with respect to major international cases. Even in those cases, however, discovery is much more limited than it would be in a court setting (especially if the court is in the United States) and the parties do not need to budget for a full-fledged appeal.[16] To that extent, arbitration is certainly less costly than major litigation.

- Arbitration is said to be less time-consuming than litigation. Although that statement may be generally true, its accuracy depends, in substantial part, on whether the parties want it to be true. In your author's experience, however, practitioners are increasingly taking advantage of opportunities for delay.
- Arbitration is said to be more confidential than a court proceeding. Arbitration is generally confidential, in the sense that the proceedings are not public and the awards are released only if all parties agree. The fact that an arbitration is being conducted, and, usually, the outcome of the case, generally become known to those who care, however, and often to the press as well.

§ 1.07 Conclusion

If some of the claims by the proponents of international arbitration—as well as some of the fears of the opponents—are overdrawn, there can be no doubt that international commercial arbitration is here to stay. No one today can fairly hold him or herself out to be an international commercial lawyer without familiarity—indeed without a fairly high comfort level—with international arbitration as it is practiced in the world's major commercial centers. If the arbitrators are well chosen and counsel are well prepared, arbitration is as good a system for resolving disputes across frontiers as can be devised, which is why the model is so often copied or adapted to public controversies, such as under the Iran-United States Claims Tribunal, under the North American Free Trade Agreement, under the World Bank International Centre for Settlement of Investment Disputes, and under the World Trade Organization's Understanding on Dispute Settlement. If the arbitrators have been chosen unwisely and the lawyers (or one side's lawyers) are poorly prepared, no institution or system of rules can save the process.

[16] *See* Chapter I.8 on the right to seek judicial review of arbitral awards and chapters in Part III concerning the right to review arbitral awards in selected jurisdictions.

Chapter I.2

Drafting an Enforceable Arbitration Clause

Daniel M. Kolkey
Richard Chernick

This chapter discusses the components of an effective arbitration clause, which should include, among other things, the identification of the rules that will govern the arbitration, the number of arbitrators who will decide the dispute, the method for selecting the arbitrators (which is normally supplied by the rules governing the arbitration), the place of the arbitration, the language of the arbitral proceedings, discovery, the governing law, the scope of judicial review of the award, and the currency in which the award is to be rendered.

SYNOPSIS

§ 2.01 Introduction

Whether the parties will reap or risk the benefits of their arbitration will depend, in part, upon the arbitration clause they draft. A poorly drafted clause can undermine enforcement, increase the costs of the arbitration (where the proceedings are held in a distant jurisdiction or needless translations are required), complicate completion of the arbitration (where the jurisdiction's procedural laws add unexpected proceedings), or thwart the expectations of at least one of the parties (where, for instance, the arbitration clause does not cover all relevant disputes, the arbitrator is not experienced in the field in which the dispute arises, or the arbitral site imposes more stringent review of the award than anticipated).

On the other hand, a well drafted arbitration clause can ensure that all disputes between the parties are arbitrated, enhance the prospects for enforcement, ensure the selection of an arbitrator experienced in the field in which the dispute arises, designate a convenient location for the proceeding, minimize translations, permit limited discovery, and address currency conversion problems.

Accordingly, a well drafted arbitration clause should address—or at least consciously decline to address—the following matters:

- The scope or nature of the disputes that are subject to arbitration;
- The rules that will govern the arbitral proceedings;
- Whether the arbitration will be administered by an arbitral institution pursuant to its rules or be ad hoc;
- The number of arbitrators;
- The method of selecting the arbitrators;
- The location for the arbitration;
- The language in which the arbitration shall be conducted;
- The discovery permitted prior to the arbitration hearing;
- The arbitrator(s)' power to grant interim relief and other remedies;
- The law governing the substance of the dispute;
- Judicial review, including the waiver or enlargement thereof;
- The currency in which the award is to be rendered;
- The award of attorney fees and costs; and
- Sovereign immunity, where one of the parties is a sovereign.

§ 2.02 The Scope of the Clause

Practitioner's Hint: *A sound arbitration clause should anticipate unusual issues or authorize the arbitrators to deal with those issues, unless the parties to the agreement determine to leave such issues unaddressed.*

[1] Alternatives

The first step in drafting an arbitration clause is to determine the scope of the disputes that are to be arbitrated. This is of some significance. A narrowly drafted clause leaves open the prospect that some of the parties' disputes will be submitted to arbitration while others will be litigated, undermining the purpose of the arbitration clause in avoiding litigation, particularly litigation in a foreign court.

A simple arbitration clause may provide:

"Any controversy or claim arising out of or relating to this contract shall be determined by arbitration . . . ."

Note, however, that if a dispute arises over the contract's validity or takes the form of a tort claim between the parties, a question may arise about the extent of the coverage of that clause; specifically, the question may arise whether that type of issue is subject to arbitration. And when the parties draft a vague clause, they may find that certain issues must first be decided by a court in a proceeding to compel arbitration, rather than in the arbitration itself.[1]

Admittedly, an enforcing court may deem the foregoing arbitration clause to be sufficiently broad to empower the arbitrator to decide those issues. For instance, in one case[2] the Ninth Circuit Court of Appeals in the United States ruled that an arbitration clause (which covered "all disputes arising in connection with [the] [a]greement") was sufficiently broad to encompass all disputes having a significant relationship to the contract, including statutory and tort claims. Not all courts in all jurisdictions may agree, however, and indeed, the latter decision was a significant liberalization of earlier Ninth Circuit rulings.[3]

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[1] Under the U.S.'s Federal Arbitration Act, 9 U.S.C. § 1 et seq., "[t]he question whether the parties have submitted a particular dispute to arbitration, *i.e.*, the *'question of arbitrability,'* is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 154 L.Ed.2d 491, 497 (2002). However, the rule that the question of arbitrability is normally an issue for judicial determination is only applicable "in the kind of narrow circumstance where contracting parties would have likely expected a court to have decided the gateway matter, where they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 83-84, 154 L.Ed.2d at 497; *see Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 451–452, 156 L.Ed.2d 414, 421-422 (2003) (plurality opn) [where the parties had agreed to arbitrate all disputes arising from a contract, whether arbitration clause forbid class arbitration should be decided by the arbitrator because it did not present the question of whether the parties wanted a judge or arbitrator to decide whether they had agreed to arbitrate the contract dispute but instead the kind of arbitration proceeding to which they had agreed]; *First Options of Chicago v. Kaplan*, 514 U.S. 938, 944-945, 131 L.Ed.2d 985, 994 (1995) [in construing the Federal Arbitration Act, 9 U.S.C.§ 1 et seq., the United States Supreme Court ruled that "the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable'" and that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakabl[e]' evidence that they did so"].

[2] *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999).

[3] *See Tracer Research Corp. v. National Environmental Services Co.*, 42 F.3d 1292 (9th Cir. 1994).

The UNCITRAL Arbitration Rules[4] suggest a more expansive clause:

> "Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration . . . ."[5]

Even that clause may not cover tort claims arising out of the parties' relationship, although many courts broadly construe such arbitration clauses. A clause that would enhance the prospect of arbitration of tort claims, even if they were not directly related to the parties' contract, could provide (similar to the clause suggested by the British Columbia International Commercial Arbitration Rules) as follows:

> "All disputes arising out of, or in connection with this contract, or in respect of any defined legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration."

To draft a clause of expansive scope, which could combine the UNCITRAL approach with that of the British Columbia International Commercial Arbitration Rules, one could provide the following:

> "Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, or any dispute, controversy, or claim in respect of any defined legal relationship associated with this contract shall be finally settled pursuant to an arbitration before [one] [three] arbitrators pursuant to the [specify] rules in the city of ____."

Still, no matter how broad the clause, there may be some disputes that are not arbitrable pursuant to the public policy of the jurisdiction in which the arbitration is to be held. Where the subject of the dispute is not capable of settlement by arbitration in the jurisdiction in which the award is to be enforced, enforcement of the award can be refused under the

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[4] UNCITRAL is the United Nations Commission on International Trade Law. The Commission has developed a set of rules, which parties can adopt to govern their arbitration, as well as a model arbitration statute, which states can enact to govern international commercial arbitrations within their jurisdiction.

[5] UNCITRAL Arb. Rules, Annex (effective Aug. 15, 2010), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html.

New York Convention for the Enforcement and Recognition of Foreign Arbitral Awards (hereinafter referred to as the "New York Convention"),[6] thereby limiting the scope of the arbitration clause. That "not capable of settlement" exception has been substantially narrowed in the United States,[7] but may still be applied where, for instance, a U.S. statutory antitrust claim is covered by an arbitration clause whose choice of forum and choice of law arguably defeat the party's claim.[8]

Nonetheless, drafting techniques are available to enhance the prospect that the arbitration clause will be found to cover a future dispute. For instance, parties who wish to minimize the risk that a court will find that the dispute is not covered by their arbitration clause can include a provision that grants the arbitrators the right to rule on objections that the dispute is not covered by the clause. The United States Supreme Court, in construing the Federal Arbitration Act, 9 U.S.C. § 1 et seq., ruled that "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is 'clea[r] and unmistakeabl[e]' evidence that they did so. [Citation.] In this manner the law treats silence or ambiguity about the question 'who (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question 'whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement . . . ."[9]

Accordingly, if the parties wish to provide that the arbitrability of their dispute be submitted to arbitration, they must so provide in their agreement. If they do so, in the U.S. at least, "the court's standard for

[6] June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html; *see* Chapter I.8.

[7] See Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 Int'l Law. 693, 697-698 (1988).

[8] See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638, n. 19, 87 L.Ed.2d 444, 462, n. 19 (1985) ["We merely note that in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violations, we would have little hesitation in condemning the agreement as against public policy."]. At present, faced with a contention that the terms of an arbitration agreement will interfere with the vindication of a statutory right, U.S. federal courts have ruled that the burden of making such a showing cannot be carried by "mere speculation" that the statutory claim cannot be vindicated in the arbitration. *Pacificare Health Sys., Inc. v. Book*, 538 U.S. 401, 405, 155 L.Ed.2d 578, 583 (2003); *Booker v. Robert Half International, Inc.*, 413 F.3d 77, 81 (D.C. Cir. 2005); see also *Anderson v. Comcast Corp.*, 500 F.3d 66 (1st Cir. 2007); *Kristian v. Comcast Corporation*, 446 F.3d 25 (1st Cir. 2006).

[9] *First Options of Chicago v. Kaplan*, 514 U.S. at 944-945, 131 L.Ed.2d at 994; accord, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. at 83, 154 L.Ed.2d at 497.

reviewing the arbitrator's decision about *that* matter [will] not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate" (pursuant to which only limited review is available).[10] Therefore, if the parties wish to minimize the prospect that a court will construe their agreement to arbitrate more narrowly than they intended, they can provide that the arbitrability of the dispute will be subject to arbitration as follows:

> "The arbitral tribunal shall decide any and all objections to its jurisdiction over the dispute, including any objections with respect to the existence, scope, or validity of the arbitration clause."

Or the provision could be incorporated into the principal arbitration clause and thus be even more encompassing as follows:

> "Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, *and any dispute, controversy, or claim over the arbitrability of any such dispute,* shall be settled by arbitration in accordance with the rules of Y."

The advantage of such a clause is that it further provides the court with a basis to defer to a decision by the arbitrators as to whether the matter is subject to arbitration, and the arbitrators may be more inclined than a court to find the dispute covered by the arbitration clause. The disadvantage is that the parties may want a court to exercise its independent judgment in deciding whether a dispute has arisen between them that is governed by their arbitration clause.

Finally and conversely, practitioners should consider whether they wish to restrict the remedies available in their arbitration clause. This can be tricky. There is case law that suggests that it is not against public policy to prohibit or waive certain remedies in an arbitration agreement, such as an award of punitive damages,[11] although a risk exists that a

[10] *First Options of Chicago v. Kaplan,* 514 U.S. at 943, 131 L.Ed.2d at 993.

[11] *Investment Partners, L.P. v. Glamour Shots Licensing, Inc.*, 298 F.3d 314, 318 n. 1 (5th Cir. 2002); see, e.g., *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 807 (7th Cir. 2003) [rejecting claim that the arbitration agreement is unconscionable despite limitations on attorney's fees and punitive damages]; *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1085 (8th Cir. 2001) [upholding arbitration agreement containing limitation on punitive damages and leaving question in the hands of the arbitrator].

court could deem such an agreement to be unconscionable, depending upon the circumstances, and thus null and void.[12] Consider also the risk that a prohibition against the arbitrator awarding a particular remedy could lead to an argument that the remedy is then outside the scope of the arbitration clause and subject to litigation in court. (This, of course, simply argues in favor of a waiver, rather than a prohibition, of any particular remedy.)

[2] Sample Clauses

Some of the recommended clauses by leading arbitral institutions are as follows:

The standard arbitration clause recommended by the International Chamber of Commerce (ICC) provides:

> "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said rules."[13]

The standard clause under the UNCITRAL Arbitration Rules provides:

> "Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules. (a) The appointing authority shall be the (name of institution or person). (b) The number of arbitrators shall be (one or three). (c) The place of arbitration shall be (town and

[12] See, e.g., *Alexander v. Anthony International, L.P.*, 341 F.3d 256, 267 (3d Cir. 2003) [arbitration agreement between parties with unequal bargaining power and which prohibits attorney's fees and punitive damages is unenforceable]; *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1062 (11th Cir. 1998) (Cox, J. concurring) [finding arbitration agreement unenforceable because it prohibited Title VII damages and equitable relief]. But see *Spinetti v. Service Corp. International*, 324 F.3d 212, 214 (3d Cir. 2003) [severing unenforceable fees and costs provision from arbitration agreement, rather than invalidating entire agreement]; *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 672, 675 (6th Cir. 2003) [severing unenforceable cost-splitting provision and damage limitations from arbitration agreement].

[13] ICC Arbitration and ADR Rules, p. 78 (effective Jan. 1, 2012), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/2012_Arbitration%20and%20ADR%20Rules%20ENGLISH.pdf

> country). (d) The language to be used in the arbitral proceedings shall be ___."[14]

The International Centre for Dispute Resolution ("ICDR"), a division of the American Arbitration Association, recommends the following:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules. The number of arbitrators shall be [one or three]; the place of arbitration shall be [city or country]; and the language(s) of the arbitration shall be ____."[15]

The recommended clause of the LCIA Court, formerly known as the London Court of International Arbitration, is:

> "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceeding shall be [ ]. The governing law of the contract shall be the substantive law of [ ]."[16]

§ 2.03 The Rules Governing the Arbitration

Once the scope of the disputes to be arbitrated is determined, the parties should decide whether the arbitration should be governed by a recognized set of rules.

[14] UNCITRAL Arb. Rules, Annex.

[15] ICDR International Dispute Resolution Procedures (effective June 1, 2009), http://www.adr.org/sp.asp?id=33994. Because the International Centre for Dispute Resolution is a division of the American Arbitration Association, the parties can substitute the International Arbitration Rules of the "American Arbitration Association" for the International Arbitration Rules of the "International Centre for Dispute Resolution.". The rules are the same.

[16] LCIA Arb. Rules (effective Jan. 1, 1998), *available at* http://www.lcia.org/ARB_folder/arb_english_main.htm.

[1] Advantages of Selecting a Set of Rules

Practitioner's Hint: *Practitioners are well advised to include in their arbitration agreement the rules which are to govern the arbitration. A set of rules, such as the ICC rules of arbitration or the ICDR rules, will fill in many gaps that arbitration agreements tend to contain.*

The advantages of selecting a set of rules to govern an arbitration are many. First, the rules will fill in procedural gaps that the parties may not have anticipated. For instance, if the parties neglect to specify—or cannot agree upon—the place of the arbitration, the number of arbitrators, the nationality of the sole or presiding arbitrator, the method of selecting the arbitrator(s), the choice of law, or the language of the arbitration, the rules will specify how those issues are to be determined. Similarly, if one of the parties defaults, the rules will specify how to proceed and can help ensure that the resulting award will be enforceable. (In such a case, the defaulting party can hardly oppose enforcement of the resulting arbitration award on the grounds of a denial of due process if the default award complies with the rules to which that party agreed as part of the arbitral clause.) Indeed, so many topics are addressed in a set of rules that the parties would be well advised to specify a set of rules to govern their arbitration unless they are prepared to draft a very detailed arbitration clause.

Second, international arbitration rules from a recognized and respected arbitral organization will provide fair procedures that acknowledge the parties' different legal traditions. Many international arbitration rules seek to incorporate both civil law and common law traditions into the procedures for the arbitration hearing. For instance, many rules will allow the arbitrator to select an expert to advise him or her, rather than simply rely on the parties' experts—something with which civil law parties and arbitrators are comfortable. Additionally, the rules may encourage (if not require) selection of the sole arbitrator or the chair of a three-arbitrator panel from a national of a jurisdiction other than that of the parties.[17] Unless the parties considered that point when

[17] For instance, article 13(5) of the ICC Rules of Arbitration (effective January 1, 2012) provides that "[t]he sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects . . . , the sole arbitrator or the president of the

they drafted the arbitration clause, they could end up with a sole or presiding arbitrator who is a national of one of the parties' jurisdictions. A wise selection of internationally recognized rules can avoid that sometimes unfortunate result.

Third, the specification of a particular set of arbitration rules to govern the arbitration will often mean (depending upon the rules) that the arbitration will be administered by an experienced arbitral organization which promulgated the rules. The arbitral organization will then handle such tasks as the collection of fees, the selection of arbitrator(s) from a roster of qualified and screened arbitrators, the enforcement of any arbitrator disclosure obligations, and review of the award for flaws in its form. Indeed, the quality control over the pool of arbitrators that an arbitral organization provides is reason enough to adopt a set of rules to govern (and thus an arbitral institution to administer) the arbitration. Some of the prominent arbitral institutions have already been mentioned: The ICC, the LCIA Court, and the American Arbitration Association. The rules for the ICC, the American Arbitration Association, and the LCIA Court, among others, provide for administration by that arbitral organization when the parties select their rules to govern the arbitration.

The UNCITRAL Arbitration Rules are a prominent exception to the "adopt our rules and get our organization" concept. The UNCITRAL rules do not provide for a particular administering authority; instead, they require the parties to specify an organization (called the "appointing authority"), which will select the arbitrator(s) in the event that the parties cannot agree upon one, but which will not administer the arbitration itself.[18]

Institutional arbitrations have other advantages over ad hoc (non-administered) arbitrations. For example, parties who do not have an administering body must deal directly with the arbitrators (unless they employ an intermediary of some kind) about fees, availability, and conflicts. A governing institution eliminates the need for such *ex parte* communications. As noted, the institution also provides access to established panels of arbitrators (although an UNCITRAL-rules arbitration

arbitral tribunal may be chosen from a country of which any of the parties is a national." Article 6(7) of the UNCITRAL Arbitration rules provides that "the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

[18] For more on commencing an arbitration pursuant to the UNCITRAL arbitration rules, *see* § I.3.03[8], below.

can select an institution to appoint the arbitrators and thus reap the advantage of that institution's established panel).

Further, one party may challenge a particular nominee's independence or competence (on the basis of bias, for example). That challenge may require resolution by the other arbitrators or a court in a non-administered arbitration, whereas the institution will normally resolve the matter in an institutional arbitration. Parties may also find that because non-administered arbitration clauses do not use an appointing authority and instead depend on the parties' agreement, they are forced to ask a court for appointment if the parties reach an impasse.

Finally, institutional rules are self-executing—the process is begun by submission of a demand for arbitration to the institution in accordance with its rules. In contrast, in non-administered arbitrations, the parties may be forced to seek an order of a court to arbitrate.

[2] Disadvantages of Selecting a Set of Rules

Practitioner's Hint: *The one (and, as far as we know, the only) disadvantage to using an arbitral institution is that the institution will impose costs on the parties in addition to the cost of the arbitrators.*

The one disadvantage to the selection of an arbitral institution's rules is that there is a cost for the institution's administration separate and apart from the cost of the arbitrator(s). That cost is often a percentage of the amount of the claim or counterclaim, although the prevailing party may be awarded those costs at the conclusion of the arbitration. To determine the cost of administration, a party need only ask the arbitral institution for a copy of the institution's rules and fee schedule (which often can be found on the back of the rules).

Of course, a party can select rules, like the UNCITRAL Arbitration Rules, where there is no institution that administers the arbitration and thus no cost to selecting such rules, although there will be a cost to using any institution selected as the appointing authority (for purposes of appointing the arbitrators).

Another arguable disadvantage to parties using an institution is the insistence of some arbitral institutions that certain of their procedures be used, even where the parties would prefer a different process. One such example is the ICC's requirement that the ICC court review every award rendered by its arbitrators before it may be issued. Even if the parties were willing to waive such review in order to save the time necessary to

procure such approval, the ICC would not permit waiver. That rule, in our view, however, should be seen as an advantage, rather than a disadvantage, since it tends to assure enforceability of the award.

[3] Addresses of Some Leading Arbitral Institutions

The present (summer 2011) addresses of some of the leading arbitral institutions are as follows:

1. The American Arbitration Association
International Centre for Dispute Resolution
1633 Broadway, 10th Floor
New York, New York 10019-6708
United States of America
Telephone: 212 -716-5800
<<www.adr.org>>

2. The ICC International Court of Arbitration
38, Cours Albert 1er
75008 Paris, France
Telephone: 33-1-49-53-29-05
Fax: 33-1-49-53-29-33
E-mail: arb@iccwbo.org
<<www.iccwbo.org/court/arbitration>>

3. LCIA
The International Dispute Resolution Centre
70 Fleet Street
London EC4Y 1EU
United Kingdom
Telephone: 44-020-7936-7007
Fax: 44-020-7936-7008
<<www.lcia.org>>

4. Japan Commercial Arbitration Association
3rd Floor, Hirose Building
3-17, Kanda Nishiki-cho
Chiyoda-ku, Tokyo 101-0054
Japan
Telephone: 81-03-5280-5200
Fax: 81-03-5280-5170
<<www.jcaa.or.jp>>

was otherwise invalid; (2) the arbitration agreement is not valid under the law to which the parties have subjected it; (3) a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; (4) the award deals with a dispute not contemplated by the submission to arbitration or contains decisions on matters beyond the scope of the submission; (5) the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement; (6) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made; (7) the subject matter of the dispute is not capable of settlement by arbitration under Singapore law; or (8) the award is in conflict with the public policy of Singapore. In addition, Singapore law provides that an award may be set aside if (9) it was procured by fraud or corruption; or (10) a "breach of the rules of natural justice" occurred in connection with the award by which the rights of a party have been prejudiced.[228]

As discussed in more detail below,[229] even though an award may have been set aside in the country in which, or under the law of which, the arbitration took place, a court in another country may nevertheless order enforcement as a matter of discretion. The argument is that, while Article V(1)(e) is discretionary, Article VII preserves any enforcement rights available under the domestic law of the jurisdiction where enforcement is sought. This discretion, however, may be more theoretical than real. U.S. courts, for instance, have rarely enforced awards that have been set aside in the country of primary jurisdiction.[230]

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[228] Smit & Pechota, World Arbitration Reporter, vol. IIB, "Singapore," at 2404.08-2404.12.

[229] *See* §8.05[8] *infra*.

[230] *See* TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 933-39 (D.C. Cir. 2007) (refusing to enforce award set aside in Colombia); Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 197 (2d Cir. 1999) (refusing to enforce award set aside in Nigeria); Spier v. Calzaturificio Tecnica, S.p.A., 71 F. Supp. 2d 279, 285-89 (S.D.N.Y. 1999) (refusing to enforce award set aside in Italy); *see also* Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A., 377 F.3d 1164, 1171-72 (11th Cir. 2004) (reversing district court's confirmation of award and remanding for further consideration in light of a previous ruling by a Venezuelan court that the dispute was not arbitrable). So far, *Chromalloy* is still the only U.S. case in which a court enforced an arbitral award that had been annulled in the primary jurisdiction.

Two other cases are worth noting. In *Kahara Bodas II*, the Fifth Circuit enforced an award even though it had been annulled in Indonesia. The court did so, however, only after concluding that Switzerland was the country of primary jurisdiction, not Indonesia. *See* 364 F.3d 274, 309-10 (5th Cir. 2004). In that case, the contract specified that Swiss

[6] The Dispute Is Not Arbitrable

Article V(2)(a) allows a court to deny enforcement if the court finds that "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country." Essentially, the "not arbitral" defense prevents enforcement of an award resulting from an arbitration based on an otherwise valid and binding arbitration agreement where the dispute involves subject matter that has been reserved for the courts.[231] That defense, however, is "a rapidly shrinking universe," especially in the United States, given the increasing reluctance of courts to reserve particular matters to the exclusive competence of the judiciary.[232] The U.S. Supreme Court and other federal courts have almost entirely negated the exceptions historically carved out for questions involving antitrust laws, federal securities laws, labor and employment laws, claims under the RICO statute, tort claims and intellectual property disputes.[233]

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arbitration law would apply and that the arbitration would occur in Switzerland. In addition, the losing party had initially attempted, unsuccessfully, to have the award annulled in Switzerland, and had repeatedly urged the district court that Swiss arbitration law applied to the arbitration. *Id.*

Similarly, the court in Nicor Int'l Corp. v. El Paso Corp., 292 F. Supp. 2d 1357 (S.D. Fla. 2003) enforced an award even though a court in the Dominican Republic had ruled that one party had waived its right to seek arbitration. The court held that since the agreement specified that the arbitration was to occur in Texas and that the agreement would be governed by Texas law, the award "was not made in, or under the laws of, the Dominican Republic" and a defense under Article V(1)(e) was not available. *Id.* at 1375.

[231] *See* Empire State Ethanol & Energy, LLC v. BBI Int'l, No. 1:08-CV-623(GLS/DRH), 2009 U.S. Dist. LEXIS 23701 at *23 (N.D.N.Y Mar. 20, 2009) (plaintiff's antitrust and tort claims were arbitrable because they "clearly implicated the parties' rights and obligations under their consulting agreement."); Coors Brewing Co. v. Molson Breweries, 51 F.3d 1511, 1516 (10th Cir. 1995) (claims under the U.S. antitrust laws may not be arbitrable unless they have a "reasonable factual connection" to the contract containing the arbitration clause).

[232] *See* George L. Blum, Annotation, *Construction and Application of United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards . . . Global Cases: Jurisdictional Issues, Construction of Essential Terms, Applicability of Convention to Action, Impact of Other Multilateral or Bilateral Agreements upon Applicability of Convention, and Reciprocity Issues,* 1 A.L.R. Int'l. 1 (2010); Carter, *Litigating in Foreign Territory: Arbitration Alternatives and Enforcement Issues,* A.B.A. Center for CLE Nat'l Inst., Int'l L. Sec., N98DBWB ABALGLED A-1 9 (Westlaw Journals Database) (Feb. 1998) (noting the increasing scarcity of non-arbitrable subject matters).

[233] *See e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, (1985) (antitrust); Shearson/American Express Inc. v. McMahon, 482 U.S. 220 (1987) (securities); Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840, 851 (2d Cir. 1987)

In addition, U.S. courts have stated that international arbitration requires that arbitrability be given broad scope. For instance, the Second Circuit in *Parsons & Whittemore* noted that "it may well be that the special considerations and policies underlying a truly international agreement call for a narrower view of non-arbitrability in the international than the domestic context."[234] This view was echoed in two U.S. Supreme Court cases, which reasoned that special comity concerns would require a broader notion of arbitrability in international arbitration than might be the case in domestic arbitration.[235] It also reflects the prevailing approach in France and other European jurisdictions.[236]

[7] Public Policy Defense

Article V(2)(b) allows a court to deny enforcement if the court finds that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." U.S. courts, taking heed of the "general pro-enforcement bias informing the Convention," have declared that "the Convention's public policy defense should be construed narrowly."[237] Consequently, in the United States, "[e]nforcement of foreign arbitral

(securities); Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 483 (1989) (securities); Scherk v. Alberto-Culver Co., 417 U.S. 506, 519-20 (1974) (securities); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (labor and employment); Collins & Aikman Prods. Co. v. Bldg. Sys., Inc., 58 F.3d 16, 23 (2d Cir. 1995) (tort); Saturday Evening Post Co. v. Rumbleseat Press, Inc., 816 F.2d 1191, 1191 (7th Cir. 1987) (copyright claims held arbitrable); Rhone-Poulenc Specialites Chimiques v. SCM Corp., 769 F.2d 1569 (Fed. Cir. 1985) (patents); *see also* Patent Arbitration Act, 35 U.S.C. § 294 ("A contract involving a patent or any right under a patent may contain a provision requiring arbitration of any dispute relating to patent validity or infringement arising under the contract.").

[234] Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 974-75 (2d Cir. 1974) (noting that the U.S. Supreme Court had enforced international, but not domestic, agreements to arbitrate federal securities act claims).

[235] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629, 640 (1984) (holding that antitrust claims arising in an international context were henceforth capable of arbitration, and noting that "it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration."); Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-18 (1974) (reasoning that special comity concerns required that securities law claims arising in an international context be capable of arbitration).

[236] Carbonneau & Janson, *Cartesian Logic and Frontier Politics: French and American Concepts of Arbitrability*, 2 Tul. J. Int'l & Comp. L. 193, 194 (1994).

[237] Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 974 (2d Cir. 1974).

awards may be denied on this basis only where enforcement could violate the forum state's most basic notions of morality and justice."[238] Although the argument is frequently made by the party resisting enforcement, it has rarely been successful.[239]

Although a wide variety of claims have been made invoking the public policy defense, some of which overlap with the defenses discussed above, most have failed. Enforcement, however, was found to violate a country's public policy where the arbitrator awarded punitive damages in a contract dispute[240] and where the choice of law and choice of forum clauses in an arbitration agreement prevented the plaintiff from pursuing his statutory claims under U.S. law.[241]

On the other hand, enforcement was found not to violate U.S. public policy where the arbitrator erroneously considered improper testimony or evidence; the arbitrator improperly excluded evidence; the arbitrator was biased; a party attorney had a conflict of interest; the arbitrator ruled on matters beyond the scope of his or her powers; the arbitrator improperly relied on prior adjudications or arbitrations; the arbitrator improperly administered the arbitration; a party had insufficient notice; an award conflicted with foreign policy; an award was contrary to state or federal law; the arbitrator misapplied foreign law; the arbitration agreement was entered into under duress; enforcement was barred by laches; and a party to the arbitration committed fraud.[242]

In *Parsons & Whittemore*, the court rejected the defendant's claim that, because the United States had severed relations with Egypt, enforcing an award predicated on the defendant's withdrawal from an

[238] *Id.*

[239] *See generally* Blum, *supra* note 232.

[240] *See* Federalnyi Arbitrazhnyi Sud Moskovskogo Okruga[Federal Arbitration Court of Moscow District]. No. KG-A40/9192-06 (Russ.) (finding an arbitral award that awarded punitive damages contrary to Russian law and consequently, its public policy).

[241] Thomas v. Carnival, 573 F.3d 113 (11th Cir. 2009) (arbitration clause requiring arbitration in Philippines under Panamanian law was void as against public policy because it denied seafarer his right to pursue his statutory remedies under U.S. law); Sivanandi v. NCL Ltd.. No. 10-CV-20296, 2010 WL 1875685 at *3 (S.D. Fla. Apr. 15, 2010) (same where contract invoked Bahamian law); *but see* Balen v. Holland Am. Line Inc., 583 F.3d 647, 654 (9th Cir. 2009) (arbitration agreement that did not foreclose applicability of U.S. law was not void as against public policy where plaintiff failed to identify any statutory claims he could pursue in the U.S. that he could not pursue in the Philippines).

[242] *See generally* Blum, *supra* note 232; *see also* Karen Maritime Ltd. v. Omar Int'l Inc., 322 F. Supp. 2d 224, 226 & n.1 (E.D.N.Y. 2004) (collecting cases in which the public policy defense was rejected).

Egyptian construction project contravened U.S. policy.[243] The court held that "equating 'national policy' with United States 'public' policy . . . quite plainly missed the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility."[244]

In recent years, U.S. courts have clarified that under domestic law an award may be said to violate public policy only where the *remedy* itself contravenes U.S. law or well-defined public policy.[245] Thus, an award does not violate public policy when the legal reasoning behind the award or the conduct of the arbitration is somehow faulty.[246] International courts have adopted a similarly restrictive application of the public policy defense, and have declined to apply the defense for a mere legal error.[247]

In a case decided under domestic arbitration law, the U.S. Supreme Court reasoned that an arbitral award would violate public policy only if the parties could not privately agree to the same outcome. Since the parties had "granted to the arbitrator the authority to interpret the meaning of their contract," the court should "treat the arbitrator's award

[243] 508 F.2d at 974.

[244] *Id.*

[245] *See, e.g.,* Aramark Facility Servs. v. SEIU, Local 1877, 530 F.3d 817, 823 (9th Cir. 2008) (The policy must be "one that specifically militates against the relief ordered by the arbitrator.") (quotation omitted); S. Cal. Gas Co. v. Utility Workers Union, 265 F.3d 787, 795 (9th Cir. 2001) (same); TemoRio, S.A. v. Electranta, S.P., 487 F.3d 928, 936 (D.C. Cir. 2007) (stating that the standard for unenforceability "is high, and infrequently met" and . . . in the classic formulation, [must be] a judgment that tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property . . . .) (internal quotations omitted); DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 825 (2d Cir. 1997) (noting that public policy defense is generally used to "prevent conduct that is particularly harmful to society and egregious in nature, such as when the conduct required by the award would jeopardize public health and safety."); Brown v. Rauscher Pierce Refsenes, Inc., 994 F.2d 775, 782 (11th Cir. 1993) ("Typically, the public policy exception is implicated when enforcement of the award compels one of the parties to take an action which directly conflicts with public policy.").

[246] *See, e.g.,* Karaha Bodas II, 364 F.3d 274, 306 (5th Cir. 2004) ("Erroneous legal reasoning or misapplication of the law is generally not a violation of public policy within the meaning of the New York Convention."); Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160, 165 (S.D.N.Y. 1987) ("'[M]anifest disregard' of law . . . does not rise to the level of contravening 'public policy,' as that phrase is used in Article V of the Convention.").

[247] *See e.g.,* Tamil Nadu Elec. Bd. v. ST-CMS Electric Co., 2007 EWHC 1713, 2007 WL 2041834 (Comm. Ct. App.); Bad Ass Coffee Co. of Hawaii Inc., v. Bad Ass Enters. Inc., 450 A.R. 344, 2008 CarswellAlta 1422 (Can. 2008).

as if it represented an agreement" between the parties.[248] Neither the Supreme Court nor other U.S. courts have strayed from this reasoning in recent decisions.

[8] The Chromalloy Limitation on the Article V(1)(e) Defense

Article VII provides that "[t]he provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be enforced."

Construing Article VII, courts have held that an application to enforce an award cannot be denied under Article V where the Article V defense is not a recognized defense under the domestic arbitration law of the enforcement jurisdiction. In other words, a defense which may fall within the list of defenses to an award contained in Article V is nevertheless not available as a defense if the domestic law of the enforcement jurisdiction, without regard to the Convention, does not recognize the defense. The scope of Article VII is discussed in the next section.

[a] The Chromalloy Decision

Article VII was first construed by a U.S. court in *Matter of Chromalloy Aero Services (Arab Republic).*[249] In *Chromalloy*, CAS (a U.S. corporation) had entered into a maintenance contract with the Egyptian Air Force. When a dispute arose between the parties, it was submitted to arbitration in Egypt in accordance with the parties' agreement. The arbitrator awarded CAS a substantial amount.

Egypt filed an appeal with the Egyptian Court of Appeal, and that court subsequently nullified the award under Egyptian arbitration law on the basis that the award was "not properly grounded under Egyptian law."[250] Specifically, the Egyptian court found that the arbitrators had erred in applying Egyptian civil law rather than administrative law to CAS's claims. While that appeal was pending, CAS initiated proceedings before the federal district court for the District of Columbia to have the award confirmed and enforced. In the U.S. enforcement proceeding, the

[248] E. Associated Coal Corp. v. United Mine Workers, 531 U.S. 57, 61-62 (2000); *see also* George Watts & Sons v. Tiffany & Co., 248 F.3d 577, 580-81 (7th Cir. 2001).

[249] 939 F. Supp. 907, 911 (D.D.C. 1996).

[250] *Id.* at 911.

annulment in Egypt established the grounds for a defense to enforcement under Article V(1)(e). The U.S. court nevertheless enforced the award.[251]

The court first reasoned that it could enforce the award notwithstanding Article V(1)(e) because Article V *permits*, but does not *require*, the court to refuse enforcement where the resisting party establishes the Article V(1)(e) defense.[252] While some have doubted that the enforcing court's discretion under Article V extends to the Article V(1)(e) defense,[253] the plain language of the Convention appears to compel that conclusion.

However, the court went on to find a second, and more controversial, basis for enforcing the award. The court concluded that Article VII *compelled* it to enforce the award despite the Egyptian court's nullification. The court reasoned that Article VII required it to grant enforcement irrespective of Convention defenses so long as CAS would be entitled, *absent the Convention*, to enforce the award under U.S. domestic arbitration law (Chapter 1 of the FAA).[254] Under Chapter 1 of the FAA, enforcement of the award could not be denied on the basis relied upon by the Egyptian court in nullifying the award, that is, the arbitrators' erroneous decision to apply civil rather than administrative law.[255] Accordingly, the court concluded, CAS was entitled to enforcement under the FAA, notwithstanding the Egyptian court nullification and Article V(1)(e).[256]

European courts have likewise held that a party seeking enforcement may resort to domestic law and thereby trump Convention defenses. For example, a French statute on international arbitration forbids French courts from refusing enforcement of an award on the grounds that it was set aside in the rendering jurisdiction.[257] The French Supreme Court has held that, where an award can be enforced under either the Convention or the domestic statute, the domestic statute trumps Article V(1)(e):

[251] *Id.*

[252] *See id.* at 909.

[253] *See* van den Berg, *Enforcement of Annulled Awards*, ICC INT'L CT ARB. BULL. 18 (Nov. 1998).

[254] *See* 939 F. Supp. at 909-10.

[255] While the FAA permits a court to deny enforcement if an award is rendered "in manifest disregard of law," the *Chromalloy* court concluded that the mistaken application of civil rather than administrative law did not rise to the level of manifest disregard under the FAA. *See* 939 F. Supp. at 911.

[256] *See id.* at 909-10.

[257] Polish Ocean Line v. Jolasry, Cour de Cassation, France, Mar. 10, 1993, translated in 19 Y.B. Com. Arb. 662, 663 (1994), *quoted in* Ostrowski & Shany, *supra* note 21, at 1660 n.43.

> "Article VII does not deprive any interested party of any right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. As a result, a French court may not deny an application for leave to enforce an arbitral award which was set aside or suspended by a competent authority in the country in which the award was rendered, if the grounds for opposing enforcement, although mentioned in Article V(1)(e) of the 1958 New York Convention, are not among the grounds specified in [the French statute]."[258]

Other European courts have followed suit.[259]

[b] Criticism of *Chromalloy*

Chromalloy has been criticized on several levels for its conclusion that the Article V(1)(e) defense could not be asserted to defeat CAS's enforcement rights under Chapter 1 of the FAA. First, commentators have taken issue with the court's conclusion that pursuant to Article VII, the proponent's enforcement rights under domestic arbitration law must prevail over the resisting party's Article V defenses. They contend that introducing domestic law into the Convention via Article VII injects disunity and uncertainty into the Convention, especially where domestic law diverges significantly from Article V defenses.[260]

[258] *Id.*

[259] Another French court confirmed the *Chromalloy* award, finding that under Article VII CAS had a right to enforcement under French law, irrespective of whether the award was nullified by the court in the rendering jurisdiction. *See* General Register No. 95/23029, Paris App., 1st Chamber, Sect. C, *reprinted in* 12:4 MEALEY'S INT'L ARB. REP. 5, *cited in* Alford & Gibson, Enforcement of Foreign Judgments, 32 Int'l Law. 249, (1998). *See also* Hilmarton v. Omnium de Traitemant et de Valorisation, Cour de Cassation, France, March 23, 1994, 1994 Revue De L'Arbitrage 327, 328, translated in 20 Y.B. Com. Arb. 663, 664-65 (1995) (French Supreme Court enforced award despite Swiss court judgment overturning award, because French domestic law prohibited French courts from refusing enforcement of award on grounds that it was nullified in the rendering jurisdiction).

[260] Ostrowski & Shany, *supra* note 21, at 1670-73. One example of the confusion and disunity surrounding the application of Article VII is the infamous *Hilmarton* arbitration. In *Hilmarton*, the French Supreme Court relied on the French statute referenced above to enforce an arbitral award rendered in Switzerland, even though the Swiss courts had set the award aside. *See* Ostrowski & Shany, at 1672-73 & n.107 (*citing* Hilmarton v. Omnium de Traitemant et de Valorisation, Court de Cassation, France, March 23, 1994, 1994 Revue De

While not directly criticizing *Chromalloy*, the Second Circuit Court of Appeals echoed that concern in *Baker Marine Ltd. v. Chevron Ltd.*[261] In *Baker Marine*, the court denied enforcement of an award on the grounds that it had been overturned in the rendering jurisdiction, notwithstanding the fact that the award had been overturned on grounds not recognized under the FAA.[262] The court reasoned that mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose award has been vacated at the site of the arbitration can automatically obtain enforcement of the award under the domestic laws of other nations, a losing party will have every reason to pursue enforcement actions from country to country until a court is found, if any, which grants the enforcement.[263]

These concerns were echoed in two other U.S. cases. In *Spier v. Calzaturificio Tecnica, S.p.A.*,[264] the court refused to consider whether an arbitral award would be enforceable under the FAA after the award had been annulled in Italy on the ground that the arbitrators had exceeded their powers. Following *Baker Marine*, and implicitly rejecting *Chromalloy*'s interpretation of Article VII, the court stated that the party seeking enforcement could not "introduce domestic United States law, statutory or decisional, into the case at bar through the vehicle of Article VII of the Convention."[265] Although the court recognized that its decision to defer to the Italian courts was discretionary, it found "no adequate reason for refusing to recognize the judgments of the Italian courts."[266]

L'Arbitrage 327, 328, *translated in* 20 Y.B. Com. Arb. 663, 664-65 (1995)). When a second award was rendered in Switzerland, the lower French courts confirmed that award. Because it had confirmed the first award, the French Supreme Court was forced to overrule the lower courts' confirmation of the second award on the grounds that it was barred by the first award. *See id.* at 1673-74 & nn.107-08 (*citing* Omnium de Traitment et de Valorisation v. Hilmarton, Cour de Cassation, France, June 10, 1997, 1997 Revue De L'Arbitrage 376, 377, translated *in* Y.B. Com. Arb. 696, 697-98 (1997)). The French Supreme Court's reliance on Article VII to enforce the first award led to the anomaly of two contradictory awards being pursued simultaneously in the same legal system, generating "a level of confusion and uncertainty seriously undermining the usual advantages of arbitration." *Id.* at 1673.

[261] 191 F.3d 194 (2d Cir. 1999).

[262] *Id.* at 197.

[263] *Id.* at 197 n.2.

[264] 71 F. Supp. 2d 279 (S.D.N.Y. 1999).

[265] *Id.* at 288.

[266] *Id.*

In a recent decision, the court in *TermoRio S.A. E.S.P. v. Electranta S.P.*,[267] affirmed the reasoning of *Baker Marine* and refused to enforce an award that had been annulled in Colombia on the ground that Colombian arbitration law did not permit the use of ICC rules in arbitrations held in Colombia. The court explained that because there was no indication that the proceedings before the Colombian court were "tainted or that the judgment of that court is other than authentic," the action to enforce the award should be dismissed under the New York Convention.[268] Despite the dubious ruling by the Colombian court, the *TermoRio* court also declined to exercise its discretion to enforce the award on public policy grounds, explaining that Article V(1)(e) does not grant unfettered discretion to courts in secondary jurisdictions to impose their own considerations of public policy in reviewing the judgment of a court in the primary jurisdiction, and that, in any event, the Colombian decision did not violate U.S. public policy.[269]

One response to these arguments is that the drafters of the Convention, by permitting recourse to more liberal enforcement provisions of domestic arbitration law, clearly chose to favor enforcement over the countervailing goal of uniformity by insisting that the Convention not *restrict* a party's right to enforcement under laws apart from the Convention. The *Chromalloy* court, and the European courts that construed Article VII similarly, simply followed the Convention's mandate that domestic enforcement rights prevail over Convention defenses.

The second criticism of *Chromalloy* is that, even if Article VII forbids the Convention from taking away domestic law enforcement rights, that article was not implicated in *Chromalloy* because CAS had no enforcement rights under U.S. domestic arbitration law in the first place.[270] Still, absent the Convention, it appears that the *Chromalloy*

[267] 487 F.3d 928 (D.C. Cir. 2007).

[268] *Id.* at 935.

[269] *Id.* at 937-39. The *TermoRio* court distinguished *Chromalloy* on the ground that the losing party in that case had violated an express provision of the arbitration agreement by seeking review of the award in the Egyptian courts. *Id.* at 937. In the decision below, the district court also declined to follow *Chromalloy*, calling the decision "questionable on the merits and distinguishable on the facts." *TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 98 (D.D.C. 2006).

[270] Ostrowski & Shany, *supra* note 21, at 1650, 1675-76, n.43; *see also* van den Berg, *supra* note 253, at 18. The *Chromalloy* court invited this criticism when it simply concluded, without analysis or explanation, that "if the Convention did not exist, the [FAA] would provide CAS with a legitimate claim to enforcement of this arbitral award." *Chromalloy*, 939 F. Supp. at 910. The French cases holding that Convention defenses

court had subject matter jurisdiction under 28 U.S.C. section 1330(a).[271] Several commentators, however, have pointed out that the FAA's venue provision did not provide a forum for CAS's enforcement petition. Section 9 provides for enforcement of arbitral awards either (1) in the district court that the parties designated in their agreement; or (2), if none is specified, in "the United States court in and for the district within which such award was made."[272] Because the award in *Chromalloy* was rendered in Egypt under Egyptian law, and the arbitration agreement did not provide for enforcement in the United States, CAS could not have enforced its award in the United States under section 9. Accordingly, the argument goes, CAS had no domestic law enforcement rights, and Article VII therefore did not prohibit the *Chromalloy* court from denying enforcement under Article V(1)(e).

This attack on the Chromalloy decision appeared to have some force until the U.S. Supreme Court decision in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*[273] In *Cortez Byrd Chips*, the Court held that section 9 provides permissive venue for enforcement of arbitral awards, and does not supplant general federal venue provisions. Thus, the Court concluded, enforcement proceedings could be brought either: (1) under section 9, in the forum the parties chose for enforcement or in the forum in which the arbitration took place; or (2) in any forum otherwise authorized under federal venue statutes.[274]

Under 28 U.S.C. section 1391(f)(4), venue is authorized "in the United States District Court for the District of Columbia if the action is

must yield to domestic enforcement rights do not present this problem, because the French statutes by their terms granted enforcement rights for foreign arbitral awards.

[271] 939 F. Supp.at 908-09. Section 1330(a) provides for subject matter jurisdiction "without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-07 of this title." 28 U.S.C. § 1330(a). Section 1605(6) provides that a foreign state shall not be immune from a proceeding to confirm arbitral awards against it if "(B) the . . . award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, [or] (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section." 28 U.S.C. § 1605(a)(6) (B)-(C). Both provisions appear to apply to CAS's enforcement petition. Further, the FAA itself applies to arbitration agreements "evidencing a transaction involving commerce," and "commerce" is defined to include "commerce . . . with foreign nations." 9 U.S.C. §§ 1-2.

[272] 9 U.S.C. § 9.

[273] 529 U.S. 193 (2000).

[274] *See id.* at 200-03.

brought against a foreign state or political subdivision thereof." Thus, absent the Convention, it appears that CAS was indeed able to bring the enforcement proceeding against Egypt in the U.S. District Court for the District of Columbia. Because CAS had enforcement rights absent the Convention, the Chromalloy court was correct to conclude that it could not refuse enforcement under Article V(1)(e) simply because the award was set aside in Egypt.

§ 8.06 Practical Issues Regarding Enforcement

[1] Arbitration and Enforcement in a Contracting State

One of the first considerations in securing enforcement under the New York Convention is to make sure that arbitration occurs in a nation that has adopted the Convention. Doing so will assure the practitioner that other countries that have adopted the Convention on the condition of reciprocity will enforce any resulting award.[275]

[2] The Search for Assets

Practitioner's Hint: *A continuing issue for the claimant in any arbitration is whether there will be anything to seize if the defendant does not voluntarily pay the award. Answering that question before the arbitration commences may well save the claimant a good deal of money and grief.*

Even before arbitration is completed and an award is issued, parties should consider the issue of collection. Parties may retain investigation firms to locate assets against which to enforce the award. Generally, such firms solicit information about the award debtor from the prevailing parties in order to narrow the search for assets to as few countries and locations as possible. The asset search firms may then utilize court records, tax records, lien and warrant registries, property records, corporate filings, fictitious business name filings, the media, business databases, government agencies, physical surveillance, interviews, and other sources to pinpoint and value the losing party's assets. Such inquiries can generally be conducted with or without the knowledge of the subject party.

[275] *See* §§ I.2.06[1] and I.4.02[1] above.

§ 1.01 Political and Legal Overview

[1] Canada as a Federation

Canada is a large country, geographically extending from the Pacific Ocean on the west to the Atlantic Ocean on the east, a distance of approximately 6,400 kilometres or 4,000 miles. Its population of approximately 34.5 million is concentrated along the country's southern border with the United States. In fact, nearly 90% of Canadians live within 200 kilometres of the border.

Canada is a constitutional monarchy and a federation of the following 10 provinces and 3 territories:

Province	Capital
Alberta	Edmonton
British Columbia	Victoria
Manitoba	Winnipeg
New Brunswick	Fredericton
Newfoundland and Labrador	St. John's
Nova Scotia	Halifax
Ontario	Toronto
Prince Edward Island	Charlottetown
Québec	Québec City
Saskatchewan	Regina

Territory	Capital
Nunavut	Iqaluit
Yukon	Whitehorse
Northwest Territories	Yellowknife

Each province has its own legislature, as do the territories. The seat of the federal government is in Ottawa, in the Province of Ontario.

[2] The Division of Powers between the Provinces and Federal Government

The Constitution Act, 1867 sets out the division of powers between the provinces and the federal government.[1] Essentially, matters concerning commercial arbitration, both domestic and international, are within provincial legislative competence. Nine of the provinces are common-law jurisdictions. Québec's commercial law is civil and (as it relates to arbitration) derives from the Civil Code of Québec and the Québec Code of Civil Procedure.

Several matters that may potentially relate to commercial arbitration fall within the federal legislative domain. They include such matters as maritime and admiralty issues, customs and excise, patents and trademarks, and bankruptcy. The federal government also has constitutional responsibility for aboriginal affairs, and in certain circumstances, the resolution of disputes involving aboriginal land and interests are regulated by federal law. Treaty-making is also a matter within the federal legislative domain, but insofar as treaties concern matters exclusively within provincial legislative competence, implementation generally falls to the provinces. Implementing legislation is necessary to carry into law any international treaty or convention entered into by Canada.

§ 1.02 Legal Context for International Arbitration

[1] Post-1986 Legal Environment: Accession to the New York Convention and Adoption of the UNCITRAL Model Law

Before 1986, Canada was not a hospitable legal environment for international commercial arbitration.

[1] Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

This changed with the promulgation of the Model Law on International Commercial Arbitration (the "Model Law") by the United Nations Commission on International Trade Law ("UNCITRAL"). On June 21, 1985, UNCITRAL adopted a final draft of the Model Law. In December 1985, the United Nations General Assembly adopted a resolution approving and promoting the Model Law. In 1986, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") came into force in Canada.[2] Subsequent to this, all of the provinces[3] and territories of Canada and the federal government adopted the UNCITRAL Model Law. For the most part, the provinces have confined the scope of the Model Law to international commercial arbitrations, while the federal government has adopted the Model Law for all commercial arbitrations within its legislative competence. Notwithstanding Canada's apparent enthusiasm toward the New York Convention and the Model Law, Canada has not become a signatory to the Inter-American Convention on International Commercial Arbitration.

Many provinces have used the Model Law as a basis for modernizing their domestic arbitration legislation with some modification.

[2] Adoption of Investment Treaties and Movement toward Implementing the Washington Convention

Canada has also adopted the North American Free Trade Agreement (the "NAFTA"), a number of other free trade agreements and over twenty bilateral investment treaties[4] ("BITs"). All provide for investor–

[2] *See* the United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985 (2d Supp.), ch. 16. Canada did not take the reciprocity reservation. Initially one province was concerned with the commercial reservation, but there now is no reservation taken by Canada. As developed later in this chapter, although Ontario originally adopted the New York Convention through the province's Foreign Arbitral Awards Act, this Act was repealed in 1988 with the passage of An Act to Implement the Model Law on International Commercial Arbitration by the United Nations Commission on International Trade Law.

[3] Quebec did not adopt the Model Law as such, but the amendments to Québec's Code of Civil Procedure provide that "[w]here matters of extra-provincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration" the Model Law, the UNCITRAL Report, and the Analytical Commentary on the Report's draft Model Law. See Art. 940.6, Book VII— Arbitrations, Title I— Arbitration Proceedings, Chapter I— General Provisions, C.P.P.

[4] Officially referred to in Canada as Foreign Investment and Protection Agreements.

state arbitration. On December 15, 2006, Canada became a signatory to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "Washington Convention") which provides for arbitration pursuant to the rules of the International Centre for the Settlement of Investment Disputes ("ICSID"). However, Canada has yet to deposit its instruments of ratification, acceptance or approval and as such, the Washington Convention is not yet in force in Canada. Consequently, any investor-state arbitrations under bilateral or multilateral investment treaties signed by Canada are presently conducted either under the ICSID Additional Facility Rules or on an *ad hoc* basis.

§ 1.03 Summary of International Arbitration Laws Adopted by the Provinces and Territories

[1] Alberta

In Alberta, the New York Convention is part of provincial law through Schedule 1 of the province's International Commercial Arbitration Act.[5] The same statute adopts the Model Law through Schedule 2[6] with the province's Arbitration Act[7] governing domestic proceedings.

Alberta's International Commercial Arbitration Act applies to all arbitration agreements and awards whether made before or after the Act came into force. The Court of Queen's Bench is the designated supervisory court. The following modifications have also been made to the Model Law:

1. The arbitral tribunal may, with the agreement of the parties, employ mediation and conciliation or other procedures at any time during the arbitration proceedings. With the agreement of the parties, the members of the tribunal are not disqualified from resuming their role as arbitrators thereafter.[8]
2. The parties may remove an arbitrator at any time prior to the final award regardless of the method through which the arbitrator was appointed. Where an arbitrator is replaced or removed, any hearing held prior to the replacement or removal must be repeated unless the parties otherwise agree.[9]
3. If the parties fail to agree or the arbitration agreement does not specify a particular law to govern the dispute, the arbitral tribunal is to apply the "rules of law" it considers appropriate.[10]
4. Upon application by the parties to two or more arbitrations, the court may consolidate the arbitrations according to the terms it considers just.[11]
5. Where a court refers parties to arbitration pursuant to Article 8 of the Model Law, the court proceedings are stayed with respect to the matters to which the arbitration relates.[12]
6. In interpreting the province's International Commercial Arbitration Act, recourse may be had to the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration.[13]

[2] British Columbia

In British Columbia, the New York Convention is implemented as provincial law through the province's Foreign Arbitral Awards Act.[14] The province's International Commercial Arbitration Act adopts the Model Law and the Commercial Arbitration Act governs domestic proceedings.

While most provincial statutes adopting the Model Law simply append it as a schedule, the British Columbia statute does not. Rather, the statute refers to the Model Law in its preamble and then more or less tracks the language of the Model Law within the statute itself. In addition, Article 1 of the Model Law was supplemented to confirm that disputes involving parties in different Canadian provinces or territories

[5] International Commercial Arbitration Act, § 2(1).
[6] International Commercial Arbitration Act, § 4(2).
[7] S.A. 1991, c. A-43.1.
[8] International Commercial Arbitration Act §.5.
[9] International Commercial Arbitration Act, § 6.
[10] International Commercial Arbitration Act, § 7.
[11] International Commercial Arbitration Act, § 8. While the wording is not as clear as it could be, case law has interpreted this provision to mean that all parties must agree before consolidation can take place.
[12] International Commercial Arbitration Act, § 10.
[13] International Commercial Arbitration Act, § 12(2).
[14] R.S.B.C. 1996, ch. 154, § 2.

are not international and thus are not governed by the province's International Commercial Arbitration Act.

An arbitration is "international" only if more than one state is involved. To ensure that the International Commercial Arbitration Act would not apply to interprovincial arbitrations, subsection 1(5) provides that "the provinces and territories of Canada must be considered one state".

British Columbia also supplemented Article 11 of the Model Law to prevent the Chief Justice of the Supreme Court of British Columbia (or his or her designate) from appointing a sole or third arbitrator who is of the same nationality as any of the parties (unless the parties previously agreed to such an appointment).[15]

The parties in arbitration may be represented or assisted during the arbitral proceedings by any person; representatives are not required to be a member of the Law Society of British Columbia or qualified to practice law in the province. [16] Further, in subsection 1(6) of the International Commercial Arbitration Act, the province provides a non-exhaustive list of relationships of a commercial nature.

[3] Manitoba

In Manitoba, the New York Convention is implemented as provincial law through the province's International Commercial Arbitration Act,[17] which also adopts the Model Law.[18] The province's Arbitration Act[19] governs domestic proceedings.

Manitoba's International Commercial Arbitration Act applies to all arbitration agreements and awards whether made before or after the Act came into force. The Court of Queen's Bench is the designated supervisory court. The following modifications have also been made to the Model Law:

1. The arbitral tribunal may, with the agreement of the parties, employ mediation and conciliation or other procedures at any time during the arbitration proceedings. With the agreement of the parties, the members of the tribunal are not disqualified from resuming their role as arbitrators thereafter.[20]
2. The parties may remove an arbitrator at any time prior to the final award regardless of the method through which the arbitrator was appointed. Where an arbitrator is replaced or removed, any hearing held prior to the replacement or removal must be repeated unless the parties agree otherwise.[21]
3. If the parties fail to agree or the arbitration agreement does not specify a particular law to govern the dispute, the arbitral tribunal is to apply the "rules of law" it considers appropriate.[22]
4. Upon application by the parties to two or more arbitrations, the court may consolidate the arbitrations according to the terms it considers just.[23]
5. Where a court refers parties to arbitration pursuant to Article 8 of the Model Law, the court proceedings are stayed with respect to the matters to which the arbitration relates.[24]
6. In interpreting the province's International Commercial Arbitration Act, recourse may be had to the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration.[25]

[4] New Brunswick

In New Brunswick, the New York Convention is implemented as part of provincial law through the province's International Commercial Arbitration Act,[26] which also adopts the Model Law.[27] The province's Arbitration Act[28] governs domestic proceedings.

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15 *See* International Commercial Arbitration Act, § 11(9).

16 International Commercial Arbitration Regulation, BC Reg 168/86. *See* § 1.04 [1], below.

17 S.M. 1986-87, ch. 32, C.C.S.M. ch. C151, § 2(1).

18 S.M. 1986-87, ch. 32, C.C.S.M. ch. C151, § 4(1).

19 S.M. 1997, ch. 4, C.C.S.M. ch. A120.

20 International Commercial Arbitration Act §.5.

21 International Commercial Arbitration Act, § 6.

22 International Commercial Arbitration Act, § 7.

23 International Commercial Arbitration Act, § 8. Though the wording is not as clear as it could be, case law has interpreted this provision to mean that all parties must agree before consolidation can take place.

24 International Commercial Arbitration Act, § 10.

25 International Commercial Arbitration Act, § 12(2).

26 S.N.B. 1996, ch. I-12.2, § 2(1).

27 S.N.B. 1996, ch. I-12.2, §4(1).

28 S.N.B. 1992, ch. A-10.1.

New Brunswick supplemented the Model Law in the same manner as Alberta and Manitoba.[29] The following modifications have been made to the Model Law:

1. The arbitral tribunal may, with the agreement of the parties, employ mediation and conciliation or other procedures at any time during the arbitration proceedings. With the agreement of the parties, the members of the tribunal are not disqualified from resuming their role as arbitrators thereafter.[30]
2. The parties may remove an arbitrator at any time prior to the final award regardless of the method through which the arbitrator was appointed. Where an arbitrator is replaced or removed, any hearing held prior to the replacement or removal must be repeated unless the parties agree otherwise.[31]
3. If the parties fail to agree or the arbitration agreement does not specify a particular law to govern the dispute, the arbitral tribunal is to apply the "rules of law" it considers appropriate.[32]
4. Upon application by the parties to two or more arbitrations, the court may consolidate the arbitrations according to the terms it considers just.[33]
5. Where a court refers parties to arbitration pursuant to Article 8 of the Model Law, the court proceedings are stayed with respect to the matters to which the arbitration relates.[34]
6. In interpreting the province's International Commercial Arbitration Act, recourse may be had to the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration.[35]

[29] International Commercial Arbitration Act, §§ 6, 7, 8, 10, 12.
[30] International Commercial Arbitration Act §.5.
[31] International Commercial Arbitration Act, § 6.
[32] International Commercial Arbitration Act, § 7.
[33] International Commercial Arbitration Act, § 8. Though the wording is not as clear as it could be, case law has interpreted this provision to mean that all parties must agree before consolidation can take place.
[34] International Commercial Arbitration Act, § 10.
[35] International Commercial Arbitration Act, § 12(2).

Apart from these modifications, New Brunswick also included an additional clause that appears to bring into the arbitration the local Rules of Court. Section 14 of the International Commercial Arbitration Act states: "Except where they may be in conflict with the provisions of this Act or the regulations, the Rules of Court under the Judicature Act apply for the purposes of this Act". The authors are unaware of any case that has interpreted this provision.

[5] Newfoundland and Labrador

In Newfoundland and Labrador, the New York Convention is adopted as part of provincial law through the province's International Commercial Arbitration Act,[36] which also adopts the Model Law.[37] The province's Arbitration Act[38] governs domestic proceedings.

The International Commercial Arbitration Act applies to international commercial arbitration agreements and awards made before or after February 1, 1988.[39] The supervisory court is the Trial Division.

Newfoundland and Labrador made the same changes to the Model Law as Manitoba and Alberta

1. The arbitral tribunal may, with the agreement of the parties, employ mediation and conciliation or other procedures at any time during the arbitration proceedings. With the agreement of the parties, the members of the tribunal are not disqualified from resuming their role as arbitrators thereafter.[40]
2. The parties may remove an arbitrator at any time prior to the final award regardless of the method through which the arbitrator was appointed. Where an arbitrator is replaced or removed, any hearing held prior to the replacement or removal must be repeated unless the parties agree otherwise.[41]
3. If the parties fail to agree or the arbitration agreement does not specify a particular law to govern the dispute, the arbitral tribunal is to apply the "rules of law" it considers appropriate.[42]

[36] R.S.N. 1990, ch. I-15, § 3(1).
[37] R.S.N. 1990, ch. I-15, § 5(1).
[38] R.S.N. 1990, ch. A-14.
[39] International Commercial Arbitration Act, § 5.
[40] International Commercial Arbitration Act §.6.
[41] International Commercial Arbitration Act, § 7(2).
[42] International Commercial Arbitration Act, § 8.

4. Upon application by the parties to two or more arbitrations, the court may consolidate the arbitrations according to the terms it considers just.[43]
5. Where a court refers parties to arbitration pursuant to Article 8 of the Model Law, the court proceedings are stayed with respect to the matters to which the arbitration relates.[44]
6. In interpreting the province's International Commercial Arbitration Act, recourse may be had to the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration.[45]

[6] Northwest Territories

In the Northwest Territories, the New York Convention is part of territorial law through the International Commercial Arbitration Act,[46] which also adopts the Model Law.[47] The Arbitration Act[48] governs domestic proceedings.

The Northwest Territories supplemented the model law in a similar manner as Alberta and Manitoba. The following modifications have been made to the Model Law:

1. The parties may remove an arbitrator at any time prior to the final award regardless of the method through which the arbitrator was appointed. Where an arbitrator is replaced or removed, any hearing held prior to the replacement or removal must be repeated unless the parties agree otherwise.[49]

[43] International Commercial Arbitration Act, § 9. Though the wording is not as clear as it could be, case law has interpreted this provision to mean that all parties must agree before consolidation can take place.
[44] International Commercial Arbitration Act, § 11.
[45] International Commercial Arbitration Act, § 13.
[46] R.S.N.W.T. 1988, ch. I-6, § 4(1).
[47] R.S.N.W.T. 1988, ch. I-6, § 7(1).
[48] R.S.N.W.T. 1988, ch. A-5.
[49] International Commercial Arbitration Act, § 8(1-2).

2. If the parties fail to agree or the arbitration agreement does not specify a particular law to govern the dispute, the arbitral tribunal is to apply the "rules of law" it considers appropriate.[50]
3. Upon application by a party to an arbitration, if all other parties consent, the court may consolidate two or more arbitrations according to the terms it considers necessary.[51]
4. Where a court refers parties to arbitration pursuant to Article 8 of the Model Law, the court proceedings are stayed with respect to the matters to which the arbitration relates.[52]
5. In interpreting the province's International Commercial Arbitration Act, recourse may be had to the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration.[53]

[7] Nova Scotia

In Nova Scotia, the New York Convention is implemented as provincial law through the province's International Commercial Arbitration Act,[54] which also adopts the Model Law.[55] The province's Arbitration Act[56] governs domestic proceedings.

The following modifications have been made to the Model Law:

1. The arbitral tribunal may, with the agreement of the parties, employ mediation and conciliation or other procedures at any time during the arbitration proceedings. With the agreement of the parties, the members of the tribunal are not disqualified from resuming their role as arbitrators thereafter.[57]
2. The parties may remove an arbitrator at any time prior to the final award regardless of the method through which the arbitrator was

[50] International Commercial Arbitration Act S. 9.
[51] International Commercial Arbitration Act S. 10.
[52] International Commercial Arbitration Act, § 11.
[53] International Commercial Arbitration Act, § 2(2).
[54] R.S.N.S. 1989, ch. 234, § 3(1).
[55] R.S.N.S. 1989, ch. 234, § 5(1).
[56] R.S.N.S. 1989, ch. 19. International Commercial Arbitration Act, §§ 7, 8, 9, 11, 13.
[57] International Commercial Arbitration Act §.6.

appointed. Where an arbitrator is replaced or removed, any hearing held prior to the replacement or removal must be repeated unless the parties otherwise agree.[58]

3. If the parties fail to agree or the arbitration agreement does not specify a particular law to govern the dispute, the arbitral tribunal is to apply the "rules of law" it considers appropriate.[59]
4. Upon application by the parties to two or more arbitrations, the court may consolidate the arbitrations according to the terms it considers just.[60]
5. Where a court refers parties to arbitration pursuant to Article 8 of the Model Law, the court proceedings are stayed with respect to the matters to which the arbitration relates.[61]
6. In interpreting the province's International Commercial Arbitration Act, recourse may be had to the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration.[62]

The Trial Division of the Supreme Court is the designated supervisory court.

[8] Nunavut

By virtue of the Nunavut Act,[63] the ordinances of the Northwest Territories and those laws made under them are duplicated to the extent that they can apply in relation to Nunavut. Accordingly, the Northwest Territories' arbitral legislation has been duplicated and applied to Nunavut. The New York Convention is part of Territorial law through the International Commercial Arbitration Act,[64] which also adopts the

[58] International Commercial Arbitration Act, § 7.
[59] International Commercial Arbitration Act, § 8.
[60] International Commercial Arbitration Act, § 9(1). Though the wording is not as clear as it could be, case law has interpreted this provision to mean that all parties must agree before consolidation can take place.
[61] International Commercial Arbitration Act, § 11.
[62] International Commercial Arbitration Act, § 13(2).
[63] S.C. 1993, ch. 28, § 29(1).
[64] R.S.N.W.T. 1988, c. I-6, §. 4(1).

Model Law.[65] The Arbitration Act[66] governs domestic proceedings. Nunavut has thus made the following modifications to the Model Law:

1. The parties may remove an arbitrator at any time prior to the final award regardless of the method through which the arbitrator was appointed. Where an arbitrator is replaced or removed, any hearing held prior to the replacement or removal must be repeated unless the parties agree otherwise.[67]
2. If the parties fail to agree or the arbitration agreement does not specify a particular law to govern the dispute, the arbitral tribunal is to apply the "rules of law" it considers appropriate.[68]
3. Upon application by a party to an arbitration, if all other parties consent, the court may consolidate two or more arbitrations according to the terms it considers necessary.[69]
4. Where a court refers parties to arbitration pursuant to Article 8 of the Model Law, the court proceedings are stayed with respect to the matters to which the arbitration relates.[70]
5. In interpreting the province's International Commercial Arbitration Act, recourse may be had to the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985), and the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration.[71]

[9] Ontario

Ontario implemented the New York Convention through the Foreign Arbitral Awards Act,[72] but that legislation was repealed in 1988 with the passage of An Act to Implement the Model Law on International

[65] R.S.N.W.T. 1988, c. I-6, § 7(1).
[66] R.S.N.W.T. 1988, ch. A-5.
[67] International Commercial Arbitration Act, § 8.
[68] International Commercial Arbitration Act, § 9.
[69] International Commercial Arbitration Act, § 10(1). Though the wording is not as clear as it could be, case law has interpreted this provision to mean that all parties must agree before consolidation can take place.
[70] International Commercial Arbitration Act, § 11.
[71] International Commercial Arbitration Act, § 2(2).
[72] S.O. 1986, ch. 25.