] While United States judgments might in some cases be enforced abroad as a matter of "comity" (a judicially created golden rule allowing courts to recognize foreign judgments)[109] or common law actions on debt,[110] this remains a matter of national discretion rather than international obligation.

However, the United States is a party to the New York Arbitration Convention, which permits American business managers and their foreign counterparties to maximize the certainty that commercial disputes will be resolved in a relatively neutral and predictable forum. The importance of such neutrality and predictability can hardly be overestimated in contexts where there exists between the parties a high degree of mistrust of the other side's judicial system and a mutual interest in foreclosing multiple litigation options.

[107] See generally William W. Park, *International Forum Selection* 46–49 (1995). On the background of ill-fated efforts to negotiate an international jurisdiction and judgments treaty, see *Conférence de la Haye en droit international privé, Rapport de Synthèse des Travaux de la Commission Spéciale sur la compétence juridictionnelle internationale et les effects des jugements étrangers en matière civile et commerciale* (Prel. Docs. No. 8 and 9, Nov. 1997 and July 1998), prepared by Catherine Kessedjian.

[108] A draft judgments treaty initialed with the United Kingdom proved unacceptable to British trade groups. See *Convention for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters*, 16 I.L.M. 71 (1977).

[109] See Restatement (Third) Foreign Relations Law §§ 481 & 482; Restatement (Second) Conflict of Laws § 98; Uniform Foreign Money-Judgments Recognition Act (13 U.L.A. 261) § 4.

[110] See the English decision in *Adams v. Cape Industries* [1990] 1 Ch. 433.