

THE INTERNATIONAL ARBITRATION NEWS

*A Publication of the International Commercial Dispute Resolution Committee of the
Section of International Law, American Bar Association*

IN THIS ISSUE

Introduction

WHETHER AND HOW TO AMEND THE FEDERAL ARBITRATION ACT — A DEBATE

The Case for the UNICITRAL Model — An Introduction

by Jack J. Coe, Jr.

Suggested Amendments to Chapter 2 of the FAA by Richard Hulbert

Saving the FAA by William W. Park

The Federal Arbitration Act Is Too Important to Amend by John M. Townsend

THE NEW SWISS RULES OF INTERNATIONAL ARBITRATION *by Dr. Georg von Segesser*

Case Notes

Calendar of Events

To amend or not to amend, that is the question. Whether and how to amend the Federal Arbitration Act was the subject of a vigorous and stimulating debate the Committee sponsored at the Section's Spring Meeting in New York. We are delighted that our distinguished debaters, Jack Coe, Richard Hulbert, William ("Rusty") Park and John Townsend, were willing to memorialize and expand their remarks for publication in this issue of THE NEWS. We are also pleased to present a timely article by Dr. Georg von Segesser on the new Swiss Rules of International Arbitration. The issue also includes six case notes on a wide variety of important issues.

In addition to the FAA debate at the Spring Meeting, the Committee also organized a well-received panel at the ABA Annual Meeting in Atlanta — "A Critique of Arbitral Practices From a User's Perspective" chaired by Lorraine Brennan and featuring a blue ribbon panel of in-house attorneys, arbitrators and counsel.

Mark your calendars and plan to attend the Section's Fall Meeting, "The Americas and Beyond" in Houston, October 12-16, 2004. This promises to be the largest and most successful Fall Meeting in Section history. It features over 25 outstanding programs and a number of lively social events, including a Texas-sized rodeo, barbeque and country dance, an exclusive showing of the Dead Sea Scrolls and an excursion to the NASA Space Center.

The Committee will sponsor several outstanding programs at the Fall Meeting:

1. Resolution of Investor/State Disputes: Part I — Ten Years of NAFTA and Five Years of NAFTA Chapter 11.
2. Resolution of Investor/State Disputes: Part II — The Practical Importance of Investment Treaties in the Americas — NAFTA and Beyond in the Light of the Emerging Arbitral Jurisprudence and Practice.
3. The Changing Ethical Environment for Arbitration.

We hope to see you in Houston for these and the many other fine programs at the Fall Meeting.

Work is underway for the Winter issue of THE NEWS. We will be pleased to receive articles (any length) until November 30, 2004 at the e-mail addresses shown below.

The Editors

International Commercial Dispute Resolution Committee

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	Pierre-Yves Gunter, Vice-Chair

Please send all submissions for future issues to:

Editor-In-Chief

Ben H. Sheppard Jr.
Vinson & Elkins L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
bsheppard@velaw.com

Executive Editor

Guy S. Lipe
Vinson & Elkins L.L.P.
Houston, Texas
glipe@velaw.com

Executive Editor

Kevin O'Gorman
Vinson & Elkins L.L.P.
Houston, Texas
kogorman@velaw.com



The Case for the UNCITRAL Model — An Introduction

By Jack J. Coe, Jr.*

Despite what one might have thought, I did not draw the short straw in having to argue for consideration of the UNCITRAL Model Law when, inevitably, the FAA undergoes modernization. While my own thinking on this issue continues to evolve, a case can be made for the Model Law (ML), particularly with respect to its adoption for international commercial disputes. In the limited space available here, I will not offer a comprehensive apology for the idea, but rather will emphasize FAA shortcomings in comparison to the ML with particular emphasis on an under appreciated constituency non-American disputants and their lawyers (whose views, after all, influence the decision to place arbitrations within the United States).

I start from the premise that even common law lawyers consult governing statutes before case law. In the case of the FAA, what do they find? By modern standards what they find is fragmentary. A study of FAA provisions, thus, is not fully helpful to one seeking to discover the American law of international arbitration, and indeed may be positively misleading. By contrast, the ML is comprehensive, covering myriad topics in relative detail. Among the 25-plus items included in the ML, but not in the FAA, are such important topics as: the limited scope for judicial intervention¹ and defined areas of judicial assistance (deciding challenges in limited settings² and assistance in taking evidence³); tribunal powers (*e.g.*, to order interim measures⁴ and appoint experts⁵); arbitrator disclosure⁶ and challenge procedures;⁷ broad procedural maxims (equal treatment and opportunity to present one's case),⁸ and award requisites.⁹

Of special note, the requirement that party appointed arbitrators be independent and impartial found in the ML would prove reassuring if codified in the United States given the varying standards known to function with respect to certain domestic arbitrations.¹⁰ Those planning pre-appointment interviews and forming expectations about the process would have statutory strictures to more fully guide them and to redouble the distancing effect promoted by the recently revised Code of Ethics for Arbitrators.¹¹ The ML and the revised Code, of course, are in accord in material respects (although the Code is more detailed). Regardless, their joint influence might reduce the number of disputants (many from abroad) who worry about whether all participants in the process are playing by the same rules.

Given FAA silence on numerous questions, what fills the void at present is a patchwork of state and federal decisional and statutory law that varies from circuit to circuit and from state to state.¹² An outsider might be forgiven for opting to avoid the United States altogether — even if that means expending bargaining capital otherwise reserved for matters of substance. Anecdotally, I can confirm that many do avoid American arbitration when given the choice, not least because the interplay between state and federal arbitral regimes and the FAA's limited and debatable levels of preemption are challenging to master even for able arbitration specialists.¹³

Adding to the ML's relative comprehensiveness is its amplification by at least two UNCITRAL documents, the more authoritative of which is the Analytical Commentary¹⁴ expressly referred to in certain ML based statutes. There is no parallel source of guidance under the FAA. Thus, under the ML but not under the FAA, an award recipient seeking to convince a judge

* Professor of Law, Pepperdine University

¹ Model Law, art. 5.

² *Id.*, art. 13.

³ *Id.*, art. 27 (only in part addressed in the FAA).

⁴ *Id.*, arts. 17.

⁵ *Id.*, art. 26.

⁶ *Id.*, art. 12(1).

⁷ *Id.*, art. 13.

⁸ *Id.*, art. 18.

⁹ *Id.*, art. 31.

¹⁰ See generally James Carter, *Living with the Party Appointed Arbitrator: Judicial Confusion, Ethical Codes and Practical Advice*, 5 Am. Rev. Int'l Arb. 97 (1995); *Improving Life with the Party Appointed Arbitrator: Clearer Conduct Guidelines for 'Nonneutrals'*, 11 Am. Rev. Int'l Arb. 295 (2000).

¹¹ See generally Ben H. Sheppard, Jr., *A New Era of Arbitration Ethics: The 2004 Revision to the AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes*, Vol. 18, No. 2, News and Notes from The Institute for Transnational Arbitration (Spring 2004).

¹² See generally Jack J. Coe, Jr., INTERNATIONAL COMMERCIAL ARBITRATION-AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 91 97 (1997). W. Laurence Craig, William W. Park, & Jan Paulsson, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION Ch 34 (2000).

¹³ In this connection, consider the words of one barrister, who in a recognition footnote to an article writes:

[Thanks] to Rusty Park, without whose comments on United States Arbitration law [the present author] would probably still be wallowing around in the world of 'federal preemption.' Adam Samuel, *Arbitration Statutes in England and the USA*, [1999] Arb. & Disp. Res. J. 2, 2.

¹⁴ See *Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law*, as published in The Canada Gazette, Part I, Vol. 120, No. 40, October 4, 1986, Supplement.

Given FAA silence on numerous questions, what fills the void at present is a patchwork of state and federal decisional and statutory law that varies from circuit to circuit and from state to state.

that, for example, 'manifest disregard' is not a basis for vacatur, finds support not only in the ML text, but also in the official commentary. Similarly, because of the ML's increasingly wide adoption, courts in one jurisdiction can be further guided by ML courts elsewhere.

One might argue that the ML's comprehensiveness is actually a weakness because it somehow stifles either party autonomy or judicial discretion. Party autonomy, however, remains robust under the ML (which is in the main an elaborate gap filler). As for judicial discretion, one need only consult the arbitration case law of federal circuits to confirm that judge made law in the federal context leads to a pronounced lack of cohesiveness and to idiosyncrasy, an ironic state affairs give Congress' nearly plenary power with respect to international trade.

It is sometimes said that the ML (while a useful formulation for emerging economies without law reform expertise) is not appropriate for major arbitration centers. Switzerland, Belgium, and Holland are often cited as important jurisdictions that have not adopted the ML. While it might be true that U.S. lawmakers will be unimpressed by a text adopted by Bahrain, Bulgaria, and Belarus, that sample is misleading; the list of ML states now contains about 50 entries.¹⁵ In addition, it has been highly influential even when not adopted outright. The English Arbitration Act of 1996, for instance, unabashedly draws inspiration from the ML, though not fully replicating it. Consider, one of the many helpful single volume references on the 1996 Act the Harris et al text.¹⁶ It does an article by article analysis of the Act, remarking numerous times either that a particular provision followed closely or was derived from the ML. Those familiar with the Mustill Report¹⁷ will realize that these borrowings are not accidental. There it was suggested that the New English Act might enjoy enhanced accessibility if it had the same structure and language as the ML. Interestingly, in the above mentioned book on the English Act, the authors offer

citations to British Columbia and Hong Kong decisional law interpreting the ML, on the thesis that they may assist in understanding the English Act; so, obviously there is some overlap.

The efforts by England and other jurisdictions to liken their enactments to the ML show that the ML represents a kind of international standard. Among the dozens of jurisdictions that have adopted the ML one finds yes: Bahrain, Bulgaria, and Belerus, but also: Germany, Spain, Sweden, the Canadian Provinces, and several American States systems not thought to lack lawmaking sophistication generally. One can assume that the desire to avoid drafting from scratch is only one consideration of many leading to adoption in these systems.

Another reservation sometimes expressed about the ML is that its adoption would nullify decades of case law development and in particular certain Supreme Court cases¹⁸ such as Mitsubishi.¹⁹ That is actually an argument to do nothing, not one specific to the ML. But, the related refrain that the ML is arcane and "foreign" deserves a short reply. Here are several points: First, gone are the days when states felt compelled to adopt the ML without refinements for fear of not being a genuine ML state.²⁰ There is always room to do some thoughtful tinkering to reflect nearly two decades of ML practice and distinctive American needs. Second, the ML has substantial similarity to the UNCITRAL Arbitration Rules — a widely in use and influential formulation extant for a quarter century; it's hard to imagine, therefore, that those who practice in the area will be taken by surprise by the ML's provisions.²¹ Third, cardinal pillars of American arbitration law would still function. Agreements to arbitrate would be tested under unchanged contract principles; arbitration contracts found to exist would still be examined for scope and enforced accordingly. Nothing would necessarily retard the pro arbitration policies that operate at present, though admittedly any

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¹⁵ According to the UNCITRAL website, legislation based on the ML has been enacted in Australia, Azerbaijan, Bahrain, Bangladesh, Belarus, Bermuda, Bulgaria, Canada, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Egypt, Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Paraguay, Peru, Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland; Scotland; in Bermuda, overseas territory of the United Kingdom of Great Britain and Northern Ireland; within the United States of America: California, Connecticut, Illinois, Oregon and Texas; Zambia, and Zimbabwe.

¹⁶ Bruce Harris, Rowan Planterose, & Jonathan Tecks, *ARBITRATION ACT 1996: A COMMENTARY* (1996).

¹⁷ DTI, Departmental Advisory Committee on Arbitration Law, *A Report on the UNCITRAL Model Law* (Mustill, L.J., Chair) (1987), reprinted in 3 *Arb. Int'l* 278 (1987).

¹⁸ See David Rivkin, *UNCITRAL Model Law Would Not Be Suitable Replacement for U.S. Arbitration*, 6(1) *News & Notes Inst. Transnat'l Arb* 1 (1991).

¹⁹ *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth*, 473 U.S. 614 (1985).

²⁰ See Pieter Sanders, *Unity and Diversity in the Adoption of the Model Law*, 11 *Arb. Int'l* 1 (1995).

²¹ The UNCITRAL Rules of course have influenced numerous institutional formulae and have been in use since the early 1980s at the Iran U.S. Claims Tribunal. See STEWART BAKER & MARK DAVIS, *THE UNCITRAL ARBITRATION RULES IN PRACTICE* (1992).

statutory change will generate interpretive issues and, hence, litigation. Regardless, the Canadian courts seem to have managed without undue disruption. Interestingly, (speaking of Canada), adoption of ML at the U.S. federal level would unify the statutory structures of the three NAFTA States, since Canada²² and Mexico²³ both have reformed their arbitration law following closely the ML.

In closing, I find myself in agreement with a commentator who wrote over a decade ago:

The world has changed dramatically since 1925 when the FAA was first enacted. The surprise is that

the law has lasted as long as it has, not that it is in need of reform today.²⁴

When, inevitably, that reform occurs, a mere drawing of inspiration from the ML, rather than wholesale adoption, may be the path chosen. Yet, in crafting an international chapter for the revised FAA, careful study of the ML ought to pay generous dividends. For those wishing to further study the question, there follows a selective bibliography.

Arbitral Reform and the Model Law — A Selected Bibliography

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²² See generally Robert Paterson, *Implementing the UNCITRAL Model Law -The Canadian Experience*, 10 J. Int'l Arb. 29 (1993).

²³ See Jose Luis Siquieros, *Mexican Arbitration-The New Statute*, 30 Tex. Int'l L. J. 227 (1995).

²⁴ Daniel Kolkey, *Reflections on the U.S. Statutory Framework for International Commercial Arbitrations: Its Scope, Its Shortcomings, and the Advantages of U.S. Adoption of the UNCITRAL Model Law*, 1 Amer. Rev. Int'l Arb. 491, 534 (1990).

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Suggested Amendments to Chapter 2 of The Federal Arbitration Act

By Richard Hulbert*

What follows are suggested amendments to Chapter 2 of the FAA, the statutory provisions implementing American accession to the 1958 New York Convention (officially the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards). The purpose of the amendments is to fill gaps in the statute that have come to light in the 30 years of experience with the statute, to correct the result of judicial decisions that seem to have strayed from the legislative purpose, and to assure that awards in international arbitration are protected from whatever increasingly intrusive court review of arbitration agreements, procedures and awards that may emerge from the boiling controversy over domestic arbitration in the United States, particularly in consumer and employment cases. The suggested amendments reflect the conviction that international arbitration has characteristics that call for separate treatment. Congressional adoption of Chapter 2 in 1970 reflected that view. The thinking behind what follows is that amendments formulated within the structure of existing Chapter 2 and, to the maximum extent possible consistent with the objectives of the amendments, in the existing language of Chapter 2 present the case in the form best calculated to win legislative acceptance.

The material in brackets is existing legislative text that would be deleted; material in bold face is proposed new text.

CHAPTER 2

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

§ 201 Enforcement of Convention

NO CHANGE

§ 202 Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in Section 2

of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance of enforcement abroad, or has some other reasonable relation with one or more foreign states, **provided, however, that an agreement that has no other foreign reference than provision for arbitration abroad shall not be deemed an agreement falling under the Convention.** For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Note: The objective of the proposed new proviso is to assure that an agreement that has no economic relationship to international commerce is not, simply by virtue of a provision for arbitration abroad, treated as falling under the Convention rather than as subject to whatever may develop as the content of American domestic arbitration law under Chapter 1 of Title 9.

§ 203 Jurisdiction; amount in controversy; applicable law

An action or proceeding **involving an agreement or award** falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in Section 460 of Title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy. **Unless the parties to the agreement or to the arbitration shall explicitly provide for the application to their arbitration of the law of a state or other subdivision of the United States, such laws shall have no application to the action or proceeding in the district court.**

Note: The words “involving an agreement or award” in the first line have been added for clarification. The objective of the new second sentence is to preclude the application of State arbitration law except in the (rare) case where the parties have explicitly provided that such law shall apply to the arbitration. In particular, this would reverse the principle established by some judicial decisions that a contractual choice of a state law is to be read to imply the application of that state’s arbitration law.

* Senior Counsel, Cleary, Gottlieb, Steen & Hamilton, New York

The thinking behind what follows is that amendments formulated within the structure of existing Chapter 2 and, to the maximum extent possible consistent with the objectives of the amendments, in the existing language of Chapter 2 present the case in the form best calculated to win legislative acceptance.

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989), is an example of such a decision.

§ 204 Venue

An action or proceeding over which the district courts have jurisdiction under this chapter may **only** be brought

- (i) in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, [or]
- (ii) in such court for the district and division which embraces the place designated in the agreement as the place of arbitration, **or the place which was the seat of the arbitration however designated**, if such place is within the United States, or
- (iii) **in respect of the enforcement of an award, in such court for the district or division which embraces the location of property of the award debtor subject to execution in satisfaction of the award;**

provided, however, that an application to vacate an award may be made only in such court for the district and division which embraces the place which was the seat of the arbitration.

Note: The objectives of the new language are (i) to cover the case where the arbitration took place in the United States but not at a place designated in the agreement (*e.g.*, designated by an administering institution or by court order), (ii) to provide for venue of actions to enforce Convention awards where the award may be executed, (iii) to fix the venue for actions to vacate, and (iv) to forestall the proliferation of other venue rules and limit forum-shopping, possible if § 204 were to be read as merely permissive, as parallel provisions of Chapter 1 have been construed in some decisions.

§ 205 Removal of cases from State courts

NO CHANGE

§ 206 Order to compel arbitration; appointment of arbitrators

A court having jurisdiction under this chapter may direct that the arbitration be held in accordance with **the provisions of the agreement at any place therein provided for, whether that place is within or [with-out] outside of the United States, or, if the agreement makes no provision for the place of the arbitration, at such place within or outside of the United States as is appropriate.** Such court may also appoint arbitrators in accordance with the provisions of the agreement, **or in the absence of such provisions or the failure or refusal to give them effect, as is appropriate.**

Note: The objectives of the additional language are to cover the case where the agreement does not specify the place of arbitration or where the agreement contains no provisions for the constitution of the arbitral tribunal or such provisions are not followed for whatever reason.

§ 207 Confirmation or vacation of award of arbitrators [Award of arbitrators; confirmation; jurisdiction; proceeding]

[Within three years after an arbitral award falling under the Convention is made] Any party to [the arbitration] **an award falling under the Convention** may apply to any court having jurisdiction under this chapter for an order [confirming] **recognizing, enforcing or vacating** the award as against any other party to the arbitration, **but only in accordance with the further provisions of this section.**

- (a) The court shall [confirm] **recognize or enforce** the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the said Convention, **and such grounds shall be open to review by the court regardless of any contrary agreement made prior to issuance of the award. An application for an order enforcing the award may not be made after three years from the date of the award.**
- (b) The court may vacate the award only if the award was rendered in an arbitration having its seat in the United States and only if the court finds one of the grounds for refusal of recognition or enforcement of an award specified in the said Convention, **and such grounds shall be open to review by the court regardless of any contrary agreement made**

The objectives of the additional language are to cover the case where the agreement does not specify the place of arbitration or where the agreement contains no provisions for the constitution of the arbitral tribunal or such provisions are not followed for whatever reason.

The proposed revisions confine both confirmation and vacation of awards to Convention grounds.

prior to the issuance of the award. No application for an order vacating the award may be made on any other ground. An application for an order vacating the award may not be made after three months from the date of the award.

- (c) If an award rendered in an arbitration having its seat outside the United States may be satisfied by execution upon property located within the jurisdiction of the court, enforcement of the award may not be refused for lack of personal jurisdiction of the award debtor or on the ground of *forum non conveniens*, and the court may allow reasonable discovery to ascertain the existence of such property.

Note: The objectives of the additional language are

- (i) to provide explicitly for vacating Convention awards if (but only if) rendered in the United States, and only on the Convention grounds for refusing recognition or enforcement, and to negate explicitly any other ground for vacatur, which would include “manifest disregard of the law;”
- (ii) to provide that the Convention grounds for vacating or refusing to recognize or enforce an award may not be waived prior to issuance of the award;
- (iii) to preclude refusal to entertain actions to enforce Convention awards for lack of full-scale due process personal jurisdiction or on the ground of *forum non conveniens*, where property of the award debtor located in the court’s jurisdiction is subject to execution to satisfy the award, and to permit reasonable discovery to ascertain the existence of such property; and
- (iv) to provide that the time limits for applications to enforce or vacate an award are to be applied as statutes of limitations. “Recognition” of an award, on the other hand, should not be subject to those limitations. It will normally be relevant for a *res judicata* defense and should therefore be available as a defense as long as any claim to which it responds could be asserted.

§ 208 Chapter 1; residual application
NO CHANGE

General Comments

1. The proposed revisions confine both confirmation and vacation of awards to Convention grounds. This is basically the approach taken in Articles 34 and 35 of the Model Law and is the approach taken in Articles 1502 and 1504 of the French statute. It is not obvious why it should not be adopted here. In fact, in my view, it probably was, as current § 207 requires a court to confirm the award unless it finds a Convention ground for refusal, and it seems odd, indeed, that an award that the Convention would require to be confirmed is nonetheless subject to being set aside under Chapter 1. That seems to me an obvious “conflict” within the meaning of § 208, precluding application of the Chapter 1 provision, but some courts have ruled otherwise.

2. The proposed revisions, in confining review to Convention grounds, which do not permit judicial review of the merits, and in providing that judicial review of an award on those grounds may not be waived prior to issuance of the award, do not allow the parties by contract to add to or subtract from the scope of review. A brief statement of the reasons for these perhaps controversial provisions seems appropriate.

- (i) the Convention does not itself prohibit the seat of the arbitration from applying non-Convention grounds in review of an award locally rendered and thus does not preclude merits review. That would follow only from a local legislative choice rejecting merits review of an award in international arbitration. There are several reasons favoring that choice. The first is that permitting a broader review tends to “make an award the commencement, not the end, of litigation,” which the Supreme Court cautioned against 150 years ago (*Burchell v. Marsh*, 58 U.S. 344, 367 (1855)) and which any number of subsequent decisions have echoed in one form or words or another. A second reason for barring merits review by the local court is that it is precisely the objective of the parties to international arbitration to avoid the substantive jurisdiction of national courts. A third reason for barring broader review is the doubt whether the result of such a hybrid process — for example, the court on broader review modifies the arbitrator’s conclusions — would be accepted elsewhere as an “award” to which the Convention applied, rather than a

The proposed revisions, in confining review to Convention grounds, which do not permit judicial review of the merits, and in providing that judicial review of an award on those grounds may not be waived prior to issuance of the award, do not allow the parties by contract to add to or subtract from the scope of review.

judicial judgment to which it did not. This rationale would not preclude a judgment that a different view might appropriately be taken of expanded review for awards rendered in strictly domestic arbitration, particularly in consumer and employment cases.

- (ii) the prohibition against waiver of the limited review of an award permitted by the Convention reflects doubt that such a waiver would be held effective in many cases and thus seeks to preclude the collateral litigation that such a purported waiver invites. Most waiver clauses are in general terms, as was the clause in the *Chromalloy* case (*Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.C.D.C. 1996)), but were such a contract clause to elaborate what it necessarily must mean, it would read along the following lines: “Court review of the award is excluded in any and every case, including without limitation cases of corruption or partiality, decision in excess of authority, unequal treatment of the parties, or the exclusion of relevant evidence or argument.” No court should be asked to give effect to an award rendered under such circumstances. If so, better to exclude such a waiver explicitly. The fact that *Chromalloy* gave such a waiver heavy, perhaps determinant, effect (ignoring the governing Egyptian statute that explicitly denied effect to such a waiver), and the further circumstance that two subsequent decisions in the Second Circuit distinguished *Chromalloy*, in part, at least, because of the absence of such a waiver in those cases, suggests the need for an explicit statutory provision.

3. The proposed revisions do not attempt to resolve the issue raised in *Chromalloy* and subsequent cases as to the enforcement of awards set aside at the seat of

the arbitration. In my view it should be the rare case in which a vacated award would be enforced (and *Chromalloy* was not such a case), but I am not persuaded that such a result should be precluded. To give effect to a foreign judgment setting aside an award necessarily involves the several considerations relevant to the enforcement of any foreign court judgment, and a hard and fast rule should not be imposed.

4. If an award were the result of “fraud, bias or corruption,” commentary makes clear that Convention Article V(a)(2) (the party “was... unable to present his case”) or Article V(2)(b) (the award is “contrary to the public policy of [the] country [where recognition or enforcement is sought]”) provide a solid basis to resist recognition or enforcement of the award, or under the proposed language above, to support an application to vacate it. It might, however, be thought desirable to make this defect an explicit additional ground for relief. I have not done so in the interest of keeping to the Convention language that Chapter 2 now employs and of avoiding the implication, which would be very unfortunate, that the Convention does not reach that situation, a construction that would be at odds with the desirable objective of a uniform interpretation of the Convention.

5. I have waffled back and forth on what if anything should be done with Sections 208. It provides that Chapter 1 of Title 9 applies to actions and proceedings brought under Chapter 2 “to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United.” One might think that the quoted language was a sufficient protection, but the judicial treatment of § 207 and the holding in some cases that “manifest disregard of the law” is an available ground for attack on a Convention award suggests otherwise. I have concluded, however, that that danger can be adequately guarded against by the specific language suggested above for § 207(b).

The proposed revisions do not attempt to resolve the issue raised in Chromalloy and subsequent cases as to the enforcement of awards set aside at the seat of the arbitration. In my view it should be the rare case in which a vacated award would be enforced (and Chromalloy was not such a case), but I am not persuaded that such a result should be precluded.

Saving the FAA

By William W. Park*

- I. Time to Be Proactive
 - A. The Varieties of Arbitration
 - B. The Ghost of Justice Astbury
 - C. A Separate Framework for International Transactions
- II. User-Friendly Award Vacatur
 - A. Models of Judicial Review
 - B. Manifest Disregard of the Law
 - C. The Sword of Damocles
- III. Proposed Chapter 4 for the Federal Arbitration Act
 - A. Statutory Text
 - B. Explanatory Notes

I. Time to Be Proactive

A. The Varieties of Arbitration

Our first President, George Washington, provided in his will that disputes among his heirs were to be arbitrated by “three impartial and intelligent men” who would declare the testator’s intention “unfettered by law or legal constructions.”¹ Perhaps this admonition against relying on law derived from exposure to a judicial saga similar to *Jarndyce v. Jarndyce*, the famous Chancery Court dispute featured in Charles Dickens’ novel *Bleak House*, described as a case which in course of time became “so complicated that no man alive knows what it means.”²

Doubtless the current Federal Arbitration Act (FAA) would have been sufficient to meet Washington’s needs. The American economy, however, has grown ever more complex during the past two hundred years. Few would quarrel that increased cross-border trade and investment requires a procedurally and politically neutral dispute resolution process, without which many wealth-creating transactions either would not be consummated or would be concluded at higher costs to reflect the greater inherent risks.

In international arbitration, the United States remains a victim of a self-inflicted competitive disadvantage imposed by its legal framework for arbitration. The spillover of domestic precedents into international cases will inevitably chill selection of American cities for international arbitration, with foreign parties understandably anxious to avoid excessive judicial interference. Consequently, American businesses will increasingly be forced to accept foreign arbitral venues with more intelligently designed legal frameworks, which of course means fewer fees to American arbitrators and counsel.

Unlike most of America’s trading partners, our courts may vacate awards for an arbitrator’s “manifest disregard of the law,” a vague term which (as discussed later) has been subject to varying interpretations. In addition, the United States (again in contrast to other civilized jurisdictions) provides no statutory scheme of general application to protect the interests of ill-informed consumers and employees who may be dispatched by an arbitration clause to seek uncertain remedies at inaccessible locations.

The two aberrations are not unconnected. For the past 80 years, our venerable yet antiquated federal arbitration statute has stubbornly resisted distinctions between business and consumer arbitration, and has pre-empted state law that tried to protect the little guy. In such an environment, the judicially created doctrine of award vacatur for “manifest disregard of the law” serves as a safety valve.

The root of the problem, of course, is yet another aspect of American exceptionalism: the prevalence of the jury in deciding contract claims. The uniqueness of our civil justice system has given our arbitration law a special evolutionary path, permitting a *sui generis* framework for arbitration to develop.

B. The Ghost of Justice Astbury

Resistance to reform has come largely from arbitration’s institutional establishment, which understandably per-

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* Professor of Law, Boston University. Co-chair, ABA International Commercial Dispute Resolution Committee. Adapted from remarks to the ABA Section on International Law and Practice, New York, April 15, 2004. © William W. Park, 2004.

¹ See W.W. Abbot, ed., THE PAPERS OF GEORGE WASHINGTON, RETIREMENT SERIES, Vol. 4 (April-December 1799), Charlottesville: University Press of Virginia, 1999, at 477-492. The will was dated at Mount Vernon on July 9, 1799, five months before Washington died of a throat infection, having enjoyed less than three years of his well-earned retirement.

² Dickens’ ninth novel was published in monthly parts between March 1852 and September 1853. Ultimately, legal costs consumed the entire estate. Despair among the potential legatees caused old Tom Jarndyce to blow his brains out at a Chancery Lane coffee house and young Richard Carstone to expire in hopeless dejection.

ceives itself as providing service to the manufacturers and employers concerned about consumer and employment cases. My good friend John Townsend has explained eloquently the establishment's fear that legislation might open a Pandora's Box of unbridled upheaval, led by an unholy alliance of consumer advocates and plaintiffs' lawyers who see arbitration as a scam to protect crooked finance companies and abusive bosses from juries that could otherwise protect folks like kind Aunt Millie and old Uncle Fred.

The establishment's opposition to change brings to mind remarks attributed to Sir John Astbury, the English judge who declared the 1926 British General Strike to be illegal. As workers rioted throughout Britain, some politicians talked of conciliation and change. To which Astbury asked rhetorically, "Reform? Reform? Are things not bad enough already?"³

It is beyond cavil that the FAA is under attack. And dangers lurk in any effort to make things better without mature reflection. Sometimes patients die on the operating room table.

On occasion, however, the health of an individual or an institution can deteriorate from neglect as well as attention. There are signs that FAA reform is no longer a matter of "if" but of "how" and of "when." The challenge in preserving a vigorous federal arbitration regime is to become proactive in promoting intelligent change. Backlash against abusive arbitration builds on legitimate concerns addressed by the American Arbitration Association itself,⁴ making it all the more vital to con-

sider a separate statute for cross-border arbitration which would permit parallel evolution in these two domains.

The so-called "Fairness Act" proposed by Senator Kennedy would completely outlaw employment arbitration.⁵ The Predatory Lending Consumer Protection Act would prohibit mandatory arbitration clauses in certain mortgages.⁶ The Motor Vehicle Franchise Contract Act already makes pre-dispute arbitration clauses unenforceable in automobile franchises.⁷

One can only be puzzled by the fear of participatory democracy suggested in assertions that intelligent reform is impossible. Since my entry into law school, no less than six substantive statutory changes have been made to the federal law of arbitration.⁸ None occasioned catastrophe. If the past is any guide to the future, Congress should be able to replicate the feat of common-sense change, which has long been part of our peculiar American genius.

C. A Separate Framework for International Transactions

The FAA should be amended to provide a separate framework for international arbitration that would contain default rules limiting judicial review of awards to the narrowest grounds, related to arbitration's basic procedural integrity, rather than the substantive merits of the case.

The conflation of domestic and international arbitration is a bad idea as a matter of both sound policy and

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The FAA should be amended to provide a separate framework for international arbitration that would contain default rules limiting judicial review of awards to the narrowest grounds, related to arbitration's basic procedural integrity, rather than the substantive merits of the case.

³ Attributed to Mr. Justice Astbury (1860-1939), who sat on the Chancery Bench from 1913 to 1929, and was elevated to the Privy Council in 1929.

⁴ See AMERICAN ARBITRATION ASSOCIATION, CONSUMER DUE PROCESS PROTOCOL (May 1998) (implementing special measures related to matters such as consumer access to information, convenient location, moderate cost and speed).

⁵ "Preservation of Civil Rights Protections Act of 2004," S.2088, found in a statute irresistibly titled "Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004." The bill provides, "Notwithstanding any other provision of law, any clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable." Two exceptions to this prohibition would allow arbitration agreements in collective bargaining agreements and agreements concluded "knowingly and voluntarily" after a dispute arises. See also S. 2435, 107th Cong. § 3 (2002) (introduced by Senators Kennedy and Feingold). Both bills would effectively overrule the U.S. Supreme Court decision in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

⁶ Lender Consumer Protection Act, S. 2438, 107th Cong. (2002) (introduced by Senator Paul Sarbanes, Chair of the Senate Banking Committee). The bill would apply to any mortgage with an APR that exceeds by six percent (for first mortgages) or eight percent (for second mortgages) the rate for U.S. Treasury securities.

⁷ Motor Vehicle Franchise Contract Act, § 11028, Pub. L. No. 107-273, 116 Stat. 1758 (enacted as 15 U.S.C. § 1226), sometimes known as the Bono Bill in recognition of its original sponsor the late Sonny Bono. For a recent cases interpreting the Act, see *Daimler Chrysler Vans LLC v. Freightliner of New Hampshire*, 2004 U.S. Dist. Lexis 316 (D.N.H. 2004) and *Indian Motorcycle Corp. v. Yamin Motorcycle of Houston*, 2003 U.S. Lexis 25188 (N.D. Cal. 2003).

⁸ In chronological order, the changes might be listed as follows: (i) In 1970, Chapter 2 of the FAA adopted the New York Convention. (ii) In 1988, Congress eliminated the Act of State doctrine in enforcement of arbitration agreements and awards. See 9 U.S.C. § 15. (iii) Also during 1988, Congress clarified the right of interlocutory appeal from arbitration-related court orders. See 9 U.S.C. § 16. (iv) The effect of sovereign immunity on arbitration was limited in 1988, when awards were made enforceable against any property used in a commercial activity in the United States (28 U.S.C. § 1610 (a)(6)) and arbitration clauses were deemed to constitute waivers of sovereign immunity from jurisdiction (28 U.S.C. § 1605 (a)(6)). (v) In 1990, FAA Chapter 3 was added to implement the Panama (Inter-American) Arbitration Convention. (vi) Finally, effective November 2002, the Motor Vehicle Franchise Contract Act made pre-dispute arbitration clauses unenforceable in automobile franchises. See § 11028, Pub. L. No. 107-273, 116 Stat. 1758, enacted as 15 U.S.C. § 1226. In addition, minor changes to the FAA were made in May 2002, when the so-called "Comma Act" improved the drafting of FAA § 10, which provides for award vacatur. See Pub. L. No. 107-69, 116 Stat. 1758.

national self-interest. Rather than a hospitable climate for international arbitration, the present regime leaves the international business community with little clear guidance to predict how courts will react to allegations of arbitrator error. Diverse cases call for different levels of judicial review, with the least interventionist role assumed in arbitration between sophisticated business entities from different countries.

Reform could be accomplished through a number of ways. One springboard can be found in the UNCITRAL Model Arbitration Law,⁹ an option explored by Professor Coe.¹⁰ The Model Law has already engendered a rich case law that could serve as a prism to separate and identify many of the interrelated themes in cross-border arbitration.¹¹ Wholesale importation of the Model Law, however, is not likely to be satisfactory.¹² Any amendment of the FAA must take account of home grown arbitration concerns and precedents, which make it best to adapt (rather than adopt) inventions from abroad.

Another possibility would be to tinker with the existing Chapter 2 of the FAA, as suggested by Dick Hulbert in his admirable reworking of provisions related to jurisdiction, venue and award confirmation or vacatur. Clearly Hulbert is right that his approach may be more realistic politically: a bit like sneaking through the back door rather than marching up the front steps. One might fear, however, that piecemeal fiddling would not be forceful enough to prevent the type of misguided judicial inventions that damage the

fabric of federal arbitration law.¹³ Indeed, Hulbert himself has questioned whether U.S. judges would even pay attention to FAA amendments: "if the law is amended," he asked (perhaps rhetorically), "would courts give it the intended effect?"¹⁴

Another path, perhaps the most sensible balance of competing goals, would be to add a new chapter to the FAA that would apply exclusively to international proceedings conducted in the United States. This approach would address principally the need to limit judicial review of international arbitration awards, permitting international arbitration law to evolve free from whatever paternalistic measures might be appropriate to domestically cultivated concerns. To this end, a proposed text for a new FAA Chapter 4 has been added at the end of these remarks.¹⁵

No system is foolproof, of course, given that fools are so ingenious. The statute would go a long way, however, toward keeping judges from second guessing arbitrators on the merits of a dispute, while still permitting courts to support arbitration by enforcement of agreements and awards, as well as through interim measures in aid of arbitration.

Arguments also exist for broader gauge change to protect from excessive review all business arbitration, domestic as well as international. The proposal in this paper is intentionally more modest, however, stemming from a concern that wider modifications of the FAA would meet more significant political impediments.

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⁹ United Nations Commission on International Trade Law, Model Law on International Commercial Arbitration, adopted June 21, 1985. The Model Law had been adopted by more than 50 jurisdictions, including four U.S. states (California, Connecticut, Oregon and Texas) and all of Canada's provinces.

¹⁰ See Jack J. Coe, *A Critical Appraisal of the Federal Arbitration Act 1925 and of the Suitability of the Model Law as Its Replacement for International Commercial Disputes* (1999) (unpublished Ph.D. dissertation, London School of Economics) (on file with author). Compare a more cautious alternative, see William W. Park, *The Interaction of Courts and Arbitrators in England: The 1996 Act as a Model for the United States?*, 1 Int'l Arb. L. Rev. 54, 67 (1998). For other commentary on the Model Law, see James Carter, *Federal Arbitration Act Seen as Out of Step with Modern Laws*, 5 News and Notes From Institute for Transnational Law 1 (1990); *Report of the Committee on State International Arbitration Statutes* (ABA Subcommittee, Section on International Law and Practice, March 1990); David Rivkin & Frances Kellner, *In Support of the FAA: An Argument Against U.S. Adoption of the UNCITRAL Model Law*, 1 Am. Rev. Int'l Arb. 535 (1990); *Report of the Washington Foreign Law Society on the UNCITRAL Model Law on International Commercial Arbitration*, reprinted in 3 Ohio St. J. on Disp. Resol. 303 (1988); *Report of the Committee on Arbitration and Alternative Dispute Resolution, Association of the Bar of the City of New York*, reprinted in 1988-89 Arbitration and the Law 250 (1989).

¹¹ See generally Henri C. Alvarez, Neil Kaplan & David Rivkin, *Model Law Decisions: Cases Applying the UNCITRAL Model Law on International Commercial Arbitration* (2003).

¹² One commentator has described the Federal Arbitration Act as "an ersatz statute divorced from the rich and distinctively American federal experience with arbitration" and suggested that what is needed is "a work of renovation, the dusting of an antique, not a revolution." Joseph D. Becker, *Fixing the Federal Arbitration Act by the Millennium*, 8 Am. Rev. Int'l Arb. 75, 75 (1997).

¹³ For example, the U.S. Supreme Court decision in *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 203, 203 (2000). It would be hard to imagine anything more inimical to good order in international arbitration than to see American courts routinely trying to vacate commercial awards made in London, Paris, Geneva and Toronto.

¹⁴ See, e.g., Richard W. Hulbert, *Comment on a Proposed new Statute for International Arbitration*, 13 AM. REV. INT'L ARB. 153 (2002). In a case confirming application of the FAA in state courts, Justice O'Connor expressed similar disenchantment with judicial interpretation of federal arbitration law, suggesting that "over the past decade the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case-by-case, an edifice of its own creation." *Allied-Bruce Terminix v. Dobson*, 513 U.S. 265, 283 (1995), cited in Hulbert, *id.* at 154.

¹⁵ For a more in-depth analysis of the proposed changes, the reader is immodestly referred to William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75 (2002).

ments that would reduce prospects for reform in the international arena, with its special need for neutrality of forum. As Voltaire observed, the best is often the enemy of the good. In this regard, others with the same philosophy may reasonably draw the line at different points, as ably demonstrated by Messrs. Coe, Hulbert and Townsend.

II. User-Friendly Award Vacatur

A. Models of Judicial Review

Few moments are more critical in defining the character of an arbitration regime than the instant at which courts review the arbitrator's decision pursuant to a motion to confirm or vacate the award. The interaction of judges and arbitrators during judicial review will determine whether arbitration constitutes an independent dispute resolution process, or merely a warm-up to later litigation.

The past century has seen experiments with at least three models of judicial review of awards at the arbitral situs: (i) scrutiny of the legal merits of the arbitrator's decision; (ii) no review at all, even for matters as gross as fraud and bias; and (iii) examination of the basic procedural integrity of the arbitration process, to insure that the arbitrators were honest, each side had an opportunity to present its case, and the limits of arbitral jurisdiction were respected.

The third model, review for procedural fairness only, would seem best suited for international transactions, and clearly represents the trend for business arbitration, having found its way into the UNCITRAL Model Law and having influenced arbitration law in key arbitral venues such as England, France and Switzerland. Courts intervene to monitor violations of basic procedural fairness and excess of jurisdiction, but not to correct mistakes. While such standards may result in a looser approximation of legal rights than in court litigation, they are likely to comport with commercial expectations.¹⁶ Normally, the arbitrator's award is supposed to

be the end rather than the beginning of dispute resolution on the merits.

Not all arbitration, however, calls for laissez-faire review. If judicial review is to evolve intelligently, different types of disputes require different degrees of judicial scrutiny. Indeed, one might better speak of arbitration in the plural than in the singular. Arbitration might be (i) private litigation for business disputes among sophisticated parties with access to competent counsel; or (ii) arbitration can be used as a mechanism to resolve workplace tensions; or (iii) arbitration can constitute a process whereby manufacturers and finance companies try to shield themselves from having consumer complaints heard by civil juries; or (iv) in an international context, arbitration can serve as a way to level the procedural playing field in deciding business controversies among players from different parts of the world, some of which are occasionally governments. Any of these four horsemen of arbitration might be worthy of a legal regime on its own.

B. Manifest Disregard of the Law

Perhaps the most compelling motive for FAA reform can be seen by examining the judicially created doctrine of "manifest disregard of the law." By statute, courts have been given power to vacate awards for defects in the basic procedural integrity of the arbitration, but not with regard to either vague notions of public policy or the merits of a dispute.

1. *Wilko v. Swan*

Fifty years ago, however, this statutory scheme was amplified by *dictum* in a U.S. Supreme Court case prohibiting securities arbitration. In *Wilko v. Swan*, the Court added "manifest disregard of the law" as a basis for award vacatur.¹⁷

Some interpretations of this concept take a restrictive view, building on notions of "excess of authority" to

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¹⁶ See *Am. Almond Prods. v. Consol. Pecan Sales*, 144 F. 2d 448, 451 (2d. Cir. 1944) (Hand, J.) (confirming an award for breach of contract in the sale of pecans where arbitrators had awarded damages even without evidence on market price).

¹⁷ *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). 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 (2002). *Wilko* was overruled in *Shearson/American Express v. McMahon*, 482 U.S. 220, 224-25 (1987) (fraud claims under Exchange Act § 10b and Rule 10b-5) and *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 477 (1989) (Securities Act § 12(2) claims). Ironically, when the *Wilko* court invented "manifest disregard of the law," it considered the concept as unduly restrictive of judicial review. The fact that a finding of "manifest disregard" was the only way courts could address a mistake was seen as evidence of the need to nip securities arbitration in the bud by declaring the topic non-arbitrable.

The problem is not necessarily in the “manifest disregard” doctrine itself... 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.

limit the principle to decisions that ignore the contract or require parties to violate the law.¹⁸ Other courts, however, have taken a more expansive view, effectively including mistakes of law¹⁹ 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.*²⁰ and *Bridas S.A.P.I.C. v. Government of Turkmenistan*.²¹ 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.

2. *Toys “R” Us*

In an ideal world, judicial review for “manifest disregard” would be limited to domestic transactions. And indeed, a careful reading of the FAA as now drafted might yield just this result, as Dick Hulbert suggests. Surprisingly, however, the Second Circuit decision in

Alghanim v. Toys “R” Us,²² has held that domestic judicial review standards applied to awards rendered in international arbitrations with a New York situs. An award for \$46 million rendered in New York, in favor of a Kuwaiti licensee of a U.S. toy store, was challenged for the arbitrator’s alleged “manifest disregard of the law.”

“Manifest disregard” is a ground for vacatur under domestic law, but not under the New York Arbitration Convention. In this connection, it is important to remember that when adopting the New York Arbitration Convention, Congress accepted its application to so-called “non-domestic awards,” made in the United States, as well as foreign awards rendered abroad. The award in *Toys “R” Us* fell under the “non-domestic” category, and thus was subject to the Convention, since two of the three parties were non-American, and the underlying agreement involved performance in the Middle East.

Convention awards would normally be subject to FAA Chapter 2, which in § 207 provides that a court “shall confirm the award” unless it finds one of the defenses to recognition contained in Convention Article V. These defenses essentially supply escape hatches related to procedural due process, public policy, and vacatur at the place where an award is made.

Drawing what seems to be a distinction between motions to confirm and motions to vacate awards, and notwithstanding the language of § 207, the Court in *Toys “R” Us* found that a non-domestic award made in the United States would be subject to vacatur “in

¹⁸ 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 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.” *Id.* 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.” *Id.* at 579. Judge Easterbrook interpreted the test for vacatur as simply that “an arbitrator may not direct the parties’ to violate the law.” *Id.* at 580.

¹⁹ See *Halligan v. Piper Jaffray*, 148 F.3d 197, 203-04 (2d 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 (2d Cir. 2002). Only a few years ago one of America’s finest arbitration scholars, in referring to elements that a losing party must prove to demonstrate “manifest disregard,” 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). At that time, of course, neither *Halligan* nor *Westerbeke* had been decided.

²⁰ *Williams v. CIGNA Financial Advisors Ind.*, 197 F.3d 752, 760-61 (5th Cir. 1999). *Williams* involved an age discrimination employment case arbitrated under 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).

²¹ *Bridas S.A.P.I.C. v. Government of Turkmenistan*, 2003 WL 22077651 (5th Cir. 2003). Here, an Argentinean 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. *Id.* at *13-14.

²² *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23-25 (2d Cir. 1997).

accordance with its domestic arbitration law and its full panoply of express and implied grounds for relief including “manifest disregard of the law.”²³

Not all jurisdictions follow the *Toys “R” Us* approach. The Eleventh Circuit has held that the New York Convention’s grounds for refusal to confirm foreign awards were also the exclusive bases on which to review a “non-domestic” award made in the United States.²⁴ A federal district court in Miami arrived at the same result with respect to a motion to confirm an award among foreign parties made in Florida.²⁵

3. *Westerbeke v. Daihatsu*

The risks of subjecting international cases to domestic grounds for vacatur are illustrated in *Westerbeke v. Daihatsu Motor Co., Ltd.*,²⁶ involving breach of a distribution agreement by a Japanese manufacturer. A Japanese manufacturer had given a U.S. company 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.

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 (pur-

chase of substitution goods and lost profits), which was exactly what had been granted in the arbitration.

To complicate matters, the arbitration had been bifurcated. A liability phase addressed 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 the manufacturer owed no more than a duty to negotiate in good faith.

The district court disagreed and vacated the award, holding that the arbitrator had misapplied the New York law on damages. As an additional ground for vacatur, the court held that the theory of liability expressed in the first stage of the proceedings differed from that articulated in the damages stage.

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 found 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

The risks of subjecting international cases to domestic grounds for vacatur are illustrated in Westerbeke v. Daihatsu Motor Co., Ltd., involving breach of a distribution agreement by a Japanese manufacturer.

²³ For other cases in which federal courts have been asked to subject international awards to domestic vacatur standards, including “manifest disregard of the law,” see *Lummus Global Amazonas, S.A. v. Aguaytra Energy de Peru*, 2002 WL 31401996 (S.D. Tex. 2002) (vacating in part and confirming in part an award arising from construction of a natural gas pipeline in Peru; modified to incorporate the parties’ joint stipulation on construction credits), *Westinghouse Int’l Serv. Co. v. Merilectrica*, D. Mass., C.A. No. 00-11832 (September 27, 2001) (upholding an award in a South American power plant construction dispute). See also discussion *infra* of *Westerbeke v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, (2d Cir. 2002).

²⁴ *Industrial Risk Insurance*, 141 F.3d 1434, 1441-42 (11th Cir. 1998) (involving a 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. *Id.* 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. *Id.* at 1441.

²⁵ *Four Seasons Hotels*, 267 F. Supp. 2d 1335, 1335-37 (S.D. Fla. 2003) (applying the New York Convention as the exclusive grounds for considering confirmation of a AAA award rendered in Miami).

²⁶ *Westerbeke*, 304 F.3d 200 (2d Cir. 2002), rev’g 162 F. Supp. 2d 278 (2001). See also *Hoefi v. MVL Group Inc.*, 242 F.3d 57 (2003), reversing lower court decision vacating an award for “manifest disregard” in an arbitration arising from a dispute over a purchase price adjustment in the sale of a corporation engaged in market research.

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.”

C. The Sword of Damocles

Although the *Westerbeke* case itself had a happy ending for the arbitration’s prevailing party, the process involved costly appellate briefing and argument. The Court of Appeals had to examine the New York law on calculation of damages, as well as 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 explore the very nature of several domestically nurtured defenses to award enforcement.²⁷ Last but not least, the nature of “manifest disregard” had to be investigated, which included examination of facts giving an indication of the arbitrator’s state of mind when deciding the case.

The very existence of the right to judicial review on the substantive merits of a dispute hangs over American arbitration like a sword of Damocles, to be grasped by litigators whose unhappy clients understandably seek relief from bothersome and costly awards. In principle, there would be nothing wrong with having these questions decided in court. However, when parties by contract agree to have the merits of their dispute decided by arbitrators, not judges, the prospect of judicial meddling by local courts will understandably alarm foreign enterprises. The procedural and political neutrality of international dispute resolution is compromised each time a local judge reviews the merits of an award.

Such temptations should be placed out of reach through a new FAA chapter that expressly forecloses back-door judicial interference with international cases. The United States will be a more user-friendly place to arbitrate if litigants from abroad feel a measure of confidence that they will get the private dispute resolution for which they bargained. By making realistic distinctions between different types of cases, such an amendment would also make the FAA a healthier and more resistant statute.

III. Proposed Chapter 4 for the Federal Arbitration Act

A. Statutory Text

Review of International Awards Made in the United States

1. Scope

- (a) Except as provided in subsection 1(b), this chapter shall apply to any arbitration with its seat in the United States, in which at least one party is resident or incorporated outside of the United States at the time the agreement to arbitrate was concluded.
- (b) Unless the agreement to arbitrate was entered into after the dispute arose, this Chapter shall not apply to (i) an employment contract in which the yearly remuneration of the employee is less than [\$ XYZ] or (ii) an agreement concluded with respect to a consumer transaction.
- (c) A consumer transaction includes any agreement related to property, services or credit with any individual for purposes outside his trade, business or profession if the amount in dispute is less than [\$ ABC].

2. Award Vacatur

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

- (i) a party to the arbitration agreement was under some incapacity, or the said agreement is not valid under the applicable law; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on

²⁷ For example, the Court had to consider the “essence of the agreement” arguments derived from collective bargaining decisions rendered more than forty years earlier in the so-called “Steelworkers Trilogy” cases. See *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960); see also *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); and *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-85 (1960). Under this line of cases, courts may vacate an award that does not “draw its essence” from the contract.

The very existence of the right to judicial review on the substantive merits of a dispute hangs over American arbitration like a sword of Damocles, to be grasped by litigators whose unhappy clients understandably seek relief from bothersome and costly awards.

Such temptations should be placed out of reach through a new FAA chapter that expressly forecloses back-door judicial interference with international cases.

matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

- (iv) the award was procured by fraud, bias or corruption; or
- (v) the award is in conflict with international public policy or the subject matter of the dispute is not capable of being submitted to arbitration.

3. Time Limit for Vacatur

An application for setting aside an award covered by this Chapter must be brought no later than three months from the date on which the party making that application has received the award.

4. Jurisdiction for Vacatur

An action to vacate an award covered by this Chapter may be brought only in the district wherein the award was made. In no event may a federal court vacate an award made outside the United States.

5. Exclusion of Other Grounds for Vacatur

Unless the parties have explicitly provided for judicial review under Chapter 1 of this title, no award covered by this Chapter may be vacated on any grounds other than as provided above.

B. Explanatory Notes

1. Separate FAA Chapter or Tinkering with Existing Provisions?

The proposal set forth above is intended as a stand-alone set of rules to cover vacatur of awards in international proceedings conducted within the United States. An alternative approach would be simply to make slight manipulations to the language of Chapters 2 and 3 that implement the New York and Panama Convention schemes for recognition of foreign and “non-domestic” awards.

Admittedly, such a wide net may complicate the prospects for adoption of the statute. The more obvious the change, the more likely there will be opposition. From a political perspective, less is often more.

Two concerns tip the scales in favor of separate provisions. First, judicial interpretation of the existing FAA Chapters has often been problematic. One may wish to reduce the prospect of ill-advised judicial creativity by establishing a framework which, to the extent possible, will operate independently of prior case law. Second, a fresh start would permit an approach more user-friendly to foreigners, particularly if the text of the legislation picks up some of the language and format used by the Model Law.

2. Fraud, Bias and Corruption

The proposed statutory language goes beyond the text of the Model Law by suggesting inclusion of “fraud, bias or corruption” as an explicit ground for vacatur. Some might argue that this is unnecessary. Admittedly, those defects are subsumed under “violation of public policy” and “inability to present one’s case,” defenses to award enforcement that may be pressed into service against bias and corruption under the New York Convention²⁸ as well as national arbitration statutes in countries influenced by the UNCITRAL Model Law.²⁹

No good reason argues for leaving these matters to judicial interpretation. An explicit prohibition on fraud and corruption, added for the avoidance of doubt, is unlikely to be seen to imply that fraud and corruption are acceptable in awards subject to the New York Convention. Moreover, inclusion of fraud, bias and corruption as grounds for vacatur could be expected to make the legislation more politically palatable. Otherwise, one can easily imagine complaints that the legislative proposal lacked the most basic protections. Explicit statutory language seems far more likely to convince Congress of the proposal’s fairness than reference to learned foreign treatises that link bias and fraud to public policy violations.

Sensibly, some countries adopting the UNCITRAL Model law have filled the lacunae by making clear that matters such as fraud and corruption may serve as

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²⁸ See, e.g., ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 302, 306, 331, 377-82 (1981) (addressing the scope of Articles V(1)(b) (inability to present his case) and Article V(2)(b) (violation of public policy)).

²⁹ With respect to public policy under the Swiss LDIP, see generally P. LALIVE, J.F. POUDET, & C. REYMOND, LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE 430 (1989), insisting that *ordre public* has a procedural (as well as substantive) aspect capable of rectifying abusive arbitrator behavior.

The type of laissez-faire judicial review scheme proposed for international contracts between sophisticated parties is not appropriate for consumer transactions and employment contracts, where heightened court scrutiny provides a healthy measure of paternalistic protection for the weaker party.

grounds for award vacatur. Scotland explicitly allows vacatur if an award “was procured by fraud, bribery or corruption,”³⁰ and the Australian statute provides “for the avoidance of any doubt” that an award violates public policy if induced by “fraud or corruption” or made in breach of rules of “natural justice,” another way of indicating procedural due process.³¹

3. Definition of International Arbitration

The scope of the proposed legislation is narrower than that of both FAA Chapter 2 and the UNCITRAL Model Law. The former includes even disputes between U.S. citizens as long as they implicate property or contract performance abroad. The Model Law combines multiple tests, bringing within its scope arbitrations in which (i) parties have places of business in different countries, (ii) the place of contract performance or the place of arbitration is outside the parties’ home country, or (iii) the parties opt to treat the proceedings as international.

A residence-based test seems more sensible.³² The linguistic and procedural differences that justify a laissez-faire arbitration regime are likely to arise when U.S. residents seek to avoid courts in Paris, Rio or Shanghai, rather than when one U.S. citizen sues another in New York over goods and/or services destined for export.

4. Opt-out Provisions

Some litigants may want the greater protection afforded by whatever paternalistic intervention might be afforded under FAA Chapter 1. Some commentators fear that expansion of judicial review would change the character of arbitration. However, freedom of contract would likely have beneficial effects on balance, reducing the apprehension of “wild card” awards in high stakes cases affecting the proverbial family jewels of a litigant. At least as between sophisticated parties to an international contract, the right to elect merits review would appear to be almost a corollary of the right to elect courts. By contrast, good arguments exist for denying the right to exclude all court scrutiny,

given that an award takes on a presumptive validity throughout the world under the New York Convention. In other words, the statutory framework for judicial review of international arbitration in the United States would constitute a floor but not a ceiling.

5. Public Policy

In the hope of reducing an overly parochial use of public policy, the statutory proposal adopts the French distinction between public policy applicable to domestic cases and public policy applicable to international cases. The latter concept, referred to as *ordre public international*, derives from the policy national courts consider relevant to cross-border transactions with no direct impact on the forum. Thus, for example, an interest rate that would violate public policy in a purely domestic transaction might be acceptable in a cross-border context.

6. Consumers and Employees

The type of laissez-faire judicial review scheme proposed for international contracts between sophisticated parties is not appropriate for consumer transactions and employment contracts, where heightened court scrutiny provides a healthy measure of paternalistic protection for the weaker party. One might argue that such restrictions also belong in other parts of the FAA and perhaps also in the New York Convention itself. Indeed that would seem eminently sensible, and might well be on the agenda of those seeking to improve other parts of arbitration’s legal framework.

7. Jurisdiction for Award Vacatur

By limiting vacatur to the place where the award is made, the proposed legislation makes clear that U.S. courts should not be in the business of setting aside decisions in foreign arbitrations. Contrary to the implication in *Cortez Byrd*,³³ defects in awards rendered abroad can best be addressed if and when they are presented for recognition and/or enforcement in the United States.

³⁰ See Law Reform (Misc. Provision) (Scotland Act), 1990, c.40, schedule 7, art. 34(2)(a)(v), allowing vacatur if an award “was procured by fraud, bribery or corruption.”

³¹ See International Arbitration Act, Act No. 136, 1974 (consolidated as in force 31 January 1992), which in Section 19 interprets “public policy” as the term appears in Articles 34 and 36 of the UNCITRAL Model Act.

³² Corporate entities should probably be considered residents if organized under the law of, or possessing a principal place of business in, the forum country. Thus, for example, a U.S. branch of a foreign corporation would be considered a U.S. resident, as would an alien individual present in the United States more than 183 days during any calendar year.

³³ See, e.g., *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 203, 203 (2000) (justifying adoption of expansive venue requirements as a way to permit an “action under the FAA in courts of the United States to... vacate awards rendered in foreign arbitrations not covered by either convention”).

The Federal Arbitration Act Is Too Important To Amend

By John M. Townsend*

In the history of American law, a very few statutes have achieved what I would describe as quasi-constitutional status. To achieve this distinction, a statute must express an important principle, usually very briefly and in general terms. Most of the detailed directions for applying that principle are then provided by court decisions, so that each of these statutes in effect builds up its own body of common law. The Civil Rights Act and the Sherman Act are two of the most conspicuous examples of this type of law: both express themselves in broad terms, the detailed application of which is left to the courts on a case-by-case basis. Congress has made additions to each over the years, but the original statements of principle have survived intact, for the good reasons that the principles are too important to meddle with, and the accretion of many years of decisions has given each statute a widely accepted and relied-upon set of meanings.

I submit that the Federal Arbitration Act of 1925 should now be considered to have joined this illustrious company. While it is not nearly as widely known as the first two examples cited, it occupies a comparable pedestal within the specialized world of arbitration, a distinguished portion of which is assembled here today.

The speakers who have preceded me have eloquently explained the deficiencies of the FAA as a governing statute for international arbitrations and how it could be amended to better serve that type of proceeding. I do not disagree that the group assembled here today could readily draft an international arbitration law for the United States that would be free from the shortcomings that some courts have discovered in or engrafted upon the FAA, and that would be a more useful model to hold out to the rest of the world.

Where I part company from my friends is that I do not believe that opening the FAA to amendment would be at all likely to improve it, at least from the point of view of those interested in promoting and protecting the process of arbitration. First, I do not

believe that amending the FAA is necessary to achieve some of the improvements they are looking for. Permitting discovery in aid of foreign arbitration proceedings could best be achieved by amending 28 U.S.C. §1782, for example, not by amending the FAA. And preventing the application of the manifest disregard doctrine to international arbitration awards could be achieved far more simply by persuading judges to apply the words already found in Section 207 of the FAA than by writing a new international arbitration act.

Second, by virtue of the special status that the FAA has achieved as a statute, practically every word of the Act has been the subject of dozens, and in some cases of hundreds, of court decisions construing and explaining how the Act works and how it relates to the litigation process, both domestically and internationally. The end result of all of those court cases may be messy, and it may fall short of the ideal, but it works. We have a structure in place that allows arbitration to proceed with relatively little interference and with considerable judicial support. That structure may not be pretty, but I would hate to walk away from it.

Third, and most important, the FAA is a big tent, whether we would now choose to design it that way or not. Its broad principles govern all sorts of arbitrations. Indeed, with the exception of arbitrations governed by the National Labor Relations Act, the FAA applies to every type of arbitration arising out of anything that qualifies as interstate commerce for purposes of the Commerce Clause of the Constitution, which covers a lot of ground. While Chapters 2 and 3 of the FAA are concerned exclusively with international arbitration, they are not, as Professor Park has pointed out, watertight compartments, because they borrow many of the provisions of Chapter 1.¹ That, of course, is the principal source of the concerns of those who advocate amending the FAA to create an entirely separate international statute.

The problem is, to some extent, the direct result of the success of the FAA. After overcoming the judicial resistance with which it was initially welcomed, the FAA has been resoundingly recognized as a statement of Congressional policy favoring arbitration. With strong judicial support behind it, arbitration has

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* John M. Townsend is a partner in the Washington office of Hughes Hubbard & Reed LLP and chairs that firm's Arbitration and ADR Practice Group. He is also a member of the Board of Directors and Chairman of the Executive Committee of the American Arbitration Association.

¹ William W. Park, "The Specificity of International Arbitration: The Case for FAA Reform," 36 *Vanderbilt Journal of Transnational Law* 1241 (Oct. 2003).

Bluntly speaking, the Federal Arbitration Act is under attack. Any effort to amend the FAA, however well intentioned, and however much its supporters intend to promote arbitration, will have the effect of opening the statute to other amendments that may have radically different objectives.

I would hate to see the FAA wheeled into surgery by its friends to have its nose straightened, only to see it emerge with its legs cut off.

achieved an enormous growth in the United States, and has been adapted to all sorts of situations and agreements. Some of the parties to some of those agreements are less enthusiastic about this development than others, however. Some advocates for consumers and employees, in particular, have been harshly critical of what they call “mandatory arbitration,” by which they generally mean pre-dispute agreements to arbitrate in contracts of adhesion. Any term in a contract of adhesion may cause dissatisfaction, of course, simply because such terms are by definition not negotiated.

There are those who believe that the insertion of appropriate mediation and arbitration processes into the consumer and employment fields has done a good deal to make redress for the ordinary run of grievances far more practical and affordable than it would be if such processes were not available.² Nevertheless, the fact remains that pre-dispute arbitration clauses have been the subjects of heated controversy in the consumer and employment fields, and that controversy has spilled over to the FAA, which is credited by both supporters and opponents with making those clauses enforceable throughout the United States. One result of the controversy has been a series of attempts to amend the FAA, many of which would make all pre-dispute arbitration agreements unenforceable unless ratified after the dispute arises, without regard to the context of the agreements. More than forty bills to amend the FAA were introduced in the last Congress alone.

The effect of such legislation, should it succeed, could be to project the United States back into the situation that afflicted much of South America before the Panama Convention was adopted, in which arbitration agreements were unenforceable unless a *compromiso* (in effect, a submission agreement) was signed after the dispute arose. Such legislation would put us at odds with both the Panama Convention and the New York Convention, and would throw ordinary commercial arbitration into chaos. But it is not unimaginable. Similar sentiments fueled a wave of legislation last year in California that was profoundly anti-arbitration, and which was pulled back from the brink only by vetoes of the worst provisions by the governor.

Bluntly speaking, the Federal Arbitration Act is under attack. Any effort to amend the FAA, however well intentioned, and however much its supporters intend to promote arbitration, will have the effect of opening the statute to other amendments that may have radically different objectives. Starting the process of amending a statute in the United States Congress is something like wheeling a patient into an operating room for surgery, except that there is no agreement in advance about what kind of operation will be performed or which surgeon will perform it. I would hate to see the FAA wheeled into surgery by its friends to have its nose straightened, only to see it emerge with its legs cut off.

² An analysis of how arbitration can provide something approximating the greatest good for the greatest number appears in Professor Samuel Estreicher's "Saturns for Rickshaws — Why Predispute Employment Arbitration Should Be Preserved," *ADR Currents* (Dec. 2001 - Feb. 2002).

The New Swiss Rules of International Arbitration

by Dr. Georg von Segesser*

1. Introduction

Switzerland is frequently chosen as a place of arbitration¹ and has a long lasting tradition as an arbitration-friendly country. In 1989, the Swiss legislature adopted the Private International Law Act, which incorporates a section on international arbitration. This new statute on international arbitration received wide praise and acceptance for its simplicity, flexibility and pragmatic approach. In the last 15 years a large body of case law has emerged from the implementation of the new law, providing valuable guidance for the practitioner and confirming the restraint exercised by Swiss courts in interfering with international arbitration practice.

International arbitration proceedings in Switzerland have traditionally been conducted under rules of different institutions, such as the ICC, local chambers of commerce and many other domestic or international organisations, or as ad hoc arbitrations with UNCITRAL Arbitration Rules or other rules being applicable.

2. Genesis of the Swiss Rules

In the mid-1990s six major Swiss chambers of commerce providing arbitration services (*i.e.* Basel, Bern, Geneva, Lausanne, Lugano and Zurich) initiated steps to harmonize their individual international arbitration rules with the result that on 1 January 2004 the new "Swiss Rules of International Arbitration" ("Swiss Rules") entered into force. They mark an important further step in Swiss international commercial arbitration, as they provide arbitration users with a modern and proven set of rules which are uniform for all of the six chambers of commerce that have initiated and successfully concluded the harmonization process.²

3. Foundation of the Swiss Rules

The Swiss Rules are broadly based on the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules, a well-trying and widely accepted foundation. The amendments and additions that were made to the UNCITRAL Rules are basically

twofold. First, it was necessary to adapt the UNCITRAL Rules, which were designed for ad hoc arbitration, to an institutional arbitration process. Second, the UNCITRAL Rules, which date from 1976, were modernised to reflect current practice in international commercial arbitration. This resulted in certain modifications and in the introduction of entirely new provisions, the most important of which will be commented in Sections 6 and 7 below.³

The main reason why the UNCITRAL Rules were used as a basis for the new Swiss Rules was that they provide parties to international arbitration proceedings with a familiar and internationally recognized system. Moreover, parties and arbitrators have the possibility of consulting the abundant legal commentary and case law relating to the UNCITRAL Rules.

4. Scope of Application of the Swiss Rules

The Swiss Rules apply where an agreement to arbitrate makes reference to them. With respect to arbitral clauses referring to the former rules of Basel, Bern, Geneva, Lausanne, Lugano or Zurich, the new rules apply to all international arbitrations in which the Notice of Arbitration is filed on or after 1 January 2004. Thus, an arbitration clause referring to one of the earlier arbitration rules of the six participating chambers now leads to the application of the Swiss Rules, unless the parties wish to remain governed by the earlier rules (Art. 1.1 and 1.3).

5. Institutional Aspects

The Swiss Rules are designed for institutional arbitration. To administer, monitor and support proceedings under the new rules, the chambers created an "Arbitration Committee" and a "Special Committee."

The "Arbitration Committee" is composed of experienced arbitration practitioners from all six chambers. This Arbitration Committee is entrusted with the bulk of the administrative services provided to users of the Swiss Rules.

The "Special Committee" is formed from members of the Arbitration Committee whose experience in international commercial arbitration is particularly extensive. The Special Committee rules on especially

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* Attorney-At-Law, Schellenberg Wittmer, Zurich

¹ According to ICC 2003 Statistical Report Switzerland is, after France, the most frequently chosen country for the venue of ICC arbitrations.

² The Swiss Rules are available at: www.swissarbitration.ch

³ A comparative version of the Swiss Rules, in which the changes to the UNCITRAL Rules are italicised, is available on the website mentioned above.

Another change to the UNCITRAL Rules is the requirement that the arbitral tribunal prepare a provisional timetable at an early stage of the proceedings, in consultation with the parties (Art. 15.3).

important matters such as challenges or replacement of arbitrators and the determination of the seat of arbitration, if necessary. Its role is also to provide advice to the Arbitration Committee on issues such as the interpretation of ambiguous arbitration clauses and, more generally, whenever required.

The overall role of these institutional bodies under the Swiss Rules is moderate, especially when compared to other major arbitration centres. This is the result of a deliberate decision taken by the chambers: the conduct of the proceedings is deemed best left to the arbitral tribunal and the parties, with the role of the institution being to support the process by providing only those administrative services that are required to ensure quality and efficiency.

6. Overview of Proceedings under the Swiss Rules

With respect to the actual conduct of the proceedings, the Swiss Rules are very similar to the UNCITRAL Rules, especially Art. 15 to 37. The following subsections focus on the main changes and innovations contained in the Swiss Rules. It must be emphasised that the parties and the arbitrators are free to agree on modifications to most of the procedural provisions of the Swiss Rules. Indeed, one of the cornerstones of the Swiss Rules remains party autonomy with respect to procedure.

6.1 Seat and Language of Proceedings

The parties are free to choose the seat of the arbitration anywhere in Switzerland (Art. 1.2). If an arbitral clause simply refers to Switzerland but fails to specify a city, the Special Committee determines the exact seat of arbitration by taking into account all relevant circumstances, or invites the arbitral tribunal to do so. In order to avoid this process, it is strongly recommended that parties specify the city in Switzerland where the arbitration shall have its seat.

That being said, the determination of the seat does not necessarily mean that the actual proceedings will be conducted at that location. The parties and the arbitral tribunal are free to decide to hold hearings, deliberations, etc. elsewhere (Art. 16.2-16.3).

The parties are also free to choose the language of the proceedings. Should they fail to do so, the arbitral tribunal will decide (Art. 17). It should, however, be noted that, when filing a Notice of Arbitration, it is recommended to use either English, German, French

or Italian; otherwise, the chambers may request a translation into one of these languages (Art. 3.5), which are also the languages of correspondence with the chambers.

6.2 Initiation of Proceedings

A party wishing to initiate arbitration proceedings must file a Notice of Arbitration with any of the six chambers (Art. 3.1-3.6) whose addresses are listed in Appendix A to the Swiss Rules. It is recommended to send the Notice of Arbitration to the chamber in the city where the arbitration is seated.

The answer to the Notice of Arbitration is filed at an early stage of the proceedings, while the arbitral tribunal is being constituted; in principle, the answer includes any counterclaim or plea of lack of jurisdiction (Art. 3.7-3.10). This is a major improvement over the UNCITRAL Rules, under which the respondent files its answer only after the tribunal has been constituted.

Another change to the UNCITRAL Rules is the requirement that the arbitral tribunal prepare a provisional timetable at an early stage of the proceedings, in consultation with the parties (Art. 15.3). This provides the parties with a clear idea of the timeframe of the arbitration.

6.3 Constitution of the Arbitral Tribunal

Pursuant to Art. 6 of the Swiss Rules, the parties are free to agree on the number of arbitrators (sole arbitrator or three-member arbitral tribunal). In the absence of an agreement by the parties, the Arbitration Committee decides this issue, taking into account all relevant circumstances. Where the amount in dispute does not exceed CHF 1 million, the case will be referred to a sole arbitrator under the "Expedited Procedure" (Art. 6.4 and 42.2; see subsection 6.6 below).

The parties are free to name arbitrators. However, all designations of arbitrators by the parties or co-arbitrators are subject to confirmation by the chambers, who will verify that the appointees have the requisite degree of independence (Art. 5). This freedom of choice represents a major change to the previous situation in Zurich, where the Zurich Chamber of Commerce always selected the sole arbitrator or the chairman from a pre-existing list.

The Swiss Rules explicitly state that arbitrators shall at all times be impartial and independent from the parties (Art. 9). Should there be reasonable doubt as to this, the parties may initiate challenge proceedings before the Special Committee (Art. 10-14).

6.4 Consolidation of Proceedings; Participation of Third Parties

As a further innovation, the Swiss Rules contain a provision regarding the consolidation of arbitration proceedings and the participation of third parties (Art. 4).

Under Art. 4.1, the chambers may consolidate a new matter with already pending proceedings. In certain exceptional cases, this is possible even if the parties to the new arbitration are not identical to those in the pending case. When taking this decision, the chambers must consult all of the parties and the Special Committee and consider all circumstances, such as the links between the two cases, before deciding to refer a new case to an existing arbitral tribunal.

Art. 4.2 of the Swiss Rules provides that the arbitral tribunal may order the participation or authorise the intervention of a third party. The drafting of this provision was kept deliberately flexible in order to enable arbitrators to tailor solutions that meet the needs of each particular case.

6.5 Jurisdiction for Set-off Defences

Article 21.5 of the Swiss Rules is another innovation compared to the UNCITRAL Rules, and provides for very broad jurisdiction with respect to set-off defences. Under the Swiss Rules, the arbitral tribunal has jurisdiction to decide on set-off defences even when the relationship out of which this defence arises is not covered by the arbitration clause, and even if another dispute resolution clause applies to that other relationship.

6.6 Expedited Procedure

Another significant innovation is the possibility of arbitrating under an "Expedited Procedure" (Art. 42). The Expedited Procedure applies where agreed by the parties and, in principle, in all cases where the amount in dispute does not exceed CHF 1 million.

The characteristics of the Expedited Procedure are as follows:

- The chambers may shorten time limits for the constitution of the arbitral tribunal;
- The number of briefs is limited;
- The dispute shall be decided after holding only one hearing for the examination of witnesses and experts or, if agreed with the parties, only on the basis of documentary evidence;
- The award shall be made within six months after transmission of the file to the arbitral tribunal;
- The reasons of the award shall only be stated in summary form (and the parties may waive reasons entirely); and
- Where the amount in dispute does not exceed CHF 1 million, the case shall, in principle, be referred to a sole arbitrator.

6.7 The Award, including Interpretation and Correction of the Award

According to the Swiss Rules, the final award shall be deemed to be made at the seat of the arbitration (Art. 16.4). Since the seat of the arbitration is in Switzerland, this triggers the application of Chapter 12 of the Swiss Private International Law Act and of the very limited possibilities of setting aside the award before the Swiss Federal Tribunal.

Under Art. 31.1 of the Swiss Rules, the presiding arbitrator may render the award alone if no majority can be achieved. This is a significant and well-received improvement to the UNCITRAL Rules, under which the majority requirement could sometimes lead to a deadlock or to unsatisfactory compromise solutions.

As with the UNCITRAL Rules, the Swiss Rules provide for possibilities of correction and interpretation of awards, and for additional awards (Art. 35-37).

Contrary to certain other forms of institutional arbitration, in particular ICC arbitration, the award is not subject to scrutiny by the institution under whose auspices the arbitration is conducted.

6.8 Confidentiality; Exclusion of Liability

The Swiss Rules provide expressly that the parties, the arbitrators and all other persons involved in the proceedings are obliged to keep confidential all awards and orders issued, as well as all materials submitted (Art. 43).

As a further innovation, the Swiss Rules contain a provision regarding the consolidation of arbitration proceedings and the participation of third parties (Art. 4).

Importantly, the actual administration of the costs is left to the arbitral tribunal.

Art. 44.1 sets out a limitation of arbitrators' and the chambers' liability to instances of intentional wrongdoing or extremely serious negligence. Art. 44.2 also provides that the parties shall refrain from seeking to make the arbitrators or representatives of the chambers witnesses in court proceedings relating to the award.

7. Costs

One of the major additions to the UNCITRAL Rules, resulting from the need to adapt these Rules to institutional arbitration, relates to the costs of the arbitration. These are governed by Art. 38-41 and by a Schedule (contained in Appendix B) similar to the one used by the Zurich Chamber of Commerce under its former rules.

Importantly, the actual administration of the costs is left to the arbitral tribunal. In contrast to certain other arbitration institutions, the chambers do not administer the finances of the proceedings. The arbitral tribunal thus determines the amount of its fees and of the administrative costs within a certain range by taking into account the amount in dispute, the complexity of the case, the time spent and other relevant circumstances. Before rendering an award on the costs, the arbitral tribunal must submit a draft to the chambers for consultation (Art. 40.4).

The arbitral tribunal may request advance deposits to secure the costs; any interest accrued is credited to the party having paid the advance. Copies of all requests for advances are sent to the chambers (Art. 41).

8. Quality Control

The Swiss Rules provide a range of instruments to ensure the continuity of the high-quality standards for which Swiss international arbitration is renowned. Such instruments are, for instance, the supervision by the

chambers of the constitution of the arbitral tribunal and the confirmation of arbitrators, the introductory proceedings being handled by the chambers, the adoption of a timetable for the proceedings and the supervision of the costs by the chambers. The Swiss Rules thereby warrant a high standard of quality and efficiency, whilst at the same time avoiding cumbersome or intrusive interventions by the arbitral institutions.

9. Model Arbitration Clause

If parties wish to arbitrate under the new Swiss Rules, it is highly recommended that they include the following model arbitration clause in their written contracts:

“Any dispute, controversy or claim arising out of or in relation to this contract, including the validity, invalidity, breach or termination thereof, shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force on the date when the Notice of Arbitration is submitted in accordance with these Rules.

The number of arbitrators shall be...
(one or three); [optional]

The seat of the arbitration shall be...
(city in Switzerland);

The arbitral proceedings shall be conducted in...
(desired language).”

10. Conclusion

The Swiss Rules enhance the importance of Switzerland as a centre for international arbitration and provide parties and arbitration practitioners with a uniform set of institutional arbitration rules that combine the advantages of a proven instrument (the UNCITRAL Rules) with modern, state-of-the-art practice.

CASE NOTES

D.C. Circuit Affirms Dismissal of Action to Compel Arbitration Based on Absence of Constitutional Standing Despite Pending Foreign Suit

Raytheon Co. v. Ashborn Agencies, Ltd., 372 F.3d 451, 454 (D.C. Cir. 2004)

The District of Columbia Court of Appeals affirmed the lower court's dismissal of a motion to compel arbitration and held that the petitioner lacked standing to seek an order compelling arbitration, even though the opposing party had initiated a foreign action. The dispute stemmed from a consulting agreement between a predecessor of Raytheon and Ashborn, an Israeli company, which provided for arbitration in Washington, D.C. Raytheon filed a demand for arbitration with the ICC, and Ashborn refused to arbitrate and subsequently filed an action for damages in Israel. Raytheon responded by filing a motion to compel arbitration pursuant to Chapter 2 of the Federal Arbitration Act. The district court dismissed Raytheon's petition due to lack of standing to sue, and the Court of Appeals affirmed. The court of appeals stated that Raytheon was required to show that it had suffered an injury in fact as a result of Ashborn's refusal to arbitrate that would be redressed by the relief sought from the court. The court held that Raytheon had failed to meet those requirements, stating that Raytheon could proceed with arbitration in Ashborn's absence, and "Ashborn's absence should, if anything, make it easier for Raytheon to obtain a favorable award." The court also stated that although the costs of defending an action in Israel constituted an injury, that injury would not be redressed by any relief sought from the American court, inasmuch as an order compelling arbitration would not prevent Ashborn from continuing its case in Israel. Thus, the court concluded that Raytheon lacked Article III standing to sue, and affirmed the dismissal.

Eleventh Circuit Holds That Participation in Arbitral Proceeding Does Not Waive Right to Challenge Arbitral Award

Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A., 2004 WL 1615611 (11th Cir. Fla. July 20, 2004)

In *Consorcio*, the Eleventh Circuit addressed the issue of whether a party's participation in an arbitral proceeding constitutes a waiver of its right to challenge the arbitral award. The dispute stemmed from a contractual relationship between Consorcio, a Venezuelan hotel developer, and Four Seasons Hotels, Ltd., a hotel management company. In a number of written agreements, the parties agreed to arbitrate their disputes under Venezuelan substantive law. In connection with an arbitration initiated by Four Seasons, Consorcio defended itself on the ground that the arbitration was improper and filed suit in Venezuela to obtain a ruling on the same issue. The arbitral panel issued a "partial arbitral award" requiring Consorcio to submit to arbitration and drop its suit in Venezuela, but the Venezuelan court held that arbitration of the particular dispute was improper. Four Seasons subsequently sought confirmation of the award in the Southern District of Florida, and the judge confirmed the award, holding that Consorcio's participation in the arbitral proceeding precluded it from challenging the award in federal court. On appeal, the Eleventh Circuit reversed the district court's ruling and held that a party "is not precluded from challenging the panel's decision merely because it participated in the arbitral proceeding." The court stated that "[n]othing in the [New York] Convention suggests that parties must make such a choice, and we can find no case that supports this preclusive rule." The court remanded the case for the district judge to consider Consorcio's argument that Article V(1)(a) of the New York Convention precludes confirmation, and indicated that the "court should balance the Convention's policy favoring confirmation of arbitral awards against the principle of international comity embraced by the Convention." *Id.*

CASE NOTES

U.S. Supreme Court Interprets 28 U.S.C. §1782

Intel Corp v. Advanced Micro Devices, Inc., 72 U.S.L.W. 4528, 124 S.Ct. 2466 (June 21, 2004)

In this case, the Supreme Court interpreted 28 U.S.C. 1782, which authorizes federal district courts to assist in the production of evidence for use in a foreign or international tribunal. The case involved a Section 1782 request to a U.S. federal court made by the complainant in a European Commission antitrust proceeding, seeking records that the target of the antitrust complaint had produced in a separate U.S. litigation matter. The court held that Section 1782 authorizes but does not require a federal district court to provide judicial assistance to foreign or international tribunals or to “interested persons” in proceedings abroad. The court rejected the “foreign-discoverability requirement” adopted by some courts, which prohibited use of Section 1782 when the foreign tribunal or interested person would be unable to obtain the documents if located in the foreign jurisdiction. The court also rejected the contention that an applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. The court held that a party seeking relief under Section 1782 need not be a litigant or the tribunal itself, but can be any party that possesses a reasonable interest in obtaining judicial assistance. Additionally, the court addressed the type of foreign tribunal to which Section 1782 applies, holding that the European Commission qualified as a foreign tribunal because it “acts as a first-instance decisionmaker.” While the court did not directly decide the question of whether Section 1782 applies to foreign arbitral proceedings, the court quoted a law review article for the proposition that “the term ‘tribunal’ ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.” Finally, the court provided guidance to district courts on the considerations that are relevant in determining whether assistance is appropriate: (1) whether the person from whom discovery is sought is a participant in the foreign proceeding, inasmuch as the need for Section 1782 aid generally is more apparent when sought from a nonparticipant; (2) the nature of the foreign tribunal, the character of the foreign proceedings, and the receptivity of the foreign tribunal to U.S. judicial assistance; (3) whether the request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States; and (4) the extent to which the requests are unduly intrusive or burdensome.

Fifth Circuit Holds That Order Remanding Case to State Court Based on Unenforceability of New York Convention Arbitration Clause Under Louisiana Public Policy Is Not Reviewable on Appeal

Dahiya v. Talmidge Intern. Ltd., 371 F.3d 207 (5th Cir. 2004)

In this case, the Fifth Circuit dismissed an appeal from an order that remanded a case to state court despite the existence of an arbitration agreement falling under the New York Convention. The lawsuit was a maritime personal injury action filed in Louisiana state court. Because there was an arbitration clause providing for arbitration in Singapore or India of any claims arising out of the plaintiff’s employment, the defendants removed the case to federal court under 9 U.S.C. §205, and filed a motion to compel arbitration and stay the proceedings. The district court held that the arbitration agreement was unenforceable as a matter of Louisiana public policy, and based on the lack of an enforceable arbitration clause, concluded that jurisdiction was lacking under 9 U.S.C. §205 and remanded the case to state court. The court also entered orders denying the motion to compel arbitration and stay proceedings. On appeal, the Fifth Circuit held that it had no jurisdiction to review the district court’s rulings, concluding that the remand order was not reviewable under 28 U.S.C. §1447(d), and that the orders compelling arbitration and staying proceedings were not binding on the state court and were not separable orders that were independently reviewable under the collateral order doctrine. Judge DeMoss dissented, and on denial of the petition for rehearing en banc, Judges DeMoss and Smith dissented, concluding that the result of the decision was “to frustrate the intention of Congress as reflected by the FAA and the [enabling legislation under the New York Convention],” and that “the

CASE NOTES

[New York] Convention will be unenforceable in the State of Louisiana and the procedural pattern utilized by Dahiya's counsel in this case will become a pattern for subjecting foreign defendants to litigation in Louisiana state court with personal injury claimants with whom agreements to arbitrate had in fact been made."

Supreme Court Interprets Scope of the Federal Tort Claims Act and Alien Tort Statute

Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004)

In 1985, Enrique Camarena-Salazar, an agent of the U.S. Drug Enforcement Agency, was captured on assignment in Mexico. He was taken to a house in Guadalajara, where he was tortured over the course of a two day interrogation, then murdered. A federal grand jury indicted Alvarez-Machain (Alvarez), a Mexican physician, for his alleged role in the torture and murder. After negotiations with the Mexican government failed, the DEA arranged for Jose Sosa and others to seize Alvarez and bring him to the U.S., where he was then arrested. Alvarez was tried in 1992, and the district court granted his motion for a judgment of acquittal. After returning to Mexico, Alvarez sued the United States under the Federal Tort Claims Act (FTCA) for false arrest, and Sosa under the Alien Tort Statute (ATS) for a violation of the law of nations. The district court denied the FTCA claim, but awarded Alvarez \$25,000 for the ATS claim.

The Supreme Court held that Alvarez could not recover under either the FTCA or ATS. Regarding the FTCA, the Court held that the exception to the government's waiver of immunity for claims "arising in a foreign country" barred Alvarez' claims since the injury was suffered abroad. The court rejected the Ninth Circuit's attempt to apply the expansive "headquarters doctrine" (for acts occurring in the United States that have their operative effect in a foreign country) to avoid application of the foreign country exception. The court also rejected the ATS claim. It reasoned that courts should exercise caution in recognizing "violations of the law of nations," and held that Alvarez' illegal detention for less than one day before transfer to lawful authorities did not violate any norm of customary international law so well defined as to support the creation of a federal remedy.

Third Circuit Reverses Dismissal of Suit After Grant of Motion to Compel Arbitration

Lloyd v. Hovensa, LLC, 369 F.3d 263 (3rd Cir. 2004)

Bruno Lloyd filed an employment discrimination and negligence lawsuit against two defendants in the U.S. Virgin Islands. Based on a dispute resolution agreement with Lloyd, the defendants filed a motion to compel arbitration, as well as a motion to stay the lawsuit pending arbitration. The district court granted the defendants' motion to compel, but dismissed the case with prejudice — rather than granting a stay — because it found all of Lloyd's claims should be arbitrated.

The primary issue on appeal was whether the district court erred by entering a dismissal instead of a stay. The Third Circuit recognized the existing split among the First, Fourth, Fifth and Sixth Circuit Courts of Appeal, which have held that when a district court finds that all claims are subject to arbitration, dismissal is a proper remedy, and the Tenth Circuit, which has ruled that the court should only stay the proceedings. The Third Circuit joined the Tenth, and held that the district court erred by dismissing the suit with prejudice. The Court based its reasoning on the plain language of the FAA, the continuing ancillary role of the District Court after compelling arbitration, and the FAA's policy to relieve the parties from further litigation pending arbitration.

CALENDAR OF EVENTS

2004

October 13-16

Section Fall Meeting

The Americas Conference, "Future of the Americas: The Next Ten Years"

The Westin Galleria

Houston, Texas

Contact: Jessica Elliot (202) 662-1663

October 24-29

IBA/Annual Conference

Auckland, New Zealand

Contact: IBA 011-44-0-20-7629-1206

2005

January 23-30

International Legal Exchange

Symposium on International Dispute Resolution

London, England and Paris, France

Contact: Christina Heid (202) 662-1034

February 11-13

ABA/Section Midyear Meeting

Grand America Hotel

Salt Lake City, Utah

April 13-16

Section Spring Meeting

Washington, D.C.

Contact: Jessica Elliott (202) 662-1663