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### III. International Law in U.S. Courts: Specific Instances

International law arises frequently in specific contexts, among them:

- International Arbitration
- International Law Respecting Families and Children
- International Sale of Goods
- International Air Transportation
- Human Rights, including laws combating torture and human trafficking
- Criminal Justice
- Environment

Each is discussed in the succeeding chapters.

#### A. International Arbitration

This section discusses instances in which U.S. courts may be asked to intervene in an international arbitration.

##### 1. International Arbitration Defined

International arbitration is a privately sponsored system through which parties agree to resolve cross-border disputes, in commercial and other settings.

In the United States, requests for judicial intervention related to international arbitration are governed by the Federal Arbitration Act, codified as amended 9 U.S.C. §§ 1 *et seq.* (2006), and frequently called the FAA.

Included within these requests are FAA provisions that implement obligations the United States undertook in 1970, and again in 1990, when it ratified two multilateral treaties on the recognition and enforcement of international arbitration agreements and awards. Respectively, these treaties are the:

- 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a global treaty typically called the New York Convention;<sup>2</sup> and

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<sup>1</sup> For what this section contains, see the Detailed Table of Contents, <http://www.asil.org/benchbook/detailtoc.pdf>.

<sup>2</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, available at [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) [hereinafter New York Convention]. The New York Convention has 149 states parties, including the United States, for which the

- 1975 Inter-American Convention on International Commercial Arbitration, a regional treaty typically called the Panama Convention.<sup>3</sup>

Except where there is a need to distinguish between the two, the New York and Panama Conventions generally are referred to in this chapter as the “Conventions.” Arbitration agreements or awards that – due to their international nature – fall within the purview of either Convention shall be referred to as “Convention agreements” or “Convention awards.”

Parties need not do anything particular for their dispute to be deemed “international.” Rather, pursuant to Sections 202 and 302 of the FAA, 9 U.S.C. §§ 202, 302, an arbitration is international, and thus falls under the ambit of the Conventions and the FAA’s associated implementing legislation, as long as it involves commerce and furthermore:

- Involves at least one foreign party;
- Involves property located abroad;
- Envisages performance or enforcement abroad; or
- Has some other reasonable relation with one or more foreign states.

An arbitration agreement may appear in a contract, in the form of a dispute-resolution clause by which the parties agree to settle specified future disputes through arbitration instead of litigation. New York Convention, art. II; Panama Convention, art. 1. The clause may name as administrator an institution such as the International Centre for Dispute Resolution (<http://www.adr.org/icdr>), a U.S.-based division of the American Arbitration Association.

The parties may select arbitrators themselves or designate an authority to appoint on their behalf. The fees of these arbitrators, as well as the costs of any administering arbitral institution, are borne by the parties. Pursuant to the law governing the merits of the dispute and any arbitral rules that the parties select, the arbitration tribunal will hear the dispute and issue a legally binding and enforceable award.

## 2. How International Arbitration Matters Arise in U.S. Courts

A U.S. court should not decide the merits of a dispute that is subject to a valid arbitration agreement. 9 U.S.C. §§ 3-4, 9-11, 207, 201 (implementing New York Convention, arts. II, V; Panama Convention, arts. 1, 5). Nevertheless, a U.S. court may receive, from a party to an arbitration, applications to:

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treaty entered into force on Dec. 29, 1970. *See* U.N. Comm’n on Int’l Trade L. (UNCITRAL), *Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html) (last visited Mar. 10, 2014).

<sup>3</sup> Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245, *available at* <http://www.oas.org/juridico/english/treaties/b-35.html> [hereinafter Panama Convention]. Of the 35 countries that belong to the Organization of American States, 19 are states parties to the Panama Convention, including the United States, which deposited its instrument of ratification on Sept. 27, 1990. *See* Dep’t of Int’l L., Org. of Amer. States, *Multilateral Treaties*, <http://www.oas.org/juridico/english/sigs/b-35.html> (last visited Mar. 10, 2014).

- Help constitute or fill vacancies in an arbitral tribunal.
- Compel a party to submit to an international arbitration, which may be accompanied with a request to stay or dismiss related litigation.
- Enjoin a party from proceeding with international arbitration.
- Compel discovery or other disclosure in aid of an international arbitration or enforce subpoenas issued by an arbitral tribunal.
- Order injunctive relief or other provisional measures in aid of arbitration.
- Confirm or vacate an international arbitration award.
- Recognize and enforce an international arbitration award.

The purpose of this *Benchbook* section on international arbitration is to provide guidance as to the U.S. and international laws relevant to deciding such applications.

### **3. Legal Framework: The Federal Arbitration Act**

Commercial arbitration is as old as the United States. Despite this long tradition, some jurists were skeptical about the arbitral process. Justice Joseph Story, for example, wrote in his *Commentaries*:

[C]ourts of justice are presumed to be better capable of administering and enforcing the real rights of the parties than any mere private arbitrators, as well from their superior knowledge as their superior means of sifting the controversy to the very bottom.

Joseph Story, 1 *Commentaries on Equity Jurisprudence as Administered in England and America* § 670 (Melville Bigelow, 13th ed. 1886). Story’s presumption stood in tension with two goals, seen to promote trade and investment:

- Respect for a pre-existing agreement of the parties; and
- Reinforcement of predictability.

*E.g.*, *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974) (describing the parties’ agreement to arbitrate as a “freely negotiated private international agreement”); *Soci t  Nationale Algerienne Pour La Recherche v. Distrigas Corp.*, 80 B.R. 606, 612 (Bankr. D. Mass. 1987) (stating that the U.S. “Supreme Court powerfully advocates the need for international comity in an increasingly interdependent world,” and adding that “[s]uch respect is especially important, in this Court’s view, when parties mutually agree to be bound by freely-negotiated contracts”).

Over time, a framework of U.S. statutes and treaties operated to tip the balance in favor of enforcing arbitral agreements. The most influential law is the Federal Arbitration Act, codified as amended at 9 U.S.C. §§ 1 *et seq.* (2006), and frequently called the FAA.

Congress passed the Federal Arbitration Act in 1925 with the aim, as stated by the Supreme Court, “to place arbitration agreements ‘upon the same footing as other contracts.’” *Scherk*, 417 U.S. at 510 (citation omitted). The statute displaced an old English common law practice of refusing to enforce such agreements. 65 Cong. Rec. 1931 (1924).

### **a. Chapter 1 of the Federal Arbitration Act: General Provisions Relating to Both Domestic and International Arbitrations**

Chapter 1 of the FAA applies to both domestic and international arbitrations. The statute’s core provisions concern matters such as:

- Enforceability of arbitration agreements
- Compulsion of arbitration and stays of related state or federal litigation
- Compulsion of discovery and testimony
- Limited judicial oversight of arbitral awards

These are discussed below.

### **b. Chapters 2 and 3 of the Federal Arbitration Act: Implementing the Conventions**

Chapters 2 and 3 of the FAA constitute amendments designed to implement the New York and Panama Conventions into domestic law, as described in the subsections below.

#### **i. Chapter 2: Implementing the New York Convention**

Amendments made to the FAA in 1970 and now contained in chapter 2 (codified at 9 U.S.C. §§ 201-08) implemented the New York Convention, which the United States joined the same year. A Senate report explained that the amendments were intended to promote international trade and investments, thus benefiting U.S. companies through the establishment of a stable, effective system of international commercial dispute resolution. S. Rep. No. 91-702, at 1-2 (1970).

To those ends, chapter 2 of the FAA sets forth procedures for the recognition and enforcement of international arbitration agreements and awards that:

- On the one hand, were made in a foreign country; or,
- On the other hand, were made within the United States, yet possess one of the cross-border components listed *supra* § III.A.1.

## **ii. Chapter 3: Implementing the Panama Convention**

Amendments made to the FAA in 1990, and now contained in 9 U.S.C. §§ 301-07, implemented the Panama Convention, which the United States joined the same year. Chapter 3 thus provides for the recognition and enforcement of international arbitration agreements and awards covered by the Panama Convention. 9 U.S.C. § 301.

## **iii. When Both Conventions Appear Applicable**

Due to the nationalities of the respective parties, some disputes might appear to fall under both the New York Convention and the Panama Convention. Generally, the New York Convention controls in such instances. 9 U.S.C. § 305(2). If most parties to the arbitration agreement are citizens of a country that has ratified or acceded to the Panama Convention and are member States of the Organization of American States, however, that regional treaty is to be applied. *Id.* § 305(1).<sup>4</sup>

## **iv. Chapters 2 and 3: Federal Jurisdiction**

Federal district courts have original jurisdiction over litigation relating to any international arbitration falling within chapters 2 and 3 of the FAA regardless of the amount in controversy. 9 U.S.C. §§ 203, 302.

## **v. Chapters 2 and 3: Removal**

The FAA expressly allows defendants to remove to federal court an action or proceeding pending in state court, if the matter relates to an international arbitration covered by chapter 2 or chapter 3. 9 U.S.C. §§ 205, 302.

## **c. If Chapters 2 or 3 Conflict With Chapter 1**

In general, chapter 1 of the FAA applies equally to all arbitrations, international as well as domestic. On matters not covered in chapters 2 or 3, chapter 1 is to be applied. 9 U.S.C. §§ 208, 307.

An exception occurs if a provision of chapter 2 or 3 conflicts with chapter 1. In this case, the provision in chapter 2 or 3 – the chapters that specifically govern international arbitrations – displaces the conflicting provision of chapter 1. *Id.*

*An example:* The time limit for confirming awards in the case of an international arbitration covered by the New York Convention or the Panama Convention is three years, pursuant to chapters 2 and 3 of the FAA. *See* 9 U.S.C. §§ 207, 302. This displaces the shorter, one-year limit contained in chapter 1. 9 U.S.C. § 9.

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<sup>4</sup> For a list of Panama Convention member states, see Dep't of Int'l L., Org. of Amer. States, *Multilateral Treaties*, <http://www.oas.org/juridico/english/sigs/b-35.html> (last visited Mar. 10, 2014).

#### **4. Distinguishing Domestic from International Arbitration Awards**

An arbitration may be deemed “international” under U.S. law and thus fall within the purview of the Conventions and the associated implementing legislation in chapters 2 and 3 of the FAA, providing that it meets the foreign nexus requirements set forth *supra* § III.A.1, whether the arbitration takes place in the United States or abroad.

Because the U.S. legal standards for enforcement of international arbitration awards vary to some degree based on where an award is rendered, however, it is sometimes necessary to distinguish between international arbitration awards rendered in the United States from those rendered abroad. This chapter thus refers to international arbitration awards which were rendered in the United States, or which applied U.S. procedural law, as “U.S. Convention Awards”; in contrast, this chapter refers to international arbitration awards which were rendered abroad as “Foreign Convention Awards.”

Both of these types of Convention awards are to be further distinguished from “domestic awards,” which result from arbitrations occurring in the United States that do not involve any of the international components listed *supra* § III.A.1. Purely “domestic awards” are covered exclusively by chapter 1 of the FAA, whereas Convention awards are also subject to chapters 2 or 3 of the FAA, the provisions implementing the Conventions.<sup>5</sup>

##### **a. Common Requests to U.S. Courts by Parties to International Arbitration**

A court in the United States may be asked to intervene in an international arbitration in a number of ways, as described *supra* § III.A.2, and further discussed below.

##### **i. Request for Order to Compel or to Stay International Arbitration**

Federal courts may be asked to compel arbitration when one party to an arbitration agreement:

- Simply refuses to arbitrate; or
- Has filed a lawsuit in a U.S. court instead of arbitrating, in which instance a motion to stay the lawsuit likely will accompany the request to compel arbitration.<sup>6</sup>

Conversely, the opposing party may seek a permanent stay of arbitration. Common arguments in favor of staying arbitration include:

- The agreement to arbitrate under review is invalid; or

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<sup>5</sup> This chapter does not address enforcement of awards rendered pursuant to the 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, available at [https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR\\_English-final.pdf](https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/CRR_English-final.pdf) (known as the ICSID or Washington Convention).

<sup>6</sup> Regarding requests for anti-suit injunctions, which prevent a party from prosecuting a foreign lawsuit in contravention of an agreement to arbitrate, see *infra* § III.A.2.

- Though valid, the arbitration agreement does not apply to the particular dispute at issue.

## **ii. Legal Framework Pertaining to Such Requests**

Resolution of requests to compel or stay international arbitration implicates both the FAA and the two treaties its provisions implement, the New York Convention and the Panama Convention, *cited in full supra* § III.A.1.

Pursuant to Section 2 of the FAA, 9 U.S.C. § 2, a “written provision” evincing an intention to submit existing or future disputes to arbitration shall be “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

A U.S. district court may compel arbitration under three scenarios; specifically:

- Under Section 4 of the FAA, 9 U.S.C. § 4, provided that the district court would have otherwise had jurisdiction over the dispute:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such [arbitration] agreement would have had jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

- Under Section 206 of the FAA, 9 U.S.C. § 206, and corresponding Article II(3) of the New York Convention for cases falling within the New York Convention.

- Section 206 of the FAA, 9 U.S.C. § 206, provides:

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

- In turn, Article II(3) of the New York Convention provides:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement



within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

- Under Section 303 of the FAA, for cases falling under the Panama Convention. Section 303, codified at 9 U.S.C. § 303, provides:
  - (a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.
  - (b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the [Panama Convention.]<sup>7</sup>

When so requested by a party, the court has discretion to stay a lawsuit that is referable to arbitration pursuant to an arbitration agreement. 9 U.S.C. § 3. Indeed, upon consideration of various factors, it may dismiss litigation in aid of arbitration, rather than simply order a stay pending arbitration. *See* John Fellas, “Enforcing International Arbitration Agreements,” *in International Commercial Arbitration in New York* 234 (James H. Carter & John Fellas eds., 2010).

Conversely, a court may order a permanent stay of arbitration if the dispute falls outside the scope of the arbitration agreement or is otherwise not arbitrable. *Id.*

### **iii. Commonly Raised Issues**

Petitions to compel or stay arbitration frequently require courts to determine:

- First, whether the parties agreed to arbitrate the dispute – an issue often described as concerning the formation and validity of the arbitration agreement under review;
- Second, if the parties did so agree, whether the particular dispute is arbitrable – an inquiry potentially involving several subquestions:

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<sup>7</sup> Although parties frequently invoke both section 4 of the FAA and the relevant sections within chapters 2 or 3 of the FAA when seeking to compel international arbitration, section 4 of the FAA only permits a district court to refer parties to arbitration in “the district in which the petition for an order directing such arbitration is filed.” 9 U.S.C. § 4. By contrast, sections 206 and 303 empower a court to direct that arbitration be held in accordance with the agreement of the parties “at any place therein provided for, whether that place is within or without the United States.” Thus, where parties seek a U.S. district court order compelling arbitration in another district or abroad, grounds for invoking either chapter 2 or 3 of the FAA must also be present.



- What is the scope of the arbitration agreement? Is it broad enough to cover the particular issues in dispute?
- Does the agreement to arbitrate bind the particular parties at issue – e.g., was it intended to cover certain nonsignatories?
- Has the party seeking arbitration waived their right to arbitrate by, for instance, engaging in litigation on the subject matter of the dispute?
- Might the issues covered by the arbitration agreement otherwise be nonarbitrable because, for example, they violate fundamental public policy?

If the dispute falls within the scope of the arbitration agreement, a motion to compel likely will be granted even if U.S. public policy is implicated. As the Supreme Court explained in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985), a U.S. court, on a requested review of the consequent arbitral award, will have an opportunity to ensure satisfaction of the United States’ legitimate interest in having its laws enforced.

**b. Arbitration Clause Severable from Underlying Contract: *Prima Paint***

In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), a judgment that derives from a domestic arbitration yet applies equally to international arbitrations, the Supreme Court adopted the presumption that arbitration clauses are “separable” or “severable” from the underlying commercial contract in which they are contained.

Plaintiff-petitioner in *Prima Paint Corp.* had filed a federal complaint for fraudulent inducement, claiming that defendant-respondent had deliberately concealed its insolvency when signing a consulting agreement, which contained an arbitration clause. Plaintiff-petitioner also asked the district court to enjoin an arbitration sought by defendant-respondent. Defendant-respondent cross-moved to stay the court action and compel arbitration pursuant to Sections 3 and 4 of the FAA, 9 U.S.C. §§ 3, 4. Defendant-respondent argued that whether there was fraud in the inducement of the consulting agreement was a question for the arbitrators, and not for the district court.

In its 1967 judgment, the Supreme Court agreed with defendant-respondent that arbitration should go forward; the Court wrote that “except where the parties otherwise intend, arbitration clauses . . . are ‘separable’ from the contracts in which they are embedded.” *Prima Paint Corp.*, 388 U.S. at 402. Although specific challenges to the validity of the agreement to arbitrate are subject to judicial review, the Court noted that challenges to the validity of the overall contract are to be determined by the arbitrators. *Id.* at 404. In sum, “a federal court may consider only issues relating to the making and performance of the agreement to arbitrate,” *id.* Therefore, if the suit challenges the validity of the contract as a whole, that does not specifically implicate the arbitration clause, and the matter should be referable to arbitration. *See also Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 449 (2006).

### **c. Authority to Decide If Parties Agreed to Arbitrate**

In *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), another judgment arising out of a domestic arbitration, the Court outlined how authority was to be allocated between courts and arbitrators with regard to challenges to the existence, validity, or enforceability of arbitration agreements. At this writing, the Court is considering extent to which that framework applies to one type of international arbitration – that between a private investor and a sovereign state. Each aspect is described in turn below.

#### **i. First Options**

Respondents in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), had asked a district court to vacate an arbitral award stemming from a dispute over the clearing of stock trades. They argued *inter alia* that the arbitral panel had wrongly reserved for itself the threshold question whether the dispute was subject to arbitration. At issue, in the words of the Supreme Court, was “who – court or arbitrator – has the primary authority to decide whether a party has agreed to arbitrate.” *Id.* at 942. Ruling against respondents, the Court held:

- Generally, U.S. courts are to determine in the first instance if parties agreed to submit the dispute to arbitration – an issue to be decided by applying “ordinary state-law principles that govern the formation of contracts.” *Id.* at 944. *See also* Gary B. Born, 1 *International Commercial Arbitration* 1071 (3d ed. 2010) (writing that in *First Options* the Supreme Court made clear that “[t]he ‘pro-arbitration’ rule of interpretation adopted by U.S. courts applies only to interpreting the scope of an existent arbitration agreement, and not to determining whether a valid arbitration agreement exists”).
- An exception is to be made if the agreement under review makes clear that the parties intended the arbitral tribunal to decide this preliminary issue. *First Options*, 514 U.S. at 944-45.

#### **ii. The Arbitrability Decision and Investor-State Arbitrations**

In *BG Group plc v. Republic of Argentina*, \_\_\_ U.S. \_\_\_, 2014 WL 838424 (U.S.) (Mar. 5, 2014), the Supreme Court reviewed, for the first time, an arbitration based on one of the thousands of bilateral investment treaties, or BITs, that states have concluded in recent decades. A treaty clause required a British private investor to submit its dispute to Argentina’s courts and wait eighteen months before seeking arbitration. The investor did not do so. Arbitrators, in an award issued after an arbitration conducted in Washington, D.C., excused this noncompliance. A federal appellate court then applied *de novo* review to overturn the award; however, the Supreme Court reversed. Justice Stephen G. Breyer’s opinion for the seven-member majority invoked precedents like *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), discussed *supra* § III.A.4.c.i, to hold that the question was one for the arbitrators to decide. *BG Group*, 2014 WL 838424, at \*12. A concurrence by Justice Sonia Sotomayor stressed that the decision left open the question of how to interpret clauses that – unlike the one at issue – expressly condition a state’s consent to arbitrate on fulfillment of the local litigation requirement. *See id.* at \*13-\*15.

### iii. The “Pro-Arbitration” Presumption: *Mitsubishi Motors*

The Supreme Court’s decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985), emphasized the strong judicial regard for the enforceability of arbitration agreements, especially in the international context.

In the case, which involved a dispute between a Japanese automobile manufacturer and an American dealer, the Court addressed the interplay between the legal framework for international arbitration and federal antitrust laws. In compelling the parties to arbitrate an antitrust dispute despite the respondents’ objections that such claims could not be arbitrated on public policy grounds, the Court reaffirmed the strong federal policy supporting the enforcement of agreements to arbitrate. *See Mitsubishi Motors Corp.*, 473 U.S. at 624-28.

At issue were Sections 4 and 201 of the FAA, 9 U.S.C. §§ 4, 201, the latter of which implements Article II of the New York Convention. Invoking these sections, petitioner had sought to compel respondent to arbitrate a dispute pursuant to a prior agreement. Respondent’s counterclaim relied *inter alia* on the Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2006), and on the argument that the strong public interest issues at stake in antitrust matters rendered such claims nonarbitrable. *Mitsubishi Motors*, 473 U.S. at 624-25.

The Court held that the antitrust claims could be resolved in arbitration. It acknowledged prior courts’ concerns about the ability of arbitrators properly to balance the business and public interests at issue in antitrust matters. *Mitsubishi Motors Corp.*, 473 U.S. at 628-29. These were held to be outweighed, not only by the fact that courts would have an opportunity to review the consequent arbitral award, as discussed *supra* § III.A.3.b.iv., but also by:

- “[H]ealthy regard’ for the strong federal policy favoring arbitration”;
- “[C]oncerns of international comity”;
- “[R]espect for the capacities of foreign and transnational tribunals”; and
- “[S]ensitivity to the need of the international commercial system for predictability in the resolution of disputes.” *Mitsubishi Motors Corp.*, 473 U.S. at 626.

### 5. Request for Injunctive or Other Provisional Measures

Parties may also petition U.S. courts – most often in the early stages of an international arbitration – to order some form of injunctive relief. What is sought variously is referred to as provisional measures, interim relief, or preliminary measures.

Provisional measures are intended to preserve the efficacy of the arbitral process and to ensure that the ultimate award will not be rendered meaningless through the dissipation of assets or evidence. As explained in Born, *International Commercial Arbitration*, *supra*, at 1943-44:

Provisional measures have particular importance in international disputes. Cases involving litigants from different nations pose special risks, including the increased danger that vital evidence will be taken out of the reach of relevant tribunals or that assets necessary to satisfy a judgment will be removed to a jurisdiction where enforcement is unlikely.

#### **a. When Provisional Measures May Be Sought**

A party may request provisional relief before issuance of a final arbitration award in order to:

- Protect assets or property in dispute;
- Preserve evidence relevant to the dispute; or
- Enjoin certain conduct that might frustrate the ultimate purpose of the arbitral process.

A request for court ordered provisional measures can arise under one of two circumstances. To be precise, a party either may:

- Apply directly to a court for provisional measures; or
- Petition a court to secure judicial enforcement of provisional measures granted in the first instance by the arbitral tribunal.

Under both scenarios, provisional measures are designed to preserve and promote the efficacy of the arbitral process by protecting assets or evidence relevant to the dispute or the award, or by prohibiting conduct that would otherwise threaten to frustrate the arbitral process.

For a detailed discussion of when provisional measures may be sought, see Born, *International Commercial Arbitration*, *supra*, at chapter 16.

#### **b. Court-Ordered Provisional Measures**

Because there can be a lag between the time in which an arbitration is commenced and an arbitral panel can be constituted, parties sometimes seek direct court intervention in order to secure assets or evidence while the panel is being formed. Even after an emergency arbitrator has been assigned or a tribunal appointed, parties may prefer court-issued preliminary relief in some situations. A party may wish to move *ex parte* because of a risk of dissipation of assets, for instance, given that *ex parte* relief is generally not available from arbitral tribunals. Alternatively, a party may seek to freeze funds or enjoin the conduct of a bank or other third party not subject to the jurisdiction of the arbitration tribunal.

The Supreme Court has not decided the extent to which judicial relief may be ordered in aid of an international arbitration implicating the New York Convention. “[W]hen seized of an

action in a matter in respect of which the parties” have agreed to arbitrate, a court must, “at the request of one of the parties, refer the parties to arbitration,” according to New York Convention, art. II(3). Courts variously have interpreted this provision:

- On the one hand, by a restrictive reading, to mean that a court’s jurisdiction is limited to compelling arbitration or confirming an existing arbitral award. *See McCreary Tire & Rubber Co. v. CEAT, S.p.A.*, 501 F.2d 1032, 1037-38 (3d Cir. 1974).
- On the other hand, by a more expansive reading that takes into account the treaty’s pro-arbitration purpose and concludes that a court may award the usual provisional remedies available in court in favor of arbitration, including injunctive relief that preserves assets. *See Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 826 (2d Cir. 1990), *cert. denied*, 500 U.S. 953 (1991).

### **c. Standards for Judicial Relief: Federal Rules of Civil Procedure**

In considering standards to apply to requests for provisional measures, courts frequently look to Federal Rules of Civil Procedure; specifically, to:

- Rule 65, “Injunctions and Restraining Orders,” for injunctive relief; and
- Rule 64, “Seizing a Person or Property,” for requests for attachments.

Each is discussed in turn below.

#### **i. Application of Rule 65: Injunctions and Restraining Orders**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, courts hearing requests for provisional relief in international arbitration matters generally require:

- Advance notice to the adverse party – unless the standard for an *ex parte* temporary restraining order, set forth in Rule 65(b)(1), is met;
- Security for the payment of costs or damages to a wrongly enjoined party, Fed. R. Civ. P. 65(c); and
- Satisfaction by the movant of standards for injunctive relief applied within the federal circuit. Usually this involves some balancing of standard injunction factors – such as irreparable harm in the absence of such relief, likelihood of success on the merits, or serious questions going to the merits – combined with some balancing of the public and private equities.

## **ii. Application of Rule 64: Seizing a Person or Property**

When a party seeks to freeze or attach assets in aid of arbitration, federal courts usually apply the state law standard for attachments, consistent with Rule 64(a) of the Federal Rules of Civil Procedure.

## **iii. Prehearing Discovery**

Although federal courts are cautious when ordering any form of prehearing discovery, as discussed *infra* §II.C.2.b.i., such requests for interim relief have been granted in “limited” circumstances. See *Deiulemar Compagnia di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 479-80, 486 (4th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000). The court in that case wrote that such relief could be available if:

- Evidence sought is “time-sensitive” or “evanescent”; or the
- Movant seeks “to perpetuate, rather than discover, the evidence.”

## **d. Anti-suit Injunctions**

One form of provisional measure that a party may request directly from a court is the “anti-suit injunction,” by which a court orders a person subject to its jurisdiction not to go forward with a foreign lawsuit that contravenes an arbitration agreement. Such relief is not expressly authorized within the international arbitration framework of the FAA, the New York Convention, and the Panama Convention. Yet the power of a court to issue such an injunction – aimed not at a foreign court, but rather at a party – is established. *China Trade & Dev’t Copr.v. M.V.Choong Yong*, 837 F.2d 33, 35-36 (2d Cir.1987).

Failure to comply with such an injunction may be treated as a contempt of court and may be punished by fine. *A. Heritage Life Ins. Co. v. Orr*, 294 F.3d 702, 714 (5th Cir. 2002), 537 U.S. 1106 (2003).

Various U.S. courts of appeals have disagreed on the degree of deference to be given foreign litigants when considering a request for an anti-suit injunction – an injunction that may place the principle of comity at odds with federal policy in favor of enforcing arbitration agreements. Compare, e.g., *Paramedics Electromedicina Comercial, LTDA. v. GE Med. Sys. Info. Techs.*, 369 F.3d 645, 652-54 (2d Cir. 2004) (advising sparing use of anti-suit injunctions) with *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 627 (5th Cir.) (declining, in the court’s words, “to genuflect before a vague and omnipotent notion of comity” whenever asked “to enjoin a foreign action”), *cert. denied*, 519 U.S. 821 (1996).

Courts do tend to agree on two threshold requirements for an anti-suit injunction. As summarized in *China Trade & Dev’t Copr.v. M.V.Choong Yong*, 837 F.2d 33, 35 (2d Cir.1987):

- First, “the parties must be the same in both matters”; and

- Second, “resolution of the case before the enjoining court must be dispositive of the action to be enjoined.”

#### **e. Judicial Enforcement of Arbitral Interim Measures**

The legal framework for international arbitrations – the FAA and the Conventions – is silent with respect to:

- Whether arbitral tribunals may order provisional relief; and
- Whether courts may enforce, by sanctions or otherwise, provisional measures that an arbitral tribunal grants.

Nevertheless, courts generally have:

- Upheld the power of tribunals to order such measures, providing such relief is consistent with the grant of authority contemplated under the parties’ arbitration agreement, *see Banco De Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003); and
- Limited judicial review of an arbitration panel’s interim order to grounds enumerated for vacating or modifying arbitral awards in Sections 10 and 11 of the FAA, 9 U.S.C. §§ 10, 11, and the similar grounds for denying confirmation and recognition of arbitral awards in Articles V of the New York and Panama Conventions. *See infra* § III.A.7 for a more detailed discussion of these vacatur and nonconfirmation standards.

#### **f. Finality of Arbitral Awards for Interim Relief**

The question may arise whether an arbitral tribunal’s award of interim relief is sufficiently final such that a court may vacate, confirm, or enforce it in accordance with the New York Convention, as implemented as a matter of U.S. law by the FAA. This Convention states at Article III:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon....

In line with this provision, a U.S. court typically enforces an interim arbitral award if it will “finally and definitively resolve self-contained issues in the case,” as stated in Robert H. Smit & Tyler B. Robinson, “Obtaining Preliminary Relief,” *in International Commercial Arbitration in New York* 257 (James H. Carter & John Fellas eds., 2010).

### **6. Request for Discovery Order**

With regard to discovery, parties in an international arbitration may ask a U.S. court to:



- Subpoena documents or witnesses; or
- Enforce a documentary or testamentary subpoena issued by an arbitral tribunal.

The avenue for such requests varies according to the venue of the arbitration:

- If an arbitration is sited in the United States, the FAA governs.
- As for foreign arbitral proceedings, a party might invoke 28 U.S.C. § 1782 (2006); some but not all U.S. judicial circuits will entertain such requests.

Each of these avenues is discussed below.

Efforts to vacate a documentary subpoena issued by an arbitral tribunal are governed by the FAA and the Conventions it implements, according to the standards for nonrecognition or vacatur of arbitral awards, discussed *infra* § III.A.7.

#### **a. Subpoenas Seeking Documents and Witnesses for U.S.-Sited Arbitrations**

Section 7 of the FAA, 9 U.S.C. § 7, pertains to requests for document or witness subpoenas to be used in an international arbitration sited in the United States. It states in full:

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

According to this section, therefore:

- Arbitrators are empowered to issue written summons for witness testimony or document production as long as it is material to the dispute; and
- In the event of noncompliance with such a summons, the U.S. district court in whose jurisdiction the arbitrators sit may be asked both to compel production of the witness

or document at issue and to hold the individual refusing to comply in contempt. U.S. courts have held that in enforcing arbitral summons under Section 7 of the FAA, 9 U.S.C. § 7, U.S. courts are bound by the requirement, set out in Rule 45 of the Federal Rules of Civil Procedure, that subpoenas be served only within the judicial district in which the U.S. district court issuing the subpoena is located. This requirement forecloses extraterritorial service of subpoenas on any person located outside the United States. Born, *International Commercial Arbitration, supra*, at 1929.

On its face, Section 7 of the FAA, 9 U.S.C. § 7, seems to limit the power of U.S. courts to enforcing discovery orders of an arbitral tribunal. In some cases, however, one of the parties to an arbitration may seek judicial assistance in taking evidence or obtaining disclosure directly from a court, without the involvement or approval of the arbitral tribunal. While U.S. courts are divided on the propriety of such requests, some U.S. courts have held that Section 7 permits court-ordered discovery at the request of a party in “exceptional circumstances.” As one commentator has observed:

[T]hese courts have generally required a fairly compelling demonstration of need for particular evidence, that otherwise will likely be unavailable, in an arbitration, as well as a showing that the arbitral tribunal itself is not constituted or is otherwise unable to take or safeguard evidence.

Born, *International Commercial Arbitration, supra*, at 1930. Thus, he continued, “in some respects, these decisions can best be understood as forms of court-ordered provisional measures in aid of arbitration, typically granted prior to the constitution of an arbitral tribunal.” *Id.* at 1930-31.

#### **b. Extent of Judicial Power under Section 7 of FAA**

By its text quoted *supra* § III.A.6.a, Section 7 of the FAA, 9 U.S.C. § 7, makes clear that an arbitral tribunal may require third parties to attend an arbitration hearing and bring documentary evidence with them. However, as noted in John L. Gardiner, et al., “Discovery,” *in International Commercial Arbitration in New York* 288-90 (James H. Carter & John Fellas eds., 2010), U.S. courts of appeals disagree on whether Section 7 encompasses prehearing discovery from third parties, as follows:

- Applying a strict reading, some courts have limited arbitrators’ authority to compel third parties to submit to discovery to an order compelling nonparties to appear before the tribunal and to hand over the requested documents at that time. *See, e.g., Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 406-08 (3d Cir. 2004); *Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 216-18 (2d Cir. 2008).
- Applying a more expansive reading, other courts have permitted limited prehearing discovery from certain third parties; for example, if the nonparty is “intricately related to the parties involved in the arbitration,” *In re Sec. Life Ins. Co. of Am.*, 228 F.3d

865, 871 (8th Cir. 2000) (internal quotation to lower court omitted), or if a “special need or hardship” is present, *COMSAT Corp. v. Nat’l Sci. Found.*, 190 F.3d 269, 271 (4th Cir. 1999).

Some authorities distinguish between prehearing document discovery and prehearing depositions, reasoning that the former may be less intrusive and thus more consistent with the goals of arbitration:

- Article 3 of the *IBA Rules on the Taking of Evidence in International Commercial Arbitration*, adopted by the International Bar Association in 2010 and available at [http://www.ibanet.org/ENews\\_Archive/IBA\\_30June\\_2010\\_Enews\\_Taking\\_of\\_Evidence\\_new\\_rules.aspx](http://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx) (last visited Mar. 10, 2014). This article suggests rules for document discovery, but is silent on depositions.
- American Arbitration Association International Centre for Dispute Resolution, *ICDR Guidelines for Arbitrators Concerning Exchanges of Information*, para. 6(b) (in effect since May 2008), available at [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_002579](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002579) (last visited Mar. 10, 2014). This passage takes the position that “[d]epositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.”

### **c. Requests for Documents and Testimony to Aid Foreign Arbitrations**

Parties whose arbitrations are sited outside the United States sometimes seek U.S. court orders to obtain evidence within the United States pursuant to the pertinent federal statute, codified at 28 U.S.C. § 1782 (2006). Entitled “Assistance to foreign and international tribunals and to litigants before such tribunals,” this statute states in full:

(a) The 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, including criminal investigations conducted before formal accusation. The 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. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. 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.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

#### **d. Extent of Application of 28 U.S.C. § 1782 to Foreign Arbitrations**

With regard to the provision in 28 U.S.C. § 1782, quoted above, that an order may be secured “for use in a proceeding in a foreign or international tribunal,” controversy persists over whether Congress intended the term “tribunal” to include arbitral panels, and if so, whether that definition encompasses panels in private commercial cases. This disagreement is discussed further below.

##### **i. Supreme Court *Dicta***

The Supreme Court’s decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), suggested that an arbitral panel is included within the meaning “tribunal” as set out in 28 U.S.C. § 1782. In her opinion for the Court, Justice Ruth Bader Ginsburg wrote:

‘The term “tribunal” . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.’

*Intel Corp.*, 542 U.S. at 258 (quoting Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026, n.71 (1965)). The Court did not decide if assistance pursuant to 28 U.S.C. § 1782 is available in connection with foreign arbitral proceedings, however, as that question was not presented.

##### **ii. Lower Courts**

Most recent U.S. judicial decisions have concluded that 28 U.S.C. § 1782 does apply to international arbitral proceedings. Yet U.S. courts of appeals remain divided as to whether Section 1782 extends both to foreign private commercial arbitrations and to foreign arbitral proceedings that are public in nature (such as arbitrations dealing with bilateral investment treaties or conducted under the auspices of ICSID, the World Bank’s Washington, D.C.-based International Centre for Settlement of Investment Disputes). Since the Supreme Court’s 2004 *Intel* decision:

- Neither the Second nor the Fifth Circuit has revised its earlier holding that Section 1782 does not permit discovery assistance to foreign private commercial arbitration tribunals. *See Nat’l Broad. Co., Inc. v. Bear Stearns & Co.*, 165 F.3d 184, 191 (2d Cir. 1999); *Republic of Kazakhstan v. Biedermann Int’l*, 168 F.3d 880, 881-83 (5th Cir. 1999).
- By contrast, the Eleventh Circuit affirmed a district court order granting Section 1782 discovery assistance in aid of a foreign private arbitral proceeding. *In re Consorcio*

*Ecuadoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 685 F.3d 987, 993-94 (11th Cir. 2012).

## 7. Request to Confirm, Recognize, Enforce, or Vacate Arbitral Awards

In addition to petitions to stay or compel arbitration, discussed *supra* § III.A.4.a, to secure provisional relief, discussed *supra* § III.A.5, or to compel discovery, discussed *supra* § III.A.6, U.S. courts may receive from parties to an international arbitration various requests with respect to an arbitral award. The party that wins the arbitration may seek to enforce an arbitration award through:

- *Confirmation*: Reduction of the arbitral award to a judgment by the court;
- *Recognition*: Obtaining of a court’s “formal certification that an ICSID award is a final and binding disposition of contested claims,” Lucy Reed, Jan Paulsson & Nigel Blackaby, *Guide to ICSID Arbitration* 179 (2d ed. rev. 2010) (discussing differences between confirmation and recognition), and thus obtain preclusive effect as to the issues decided in the award; or
- *Execution*: Collection of the award, following confirmation or recognition, through means such as an attachment or lien.<sup>8</sup>

Conversely, the losing party may request to vacate – to have an award “annulled” or “set aside” by a competent authority such that it will cease to have legal effect, at least under the laws of the state where it was annulled.

The place where such requests may be brought depends on the nature of the request:

- *Requests to confirm or recognize*: Pursuant to the FAA provisions implementing the Conventions, such requests may be brought in any U.S. district court, regardless of where the award was rendered. 9 U.S.C. §§ 207, 302.
- *Requests to vacate*: The New York Convention has been construed to require that such requests be brought only in the country of “primary jurisdiction,” that is, the country where, or under the law of which, the arbitral award was made. *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004).

A court in another country may deny recognition or enforcement, but may not vacate or annul, an arbitral award made in the United States.

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<sup>8</sup> This chapter does not deal with execution, which is often governed by state law standards, but which nevertheless can implicate complex questions in the international arbitration arena, such as the extent to which foreign government entities can resist execution on grounds of sovereign immunity. *See, e.g.*, Brian King, Alexander Yanos, Jessica Bannon Vanto & Phillip Riblett, “Enforcing Awards Involving Foreign Sovereigns,” in *International Commercial Arbitration in New York* 419-22 (James H. Carter & John Fellas eds., 2010).

Petitions to confirm, recognize, and vacate international arbitral awards may present complex questions relating to:

- Differences among grounds for nonrecognition or vacatur of arbitral awards set forth in the relevant instruments – that is, the FAA and the Conventions, which it implements;
- The extent to which federal courts may review an assertion that an arbitral tribunal committed legal error; and
- Whether parties contractually may expand the scope of judicial review of an award.

Such issues are discussed below.

#### **a. Legal Framework Applicable to Applications to Confirm or Recognize International Arbitral Awards**

With the exception of certain procedural requirements supplied by chapter 1 of the FAA, chapters 2 and 3 of the FAA provide the general framework for the confirmation and recognition of international arbitration awards falling under the New York or Panama Conventions: that is, as described *supra* § III.A.3.b.i., awards that:

- Were made abroad; or
- Were made in the United States, but :
  - Involve a foreign party;
  - Involve property located abroad;
  - Envisaging performance abroad; or
  - Have some other reasonable relation to foreign states.

Section 207 of the FAA, 9 U.S.C. § 207 – part of chapter 2, which implements the New York Convention – states in full:

##### *Award of arbitrators; confirmation; jurisdiction; proceeding*

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

Section 302 of the FAA, 9 U.S.C. § 302, incorporates Section 207's confirmation provisions for awards falling under the Panama Convention, which is implemented in chapter 3 of the FAA. Unlike chapter 2 – which does not restrict enforcement to awards rendered in other New York Convention signatory states – Section 302, 9 U.S.C. § 302, states:

*Recognition and enforcement of foreign arbitral decisions and awards;  
reciprocity*

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

**i. Timing of Requests to Confirm an International Arbitral Award**

Pursuant to the above legislation implementing both the New York Convention and the Panama Convention, a party may seek recognition and enforcement by moving to confirm a foreign award in a U.S. court within three years from the date of that award. 9 U.S.C. §§ 207, 302.

**ii. Procedures for Applications to Confirm an International Arbitral Award**

Chapter 1, Section 13, of the FAA, 9 U.S.C. § 13, provides that a party moving for confirmation of an award must supply the clerk of the court with the following papers at the time that the party's motion for confirmation is brought:

- The arbitration agreement;
- The award; and
- All affidavits, legal briefs, or other documentary evidence in support of the order sought.

Pursuant to Section 6 of the FAA, 9 U.S.C. § 6, which provides that applications under the statute “shall be made and heard in the manner provided by law for the making and hearing of motions,” applications to confirm international arbitral awards should be brought by motion or petition to confirm an award, not a complaint.

Section 9 of the FAA, 9 U.S.C. § 9, supplies the instructions for service of process in an action to enforce an award. Identical instructions for service of process in actions to vacate an award are found in Section 12 of the FAA, 9 U.S.C. § 12. These sections provide for different methods of service depending on whether the adverse party is a resident or not of the district in which the award was made. John V.H. Pierce and David N. Cinotti, “Challenging and Enforcing International Arbitral Awards in New York Courts,” in *International Commercial Arbitration in New York* 363 (James H. Carter & John Fellas eds., 2010).

**b. Grounds for Refusing to Enforce an Award**

Pursuant to the above legislation implementing both the New York Convention and the Panama Convention, a court shall confirm an arbitral award unless a ground for denying nonrecognition or enforcement specified in the relevant treaty applies. 9 U.S.C. §§ 207, 302.



### **i. Grounds Specified in the New York and Panama Conventions**

Article V(1) of both Conventions provides circumstances under which a decision may be refused by a party to the arbitration, at the request of the party against whom it is invoked, if that party can prove one of the following:

- Incapacity or invalidity of the agreement under the applicable law;
- Ineffective or incomplete notice to a party about the arbitrator or arbitration procedure;
- Inability of a party to present a defense;
- The disputes addressed by the decision were not agreed upon by the parties when they submitted to arbitration; the sections of such a decision containing issues agreed upon for arbitration may still be binding on the parties;
- Procedure of the tribunal departing from that agreed upon by the parties, or where no agreement exists, procedure of the tribunal that departs from the law of the State where the arbitration took place; or
- A nonfinal or annulled decision, or one suspended by a competent authority in the State where the decision was made.

Article V(2) of both Conventions provides circumstances under which a decision may be refused by an authority of a State where recognition and execution of the judgment is sought. These include:

- The law of the State does not allow for settlement by arbitration of the subject matter in question; or
- The public policy of the State does not permit recognition or execution of the decision.

### **ii. Application of Grounds Enumerated in Conventions**

No ground set out in either Convention permits nonrecognition on the basis that an arbitral tribunal's decision was wrong on the facts or law. As stated in Born, *International Commercial Arbitration*, *supra*, at 2865:

It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign arbitral awards in recognition proceedings.

Section 207 of the FAA, 9 U.S.C. § 207, explicitly states that a court "shall," upon application of a party, confirm an award unless one of the grounds quoted *supra* § III.A.7.b.i. is

met. A court is not required to deny recognition even if such grounds are shown – Article V of the New York Convention states that “[r]ecognition and enforcement of the award may be refused” based on the enumerated grounds, not that it must. Born, *International Commercial Arbitration*, *supra*, at 2722. The same is true of Article 5 of the Panama Convention.

Additionally, Article VI of the New York Convention provides that a court faced with an application for confirmation or recognition “may” stay such proceedings to await the outcome of proceedings to vacate or annul before a competent authority; that is, a court in the jurisdiction in which, or under the law of which, the award was rendered. Article 6 of the Panama Convention contains a similar provision.

In effect, the U.S. court may exercise its discretion to proceed or to adjourn its own proceedings. *See Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir.), *cert. denied*, 543 U.S. 917 (2004).

Under both Conventions, a court may require the party seeking to stay confirmation proceedings while its application for vacatur or set aside is pending elsewhere to give the other party seeking confirmation “suitable security.” New York Convention, art. VI; Panama Convention, art. 6.

### **iii. Frequently Invoked Grounds**

Two lower court decisions illustrate how U.S. courts may apply certain of the more frequently invoked grounds specified in the New York and the Panama Conventions; specifically, the grounds of:

- Public policy
- Insufficient case presentation

Each is discussed in turn below.

#### **iii.1. Contrary to Public Policy**

Both the New York Convention, art. V(2)(b), and the Panama Convention, art. 5(2)(b), expressly permit a U.S. court to refuse to confirm an international arbitral award if to do so would be contrary to U.S. public policy.

This ground is narrowly construed – so that arbitral awards may be confirmed and enforced – and thus is seldom invoked successfully. *See, e.g., Parsons & Whittemore Overseas Co. v. Société Générale de L’Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974) (stating that the public policy exception only applies if “enforcement would violate the forum state’s most basic notions of morality and justice”).

### **iii.2. Insufficient Opportunity to Present a Case or Defense**

The New York Convention, art. V(1)(b), expressly permits a U.S. court to refuse to confirm an international arbitral award if a party was denied an opportunity to present its case. A similar provision in the Panama Convention, art. 5(1)(b), pertains to denial of the opportunity to present a defense.

In *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145-46 (2d Cir. 1992), the court held that an arbitral tribunal had so restricted a party's ability to present its evidence in support of its claim that denial of enforcement was warranted.

### **iv. Other Grounds**

For detailed discussion of judicial applications of other enumerated grounds, see Born, *International Commercial Arbitration*, *supra*, at chapter 25(D)(4).

### **c. Legal Framework Pertinent to Applications to Vacate International Arbitral Awards**

As noted *supra* § III.A.7, actions to vacate international arbitration awards are distinct from actions to confirm or recognize international arbitration awards. The latter actions can be brought in any jurisdiction; in contrast, actions to vacate international arbitration awards can only be properly brought in the country of "primary jurisdiction." This is the country where, or under the law of which, the arbitral award was made. Therefore, U.S. courts may vacate only international awards rendered in the United States or under U.S. procedural law, defined above as "U.S. Convention Awards." For "Foreign Convention Awards," U.S. courts may deny recognition or enforcement pursuant to the standards set forth in Article 5 of the Conventions, as set forth in the section above; however, courts may not technically "vacate" those awards.

Authorities are divided on which chapters of the FAA govern requests to vacate U.S. Convention Awards:

- A majority of the U.S. Courts of Appeals has held that chapter 1 of the FAA governs; specifically, Sections 9-11 of the FAA, 9 U.S.C. §§ 9-11. *E.g.*, *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998). *See also* *Ario v. Underwriting Members of Syndicate 53 at Lloyds*, 618 F.3d 277, 292 (3d Cir. 2010).
- A minority of such courts, and several commentators, disagree. Identifying congressional intent to maintain consistency of treatment between U.S. and Foreign Convention Awards, these authorities maintain that what governs is chapters 2 and 3 of the FAA, 9 U.S.C. §§ 207, 302, which incorporate the grounds for nonrecognition of international arbitral awards set forth in Articles 5 of the New York and Panama Conventions. *See, e.g.*, *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1441 (11th Cir. 1998), *cert. denied*, 525 U.S. 1068 (1999); American Law Institute,

*Restatement Third, The U.S. Law of International Commercial Arbitration, Tentative Draft No. 2*, §§ 4-3 cmt. c, 4-11 cmt. a (2012).<sup>9</sup>

This issue is also discussed *infra* § III.A.7.d.

### **i. Time Limit for Vacating an Award under FAA Chapter 1**

“Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.” 9 U.S.C. § 12. As noted *supra* § III.A.7.d.i.3, this section of the FAA also supplies the procedures for service of process of such motion. These procedures vary, based on whether the adverse party is a resident of the district where the award was made.

### **d. Grounds for Vacating an Award under FAA Chapter 1**

As discussed below, federal jurisdictions that apply chapter 1 of the FAA to actions to vacate U.S. Convention Awards look primarily to two sections of the FAA:

- For annulment of an award, to Section 10 of the FAA, 9 U.S.C. § 10
- For correction or modification of an award, to Section 11 of the FAA, 9 U.S.C. § 11

Each is discussed below.

#### **i. Grounds Enumerated in Section 10 of the FAA**

Grounds for vacating an award pursuant to Section 10 of the FAA, 9 U.S.C. § 10, include:

- The award was procured by corruption, fraud, or undue means;
- One or more arbitrators were corrupt or unduly partial to one side;
- Arbitrators improperly refused to postpone a hearing or to hear material evidence;
- Arbitrators misbehaved in a way that prejudiced a party’s rights; and
- Arbitrators exceeded or imperfectly executed their powers.

#### **ii. Grounds Enumerated in Section 11 of the FAA**

Section 11 of the FAA, 9 U.S.C. § 11, provides the following additional grounds for modifying or correcting an award “so as to effect the intent thereof and promote justice between the parties”:

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<sup>9</sup> On the status of this *Restatement* project by the American Law Institute, see *infra* §§ III.A.8.a, IV.B.1.

- Evident material miscalculation of figures or material mistake in the award’s description of a person, thing, or property;
- Arbitrators awarded on a matter not submitted, affecting the merits; and
- Imperfection in form that does not affect the merits.

### **iii. Potential Unenumerated Ground: Manifest Disregard of the Law**

Neither Section 10 nor Section 11 of the FAA expressly permits an award to be vacated on account of any sort of mistake of law; nevertheless, some U.S. courts have vacated awards on the ground that the arbitral tribunal manifestly disregarded the law. As described below, this unenumerated ground emerged out of dictum in a mid-twentieth century Supreme Court decision. It then sustained criticism by commentators and a later Court. Yet it remains somewhat intact, at least in some circuits.

#### **iii.1. Emergence of the “Manifest Disregard” Ground: *Dictum in Wilko***

In his opinion for the Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953),<sup>10</sup> which involved a domestic arbitration award, Justice Stanley Reed observed in passing:

[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation.

Some lower courts interpreted this dictum as implying that chapter 1 of the FAA permitted review of arbitral awards on the ground of manifest disregard of the law. *See Gov’t of India v. Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989). Another court questioned this reasoning. *See Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994).

#### **iii.2. Possible Rejection of “Manifest Disregard” Ground: *Hall Street***

*Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), involved a motion to vacate, modify or correct a domestic arbitral award. The Court was asked to determine whether parties to an arbitration agreement might contract to permit judicial review on a ground not mentioned in Sections 9-11 of the FAA, 9 U.S.C. §§ 9-11 – in this case, as stated in the arbitration agreement, the ground of “legal error.” 552 U.S. at 579-80. Petitioner relied on the “manifest disregard of law” dictum in *Wilko*, 346 U.S. at 436-37, quoted *supra* § III.A.7.d.iii.1, to argue that review extend beyond the grounds enumerated in the statute.

In his opinion for the Court, Justice David Souter countered that *Wilko* could not bear such weight, and suggested in part that “manifest disregard” might have been “shorthand” for one of the statutorily enumerated grounds. *Hall Street*, 552 U.S. at 585. “[I]t [made] more sense,” the Court reasoned, “to see the three provisions, §§ 9-11, as substantiating a national

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<sup>10</sup> The Court overruled an unrelated point of law in *Wilko* in a subsequent decision. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway.” *Id.* at 588.

### **iii.3. Current Status of This Ground: Uncertain**

The inference that the Court in *Hall Street* had abandoned “manifest disregard of the law” won support from authorities that opposed its application as a separate, unenumerated ground to upset arbitral awards. *See* Born, *International Commercial Arbitration, supra*, at 2640. Some courts indeed adopted this inference. *See, e.g., Ramos-Santiago v. United Parcel Service*, 524 F.3d 120, 124 n.3 (1st Cir. 2008) (drawing this inference in dictum).

But the Supreme Court has indicated that it considers the question still open. In dicta in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 672 n.3 (2010), Justice Samuel A. Alito, Jr., wrote for the Court:

We do not decide whether “manifest disregard” survives our decision in *Hall Street* ... as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10. . . . Assuming, *arguendo*, that such a standard applies, we find it satisfied for the reasons that follow.

Some lower courts considering the issue since the Court’s decision in *Hall Street* have continued to recognize the standard – not as a standalone ground, but rather in the form of a “judicial gloss” on the statutorily enumerated grounds. *E.g., Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277, 1281, 1283 (9th Cir.), *cert. denied*, 558 U.S. 824 (2009); *Citigroup Global Markets, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Stolt-Nielsen SA v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *rev’d on other grounds*, 559 U.S. 662 (2010).

### **iii.4. “Manifest Disregard” and International Arbitration Awards**

Neither the New York Convention nor the Panama Convention recognizes “manifest disregard of the law” as a basis for denying recognition or enforcement of international awards. *See* 9 U.S.C. §§ 207, 302 (implementing New York Convention, art. V, Panama Convention, art. 5); *supra* § III.A.7.d.i.a. Both permit such nonrecognition, however, if a competent court in the country where the award was rendered has vacated the award. New York Convention, art. V(1)(e); Panama Convention, art. 5(1)(e).

Consequently, consider the case of an international arbitration award made in the United States – an award this section calls a U.S. Convention Award. If it were vacated in one U.S. court by reason of “manifest disregard of the law” – applying chapter 1 rather than chapter 2 of the FAA – that or another U.S. court may deny an application seeking enforcement and recognition of the vacated award.

The indirect result is to render the award ineffective on a ground not contained in either of the Conventions that the FAA is supposed to implement. This inconsistency drives the argument, maintained by some commentators and by a minority of courts, that chapter 2 should

govern the standards pertaining to the recognition or nonrecognition of all international arbitration awards, whether made in the United States or overseas, to the exclusion of chapter 1's separate grounds for vacatur. *See supra* § III.A.7.d.i.1.

## **8. Additional Arbitration Research Resources**

Numerous print and online resources may aid research on questions relating to international arbitration.

### **a. Arbitration *Restatement* Project**

The American Law Institute is in the process of completing the *Restatement (Third) of the U.S. Law of International Commercial Arbitration*. The Reporter for this Restatement is Columbia Law Professor George A. Bermann; Associate Reporters are Pepperdine Law Professor Jack J. Coe, University of Kansas Law Professor Christopher R. Drahozal, and Pennsylvania State Law Professor Catherine A. Rogers.

Notwithstanding the title, this publication will be the first *Restatement* on the subject of international commercial arbitration. A Tentative First Draft was approved in 2010, a Tentative Second Draft in 2012, and a Tentative Third Draft in 2013.

Texts of these drafts, as well as other information about the project, may be found at American Law Institute, *Current Projects*, [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=20](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20) (last visited Mar. 10, 2013).

### **b. Print Resources**

Print resources on international arbitration, other than the draft *Restatement* just described, include:

- Nigel Blackaby, Constantine Partasides, Alan Redfern & Martin Hunter, *Redfern & Hunter on International Arbitration* (5th ed. 2009).
- Gary B. Born, *International Commercial Arbitration* (2009).
- Gary B. Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (3d ed. 2010).
- Lucy Reed, Jan Paulsson, and Nigel Blackaby, *Guide to ICSID Arbitration* 179 (2d ed. rev. 2010)



### **c. Online Resources**

Resources on international arbitration available online include:

- S.I. Strong, *International Commercial Arbitration: A Guide for U.S. Judges* (Fed. Judicial Ctr. 2012), available at [http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/\\$file/strongarbit.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/strongarbit.pdf/$file/strongarbit.pdf).