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USAGES AND CUSTOMS, GENERAL PRINCIPLES, ETC., AS 'UNIFORM LAW'

From the U.S. national law perspective, would it be proper to include within the notion of 'uniform law' usages of the trade or 'customs', general principles of law, general principles of contract law or of the law of obligations, transnational law, *lex mercatoria*, general principles of procedure?[1]

In the United States, non-state rules, such as usages of trade, general principles of law, *lex mercatoria*, and the like, can be included within the notion of "uniform law". In particular, usages of trade hold a central role in the conception of the Uniform Commercial Code (UCC), which provides that "any usages in the vocation or trade in which [the parties] are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement."[2] Furthermore, it provides for sales agreements that "[t]he express terms of an agreement . . . as well as any usage of trade, shall be construed whenever reasonable as consistent with each other."[3] Carl Llewellyn, the UCC's main drafter, understood trade usages as a continuation of the tradition of the medieval *lex mercatoria*.[4] Scholars affirm (and criticize) that "in practice, . . . courts, in a variety of doctrinal guises that are either explicitly or implicitly

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1 The questions addressed by the reporters in this project were authored by Professor Horacio A. Grigera-Naon.

2 U.C.C. § 1-205(3).

3 U.C.C. § 2-208(2).

4 *See* James Q. Whitman, *Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the Uniform Commercial Code*, 97 YALE L.J. 156, 161, 171-73 (1987). For criticism, see Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765-1821 (1996); Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710-80 (1999). See also Christopher R. Drahozal, *Commercial Norms, Commercial Codes, and International Commercial Arbitration*, 33 VAND. J. TRANSNAT'L L. 79, 84-85 (2000).

authorized by the Code, often allow these considerations to vary or trump the express terms of a written contract."[5]

In addition, regarding international arbitration, it seems to be undisputed in the U.S. that parties may agree—eventually through a reference to institutional rules containing such powers—that arbitrators may apply such rules that are not officially enacted by some sovereign legislator.[6] It therefore seems natural to include these kinds of rules and notions into any analysis of uniform law in the context of commercial arbitration.

INCORPORATION OF UNIFORM LAW AS NATIONAL U.S. LAW

To what extent has the Uniform Law been incorporated as National Law through treaty ratification, other enactments, or court decisions?

Currently, the Federal Arbitration Act (FAA) is the controlling body of arbitration law at both the state and federal level in the United States.[7] It was enacted by Congress in 1925 "primarily to overcome judicial reluctance to enforce agreements to arbitrate" and consists of three chapters.[8] Chapter 1 contains the basic provisions of the act regarding the making of arbitration agreements and the enforcement of awards, chapter 2 implements the New York Convention, and chapter 3 implements the Panama Convention.[9] The United States acceded to the New York Convention in 1970 in an effort to statutorily enforce arbitration agreements in international commercial transactions.[10] The New York Convention applies to an arbitration agreement or award that is not entirely between U.S. citizens and where the agreement "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable

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5 Bernstein, *Merchant Law*, *supra* note 4, at 1783-84.

6 *See* Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, 54 AM. J. COMP. L. 209, 213 (Supplement).

7 Federal Arbitration Act, 9 U.S.C. §§ 1–307.

8 Daniel A. Zeft, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C. J. INT'L L. & COMP. REG. 705, 706 n.1 (1997); *see also* Sebastien Besson, Note & Comment, *The Utility of State Laws Regulating International Commercial Arbitration and their Compatibility with the FAA*, 11 AM. REV. INT'L ARB. 211, 212 (2000) (stating Congress's intent to overrule the hostility towards arbitration and to ensure judicial enforcement).

9 *See* Federal Arbitration Act, 9 U.S.C. §§ 1–16 (describing the basic provisions in chapter 1); *id.* §§ 201–208 (implementing the New York Convention); *id.* §§ 301–307 (implementing the Panama Convention).

10 Andre J. Brunel, *A Proposal to Adopt UNCITRAL's Model Law on International Commercial Arbitration as Federal Law*, 25 TEX. INT'L L.J. 43, 46 (1990); *see also* Federal Arbitration Act, 9 U.S.C. §§ 201–208.

relation with one or more foreign states."[11] Lastly, in 1990, the United States became a party to the Panama Convention, which specifically applies to commercial disputes.[12] Chapter 2 and 3 together are often referred to as the "international FAA" even though an international arbitration agreement will also be subject to the "domestic chapter" to the extent it does not conflict.[13]

The Supreme Court in *Southland Corp. v. Keating*,[14] noted two problems that the FAA was adopted to resolve. The first problem was the common law's hostility toward arbitration and the second was the failure of state arbitration acts to require enforcement of arbitration agreements.[15] However, this means that the FAA is a "bare-bones" statute dealing primarily with ensuring that courts give effect to arbitration clauses and sets out limited grounds for vacating arbitration awards.[16]

Because of the "bare bones" nature of the FAA, there is a great debate over whether the FAA should be amended or replaced with a more modern and uniform arbitration statute. It has also led to states enacting their own international commercial arbitration statutes to fill in the gaps of the FAA and attract business. The current debate is whether the United States should adopt the United Nations Commission on International Trade Law's (UNCITRAL) international commercial arbitration model law that many countries have adopted as their Uniform Law.[17] Currently, the United States has *not* adopted the Uniform Law (UNCITRAL) through treaty

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[11] Heather A. Purcell, Comment, *State International Arbitration Statutes: Why They Matter*, 32 TEX. INT'L L.J. 525, 533 (1997); Federal Arbitration Act, 9 U.S.C. § 202.

[12] *See* Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 234 (2006); Purcell, *supra* note 11, at 533; s*ee also* Federal Arbitration Act, 9 U.S.C. § 301.

[13] Purcell, *supra* note 11, at 532.

[14] 465 U.S. 1, 14 (1989).

[15] *Id.*; s*ee also* Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 70 (2001) (discussing the impact of *Southland* on FAA preemption of state laws).

[16] Drahozal, *supra* note 12, at 236; *see also* Alan S. Rau & Edward F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, 30 TEX. INT'L L.J. 89, 90 n.3 (1995).

[17] Status 1985, UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Jan. 31, 2009) (Legislation based on the UNCITRAL Model Law on International Commercial Arbitration has been enacted in: Australia, Austria (2005), Azerbaijan, Bahrain, Bangladesh, Belarus, Bulgaria, Cambodia (2006), Canada, Chile, in China: Hong Kong Special Administrative Region, Macau Special Administrative Region; Croatia, Cyprus, Denmark (2005), Egypt, Estonia (2006), Germany, Greece, Guatemala, Hungary, India, Iran (Islamic Republic of), Ireland, Japan, Jordan, Kenya, Lithuania, Madagascar, Malta, Mexico, New Zealand, Nicaragua (2005), Nigeria, Norway (2004), Oman, Paraguay, Peru, the Philippines, Poland (2005), Republic of Korea, Russian Federation, Singapore, Spain, Sri Lanka, Thailand, Tunisia, Turkey (2001), 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, Louisiana, Oregon and Texas; Uganda, Zambia, and Zimbabwe.).

ratification, court decisions, or other enactments on a federal level.[18] However, for purposes of this memorandum,

UNCITRAL WILL BE CONSIDERED THE UNIFORM LAW. UNCITRAL AS THE UNIFORM LAW

UNCITRAL was established upon the adoption of United Nations General Assembly Resolution 225 (XXI) on December 17, 1966, as a result of the negotiations of fifty-eight states.[19] One goal of UNCITRAL was to "harmonize international arbitration procedure among nations and to free international arbitration from the parochial requirements of domestic laws."[20] A second goal was to "assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration."[21] The stated purpose for the creation of UNCITRAL was the United Nations' belief that the differences in State's laws relating to international commercial trade was one of the obstacles to the growth of international trade.[22]

The UNCITRAL model brings within its scope, three situations: (1) "parties having places of business in different countries," (2) "the place of contract performance or the place of arbitration is outside the parties' home country," and (3) "the parties opt to treat the proceedings as international."[23] Further, because of UNCITRAL's focus on international commercial arbitration, it covers several key issues that are omitted from the FAA, including: disclosure by arbitrators, challenges to arbitrators, challenges to the tribunal's jurisdiction, the place for

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[18] Besson, *supra* note 8, at 211.

[19] Daniel M. Kolkey, *It's Time to Adopt the UNCITRAL Model Law on International Commercial Arbitration*, 8 TRANSNAT'L L. & CONTEMP. PROBS. 3, 5 (1998); Besson, *supra* note 8, at 211; s*ee also* Susan Block-Lieg & Terence C. Halliday, *Incrementalisms in Global Lawmaking*, 32 BROOK. J. INT'L L. 851, 856 (2007).

[20] Kolkey, *supra* note 19, at 5–6.

[21] Status 1985, UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Jan. 31, 2009) (stating that the law "covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.").

[22] Block-Lieg & Halliday, *supra* note 19, at 856.

[23] William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75, 95 (2002); UNCITRAL Model Arbitration Law, § 1(3).

arbitration when parties fail to agree, applicable substantive law when parties fail to agree, interim measures of protection, and the tribunal's right to modify or correct its award.[24]

State Statutes Adopting UNCITRAL

The widespread adoption by other nations makes UNCITRAL something of an international standard for arbitration agreements and it is gaining support in the U.S. legal community based on its use by the United States' NAFTA partners, Canada and Mexico, and its use by the Iran-U.S. Claims Tribunals.[25] Contrary to the United Nations' recommendation in November 2002 that all member countries adopt the UNCITRAL model, the U.S. has yet to do so.[26]

Responding to the inaction by Congress, several states have adopted their own international arbitration statutes to "increase exports, attract foreign investment, and raise employment levels."[27] These state statutes primarily govern in three situations: (1) where they can fill in the gaps of the FAA and are harmonious with the federal policy, (2) where the parties specifically choose the law of the state to govern an international commercial arbitration, and (3) where an arbitration agreement is not within the scope of the FAA; the state international arbitration provisions may apply if the agreement is within the scope of the state statute.[28] Under the first situation, the FAA will only preempt where there is an "actual conflict" between state and federal legislation.[29] An "actual conflict" exists in two circumstances: (1) when the federal and state legislation are contradictory on their face, and (2) when the state legislation frustrates the pro-arbitration objectives of the FAA.[30]

It is important to examine the state statutes because of the bare bones nature of the FAA and because parties may choose those state laws specifically in their arbitration agreement.[31] State arbitration statutes generally fall into three categories: (1) those states that follow the Uniform Arbitration Act (UAA) (which largely follows the FAA), (2) those states that adopt UNCITRAL

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[24] Kolkey, *supra* note 19, at 6–11.

[25] William K. Slate et al., *UNCITRAL (United Nations Commission on International Trade Law) Its Workings in International Arbitration and a New Model Conciliation Law*, 6 CARDOZO J. CONFLICT RESOL. 73, 79 (2004) (finding that California, Connecticut, Oregon, and Texas have adopted the UNCITRAL Model Law).

[26] *Id.* at 73.

[27] Brunel, *supra* note 10, at 51-52.

[28] Zeft, *supra* note 8, at 721; Purcell, *supra* note 11, at 544.

[29] Zeft, *supra* note 8, at 735.

[30] *Id.*

[31] Kolkey, *supra* note 19, at 12 (noting the gaps in the FAA that allow states to enact laws governing international commercial arbitration); Purcell, *supra* note 11, at 532.

with only minor changes, and (3) "ad hoc" state statutes that do not follow any particular model.[32]

New York was the first state to take the lead in creating a state international commercial arbitration statute. However, it had a sophisticated arbitration statute in place when UNCITRAL was promulgated in 1985 and proactively amends its general act as the need arises and therefore has not adopted UNCITRAL.[33] Georgia adopted its own international commercial arbitration statute in 1988 and chose to use New York's arbitration statute as a model for its revised code.[34] Colorado, along with a majority of states, has added international commercial arbitration statutes based on the UAA.[35] Moreover, Maryland has taken a unique approach by adopting the FAA into state law to apply to international arbitration in that forum.[36]

Florida and Hawaii have ad hoc statutes that partially adopt UNCITRAL and partially draw on other sources.[37] Florida, specifically, did not use UNCITRAL as a template when creating its legislation, but instead used it as one of many sources including "institutional arbitral rules, treatises, court decisions, conventions, and existing or proposed legislation in the United States and abroad."[38]

In 1988, California adopted UNCITRAL as its international commercial arbitration statute with only limited changes.[39] Soon thereafter, Texas enacted its own international arbitration act based almost entirely on the UNCITRAL model.[40] And, very recently, Connecticut enacted the UNCITRAL model law on international commercial arbitration, in whole, as a supplement to the

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[32] George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C. J. INT'L L. & COM. REG. 419, 423 (1992).

[33] The New York Arbitration Law, N.Y. C.P.L.R. 7501-7514 (McKinney 1989); Brunel, *supra* note 10, at 52.

[34] GA. CODE ANN. §§ 9-9-30–9-9-43 (West 2006); *see also* Brunel, *supra* note 10, at 54-55.

[35] Purcell, *supra* note 11, at 530.

[36] *Id*.

[37] *Id.* at 531.

[38] Brunel, *supra* note 10, at 52 (citing Loumiet, O'Naghten & Swan, *Proposed Florida International Arbitration Act*, 16 U. MIAMI INTER-AM. L. REV. 591, 592 n.2 (1985)); *see also* Florida International Arbitration Act, FLA. STAT. ANN. §§ 684.01– 684.35 (West 2007).

[39] Arbitration and Conciliation of International Commercial Disputes, CAL. CIV. PRO. CODE §§ 1297.11–1297.61 (West 2007); *see also* Brunel, *supra* note 10, at 53-54.

[40] TEX. CIV. PRAC. & REM. ANN. §§ 172.001–172.215 (Vernon 2007); *see also* Brunel, *supra* note 10, at 57.

FAA.[41] Today, Illinois, Ohio, Louisiana, North Carolina, and Oregon have followed suit and enacted UNCITRAL as state law to encourage arbitration business within their boundaries.[42]

Interaction of FAA and State Statutes

State adoption of UNCITRAL raises some questions regarding FAA preemption and interaction with the state statutes. Two Supreme Court cases, *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*,[43] and *Mastrobuono v. Shearson Lehman Hutton, Inc.*,[44] attempted to clarify some of the issues.

The Supreme Court in *Volt* held that the intent of the parties, as expressed in the arbitration agreement, to conduct their arbitration under state law effectively trumps FAA preemption.[45] Further, the court noted, "[a]rbitration under the Act (FAA) is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit."[46] However, there was still some confusion over the effect of a choice of law clause in an international commercial arbitration agreement. This confusion led to *Mastrobuono*. In *Mastrobuono*, the Supreme Court clarified *Volt* and held that a choice of law clause "covers the rights and duties of the parties" and the arbitration clause "covers arbitration" so that state law inconsistent with the FAA could only be invoked by a showing of definitive intent of the parties.[47] The decision suggests that inconsistent state arbitration law may only apply when the parties "include a choice of law clause that expressly reveals the parties' intentions to have such a state law provision apply."[48] A standard choice of law clause would be insufficient to make a conflicting state law applicable.[49]

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41 UNCITRAL Model Law on International Commercial Arbitration, CONN. GEN. STAT. ANN. §§ 50a-100–50a-136 (West 2007); *see also* Houston P. Lowry, *Connecticut and International Law*, 12 ILSA J. INT'L & COMP. L. 575, 577 (2006) (noting that disputes in the United States involving trade solely between other countries do not fall within the commerce clause and therefore Connecticut can regulate exclusively in this area.).

42 *See* Illinois International Commercial Arbitration Act, 710 ILL. COMP. STAT. ANN. §§ 30/1-1–99-99 (West 2007); Ohio International Commercial Arbitration Act, OHIO REV. CODE ANN. §§ 2712.01–2712.91 (West 2007); Louisiana International Commercial Arbitration Act, LA. REV. STAT. ANN. §§ 9:4241–9:4276 (2006); North Carolina International Commercial Arbitration and Conciliation Act, N.C. GEN. STAT. §§ 1-567.30–1-567.87 (2007); Oregon International Commercial Arbitration and Conciliation Act, OR. REV. STAT. §§ 36.450–36.558 (2005); *see also* Alan S. Rau, *Federal Common Law and Arbitral Power*, 8 NEV. L.J. 169, 180 n.34 (2007); Purcell, *supra* note 11, at 529-30.

43 489 U.S. 468, 468 (1989).

44 514 U.S. 52, 52 (1995).

45 *Volt*, 489 U.S. at 478–79; *see also* Hayford, *supra* note 15, at 72.

46 *Volt*, 489 U.S. at 479.

47 *Mastrobuono*, 514 U.S. 52, 64 (1995).

48 Zeft, *supra* note 8, at 791-94.

49 *Id*.

Volt and *Mastrobuono* established that a properly drafted choice of law clause, intending to invoke a state international commercial arbitration provision, is sufficient to override any inconsistencies with the FAA. But, the question then becomes, what happens with the parties fail to include a properly drafted choice of law clause? Is all state law preempted by the FAA?

The general rule is that the Federal law (FAA) only supersedes state law provisions that are in direct conflict with the FAA or undermine the pro-arbitration policy underlying the FAA.[50]

Stephen L. Hayford, in his article *Federal Preemption and Vacatur: The Bookend Issues under the Revised Uniform Arbitration Act*, proposes a "preemption continuum" where he discuses issues that are totally preempted by the FAA, issues on the borderline, and those that are not preempted by the FAA and left exclusively to the states.[51] According to Hayford, on one end of the continuum are issues such as enforcement, substantive arbitrability, and evasion of a valid arbitration agreement, that are exclusively within the domain of the FAA and there is no room for state law that does not mimic the FAA.[52] On the other end is the determination of the existence of an agreement to arbitrate. Hayford states that these issues of contract formation "are matters to be decided solely under state contract law principles" and therefore the FAA plays no role unless the state law is not arbitration friendly.[53] In the middle of the continuum, are borderline issues such as "the authority of arbitrators to award punitive damages, the standard for arbitrator disclosure of conflicts of interest, the authority of the courts and arbitrators to direct provisional remedies, and the right of parties to representation by an attorney."[54] Hayford proposes that these "borderline issues" may be free for regulation by the states so long as they are in line with the FAA's "pro-arbitration public policy."[55]

Possible Adoption of UNCITRAL on the Federal Level

The difficult questions regarding when the FAA and state laws are applicable have led many commentators to argue over whether or not the FAA should be amended. Some argue that the current FAA is sufficient because parties may choose their own arbitration rules by creating a valid and enforceable choice of law clause. Others argue that Congress should react to the

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50 Purcell, *supra* note 11, at 532.

51 Hayford, *supra* note 15, at 74.

52 *Id*.

53 *Id*.; *see also* Park, *supra* note 23, at 120-21.

54 Hayford, *supra* note 15, at 75.

55 *Id*.

changing market and wholly adopt UNCITRAL for all international commercial arbitration in the United States. This portion will discuss those differing views.

Hayford argues that the FAA is sufficient, but provides a discussion of the Revised Uniform Arbitration Act (RUAA) as a framework for states to follow when updating their arbitration acts.[56] According to Hayford, the RUAA was "drafted largely in juxtaposition to the Federal Arbitration Act" regarding substantive and procedural arbitration issues that are on the FAA end of the continuum. The RUAA created some additional grounds for vacatur that were not considered under § 10(a) of the FAA, but do not directly conflict with the FAA's pro-arbitration policy.[57]

Daniel A. Zeft in his article, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, also thinks the FAA is sufficient.[58] He argues that the infrequency of conflicts between state and federal arbitration legislation is the exact reason why there is no need to amend the FAA to preempt all state statutes.[59] Further, according to Zeft, the secondary role of state international arbitration statutes and the "complementary character of most of the provisions" contained in the state statutes does not appear to justify an amendment to the FAA.[60] He views the existence of the national statutory scheme through the FAA and the numerous state statutes as providing choices to parties considering arbitration in the United States.[61]

Similarly, Alan S. Rau in *Federal Common Law and Arbitral Power*, argues that there is no need for state adoption of UNCITRAL because with any possibility of FAA preemption, parties are not likely to choose those states for the site of their arbitration.[62] Even if the parties choose the United States, George K. Walker suggests continuing to look at the state laws as "laboratories for effecting legal change" and until congressional action they serve as useful "gap-fillers and definitional sources" in the federal courts.[63]

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56 *Id.* at 80.

57 *Id.* at 87.

58 Zeft, *supra* note 8, at 737.

59 *Id.*

60 *Id.* at 793.

61 *Id.* at 794.

62 Rau, *supra* note 42, at 181.

63 George K. Walker, *Trends in State Legislation Governing International Arbitrations*, 17 N.C. J. INT'L L. & COM. REG. 419, 460 (1992).

William W. Park in *Amending the Federal Arbitration Act*, takes a moderate approach and argues for the adoption of UNCITRAL but not in whole.[64] According to Park, the FAA needs to be amended to provide a separate default rule for international arbitration that would limit judicial review of awards. He proposes either amending chapters 2 and 3 in the current FAA, or adding a new chapter to cover all international arbitration proceedings in the United States.[65]

Other commentators argue for complete federal adoption of UNCITRAL. Heather A. Purcell argues for a change to the FAA because, unlike the UAA, California, and New York statutes, it remains frozen in 1925 and entirely outdated.[66]

According to Andre J. Brunel, in *A Proposal to Adopt UNCITRAL's Model Law on International Commercial Arbitration as Federal Law*, the United States needs to adopt UNCITRAL to reduce confusion, eliminate the current deficiencies in the FAA, and prevent states from adopting divergent international commercial arbitration statutes.[67] He argues that UNCITRAL should be added as a new chapter to the FAA applying only to international commercial arbitration thus eliminating the "existing procedural ambiguities in the state systems (derived from the FAA and the UAA) by providing one national act for international arbitration."[68] Adoption would thereby eliminate the need for individual state international arbitration statutes.[69]

Daniel M. Kolkey, in *It's Time to Adopt the UNCITRAL Model Law on International Commercial Arbitration*, argues that by enacting UNCITRAL on a national level, its "comprehensive nature and specific focus" will leave no room for confusing state enactments.[70] His proposal specifies in Article I of the U.S. version of UNCITRAL that the federal law "preempts any law of every state of the United States affecting the procedures governing international commercial arbitration."[71] Further, Kolkey argues that complete preemption is necessary because under the current version of the FAA, a foreign party considering whether to

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64 Park, *supra* note 23, at 77.

65 *Id.* at 83.

66 Purcell, *supra* note 11, at 541.

67 Brunel, *supra* note 10, at 51.

68 *Id.* at 63.

69 *Id.*

70 Kolkey, *supra* note 19, at 13.

71 *Id.*

arbitrate in the United States must seek advice on federal law and on state law where the arbitration may occur, thus adding cost and possibly multiple attorneys to one transaction.[72]

Sebastien Besson sees two serious problems created by state adoption of UNCITRAL; the "risk of confusion created by increasingly complicated state laws that depart from the UAA and the FAA, and the "increased lack of uniformity" among the various state arbitration laws.[73] According to Besson, these problems arguably make it more difficult for foreign parties to understand the operation of international arbitration law in the United States.[74] Because of these problems, he argues for UNCITRAL adoption on the federal level to allow foreign parties to more easily understand United States arbitration law.[75]

APPLICATION OF UNIFORM LAW WHEN U.S. LAW IS THE GOVERNING LAW

To what extent has federal law included the UNCITRAL Model Law when dealing with the enforceability of a contract to arbitrate, and when the United States has been designated as the forum for arbitration?

The underlying theme in both questions three and four is to what degree federal law allows parties to require the use of UNCITRAL's Model Law or some other foreign law when an agreement to arbitrate designates a U.S. forum as the seat of the arbitration. These questions are ones that have been squarely answered by the Supreme Court on numerous occasions, but particularly in *Mitsubishi*[76] and *Volt.*[77]

The Court in *Volt* was not faced with an international commercial arbitration agreement, but the case is none the less instructive when determining to what extent federal law allows for and enforces a choice of law clause. In *Volt*, the parties entered into a contract that contained an arbitration provision requiring them to adopt the substantive law of the forum in which the contract was performed, which turned out to be California.[78] The California code contained a statute that permits a court to stay arbitration proceedings if there is pending, related litigation

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72 *Id*. at 13–14.

73 Besson, *supra* note 19, at 245.

74 *Id*.

75 *Id*.

76 473 U.S. 614 (1985).

77 489 U.S. 468 (1989).

78 *Id*. at 470.

that might result in a conflicting ruling regarding a common issue of law or fact.[79] When a dispute arose, the original plaintiff made a demand for arbitration, and in response the defendant filed an action in state court.[80] The issue arose when the plaintiff requested the state court to compel arbitration under the argument that the FAA preempted the state law allowing a stay and required the court to enforce the arbitration agreement. The Supreme Court held that the FAA did not preempt state law because California state law was the law selected by the parties in the arbitration agreement.[81] The Court went on to clarify further its holding by stating that the FAA preempts application of state laws which render arbitration agreements unenforceable, [but] it does not follow, however, that the federal law has preclusive effect in a case where the parties have chosen in their arbitration agreement to abide by state rules. To the contrary, because the thrust of the federal law is that arbitration is strictly a matter of contract, the parties to an arbitration agreement should be at liberty to choose the terms under which they will arbitrate.[82]

This is an important statement by the Court because it enunciates a specific right to contracting parties that they are free to chose the rules by which they will arbitrate, whether those rules are the state law of contract performance or UNCITRAL's Model Law on Arbitration.

The Court also spoke about the general policy of federal neutrality when it comes to the contracting parties' decision to arbitrate and under what terms: "There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure that enforceability, *according to their terms*, of private agreements to arbitrate.[83] The Court concluded its decision by reaffirming the contracting rights of private parties and how those rights are affected by the FAA, stating that "the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so to may they specify the rules under which that arbitration will be conducted."[84] While this case does not involve an international commercial arbitration agreement, the case is still important because it provides the reasoning behind a party's ability to make a choice of law decision as it pertains to potential arbitration

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79 *Id*. at 471.

80 *Id*. at 470–71.

81 *Id*. at 470.

82 *Id*. at 472.

83 *Id*. at 476 (emphasis added).

84 *Id*. at 479.

regardless of the place of arbitration. The ability of private parties to choose the law by which arbitration will be governed allows U.S. based parties, or foreign parties, to choose UNCITRAL without conflict.

The Court in *Mitsubishi* was faced with an arbitration agreement involving international parties that required the arbitration of any disputes to be conducted in Japan under the rules and regulations of the Japan Commercial Arbitration Association.[85] The issue in the case involved the defendant's counterclaims that involved potential anti-trust violations pursuant to the Sherman Act.[86] The defendant's contention was that their anti-trust claims were not arbitrable because they were based on federal statutory claims specific to the laws and rights of U.S. parties, and that those rights could not be adjudicated in a foreign forum under foreign rules.[87] The Court held that the anti-trust claims made by the defendant were claims arising out of the contract, which required their submission to the arbitral tribunal.[88] One of the primary reasons the Court decided in favor of arbitrating the federal statutory claims was the congressional intent in the adoption of the New York Convention as an amendment to the FAA. The Court "reinforced the . . . emphatic federal policy in favor of arbitral disputes dispute resolution," but also distinguished agreements between international commercial parties by stating that "this Nation's accession in 1970 to the Convention, and implementation of the Convention in the same year by amendment of the Federal Arbitration Act, . . . *applies with special force in the field of international commerce*.[89]

The Court also went on to say that the possibility of a U.S. party getting a result that would be contrary to one a domestic court would reach based on the application of domestic law is not persuasive enough to overcome the policy of enforcing a private agreement to arbitrate.[90] Related to this line of reasoning the Court also stated that by agreeing to arbitrate in a foreign forum a U.S. party is not waiving their federal statutory rights, but rather, the party has agreed to have those statutory rights asserted by a non-judicial forum.[91] In addition, the Court states that

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85 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 617 (1985).

86 *Id*. at 619–20.

87 *Id*. at 624.

88 *Id*. at 639.

89 *Id*. at 631 (emphasis added).

90 *Id*. at 629 ("[T]hat concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.").

91 *Id*. at 627–28.

no presumption exists that would create a per se rule declaring a foreign tribunal insufficient to interpret and apply federal law.[92] One of the strongest statements of the Court that summarizes the reasoning behind the policy that private party agreements, especially international parties, should be enforced with respect to choices of forum and rules is:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[93]

The previous two cases answer questions three and four by stating unequivocally that federal law, specifically the New York Convention, allows for the inclusion of foreign law, and possibly the UNCITRAL Model Law, for disputes they agree to arbitrate. This policy is applied rigidly to all arbitration agreements, but a special adherence is given to international agreements between commercial parties.

UNIFORM LAW AND APPLYING FOREIGN LAW IN THE U.S.

To what extent do federal law and public policy concerns allow for the inclusion of foreign law when the agreement to arbitrate declares the United States as the forum and includes a choice or law provision requiring the use of foreign law?

To expand on question four it is important to note that the FAA has not been significantly changed since 1925 and therefore lacks the substantive rules governing arbitration proceedings that are found in more modern statutes.[94] Section 2 of the FAA outlines the basic policy that arbitration agreements are "valid irrevocable, and enforceable, save upon grounds as exist at law or in equity for the revocation of any contract."[95] Section 303(a) of the FAA (Chapter 3 Panama Convention) also states that "[a] court . . . may direct that *arbitration be held in accordance with the agreement* at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the

92 *Id*. at 634.

93 *Id*. at 620 (quoting Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972)).

94 Drahozal, *supra* note 12, at 238.

95 Federal Arbitration Act, 9 U.S.C. § 2.

agreement."[96] This means that any gaps in the FAA are left "largely to private contract and court decisions."[97]

It is only when the agreement does not make a provision for the place of arbitration or the appointment of arbitrators that the arbitration is held in accordance with Article 3 of the Inter-American Convention.[98] Because of the Supreme Court's decision in *Volt*, if a party expressly chooses the law of a particular state to apply to their international arbitration then that law will apply.[99] This means that when a party chooses UNCITRAL as the applicable arbitration law of the agreement, the United States will accept UNCITRAL principles as the chosen law even if there is a conflict with the FAA.

AVAILABILITY AND GENERAL IMPACT OF ARBITRAL CASE LAW IN THE U.S.

To what extent are arbitral awards formally published or informally disseminated within the business and legal community? Is the United States a stare decisis country; and is if so, to what extent is the doctrine of stare decisis applied to arbitral awards? To what extent is issue and claim preclusion applicable to arbitral awards either from an arbitral tribunal to the court or the court to the arbitral tribunal?

Publication of Arbitral Awards in the United States

Arbitral proceedings and awards are generally private.[100] Unlike judicial opinions, arbitral opinions are often confidential, not subject to appeal, and are subject to judicial review only in narrow circumstances.[101] As a result, the law may develop more slowly because the usual process of creating precedent is not available. Typically, arbitral awards that are published are disseminated as an effective teaching tool among business and legal circles. At a minimum, there are six kinds of arbitration awards: (1) Commercial; (2) International; (3) Securities; (4)

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96 Federal Arbitration Act, 9 U.S.C. § 303(a) (emphasis added).

97 Drahozal, *supra* note 12, at 236.

98 Federal Arbitration Act, 9 U.S.C. § 303(b).

99 Purcell, *supra* note 11, at 540; *see also* Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 468 (1989).

100 Jean M. Wenger, *Update to International Commercial Arbitration: Locating the Resources* (May 24, 2004), http://llrx.com/features/arbitration2.htm (noting that due to the confidential nature of the arbitral process, the names of parties, and any identifying features of awards are often omitted in published decisions) (last visited Jan. 31, 2009).

101 *Id*.

Maritime; (5) Patent; and (6) Labor.[102] Commercial and construction arbitral determinations are highly confidential; however, there are a few fields that do publish arbitral awards, such as labor, employment, securities, and New York state insurance awards.[103]

However, there are several informal means of obtaining certain arbitral awards.[104] According to LexisNexis, "international arbitration awards and court decisions are reported in the *Yearbook of Commercial Arbitration*. The yearbook also publishes a report on developments in various countries, a bibliography of arbitration publications, and a list of the members of the International Council for Commercial Arbitration."[105] Also, Westlaw has a database titled "International Commercial Arbitration Awards" that publishes some arbitral awards. Finally, *International Arbitration Report* is a monthly publication that contains commentary and notes about recent arbitration cases and selected text of arbitration awards.[106]

United States as a Stare Decisis Country

The doctrine of stare decisis is one that has been a long standing principle of the U.S. legal system. *Black's Law Dictionary* defines stare decisis as "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation."[107] The Supreme Court of the United States has time and again reiterated the importance of the doctrine of stare decisis under its system of jurisprudence. In 1932, Justice Brandeis stated that "[s]tare decisis is usually the wise policy, because in most matters it is more important that an applicable rule of law be settled then it be settled right."[108] In *State Oil Co. v. Hahn*,[109] the Court affirmed Justice Brandeis' assertion, and in *John R. Sand & Gravel Co. v. United States*,[110] the Court has distinguished the doctrine of stare decisis as it pertains to

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[102] Andrew Zimmerman, *Zimmerman's Research Guide: Arbitration, Mediation and Alternative Dispute Resolution*, http://www.nexis-lexis.com/infopro/zimmerman/disp.aspx?z=1180 (last visited Jan. 31, 2009).

[103] *Id*. (stating, "[m]ost commercial arbitration in the U.S. is handled by either the American Arbitration Association (AAA) or Judicial Arbitration & Mediation Services (JAMS). Their awards are not published, except for securities arbitration.").

[104] Wagner, *supra* note 100.

[105] Zimmerman, *supra* note 102.

[106] Georgetown University Law Library, http://www.ll.georgetown.edu/intl/guides/arbitration/arb_4.html (last visited Jan. 31, 2009).

[107] BLACK'S LAW DICTIONARY (8th ed, 2004).

[108] Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, L., dissenting).

[109] 522 U.S. 3, 20 (1997) (restating Justice Brandeis' assertion and adding that stare decisis "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process").

[110] 128 S.Ct. 750 (2008).

statutory interpretation finding that its decisions require a stricter adherence and carry "special force [because] Congress remains free to alter what we have done."[111] Because the FAA is a statutory mechanism, one can infer that a court would willingly and strictly apply the doctrine of stare decisis.

Issue Preclusion and Collateral Estoppel Application in Arbitration

In arbitration, whether preclusion principles apply is not entirely clear. The parties generally agree ahead of time to abide by the arbitrator's ruling or award. The FAA and judicial precedent establish the authority of arbitration awards. The scope for challenging an award in court is limited to alleged problems in the process, such as arbitrator misconduct or disregard for the contract or law.[112] The merits of an arbitrator's decision are not subject to judicial review because the arbitrator's decision is usually final and courts rarely reexamine it; however, arbitral awards are enforceable by the courts.[113]

However, the issue of res judicata and collateral estoppel in international commercial arbitration are ones that have not been specifically addressed by the Supreme Court. There have been some circuit court opinions that have had to determine the preclusive effect of foreign arbitral awards to either adjudicate disputes or issue orders preventing other courts from disturbing the arbitral awards. Initially, it is important to take notice of the statutory language that requires a court to give a foreign arbitral award preclusive effect. Section 207 of the New York Convention states that "any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award . . . [and] the court *shall* confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award . . . ."[114] The grounds specified by the FAA for vacation of arbitral awards are mainly based on contractual or procedural deficiencies and do not address substantive issues such as the law governing the arbitration proceedings or the types of claims the parties have agreed to arbitrate.[115] Prior to

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111 *Id*. at 756.

112 Federal Arbitration Act, 9 U.S.C. § 10.

113 *See* Federal Arbitration Act, 9 U.S.C. §§ 9–10.

114 Federal Arbitration Act, 9 U.S.C. § 207 (emphasis added).

115 Federal Arbitration Act, 9 U.S.C. §§ 10 (stating that a court may vacate an award if "the ward was procured by corruption, fraud, or undue means . . . where there was evident partiality or corruption in the arbitrators . . . where the arbitrators were guilty of misconduct . . . [or] where the arbitrators exceeded their powers . . . .").

examining how U.S. courts enforce the provision of the FAA just discussed, it is important to briefly detail how the federal courts have the ability to assert jurisdiction, either original or removal, over enforcement or recognition actions in a international arbitration dispute.

Section 203 of the New York Convention states that "an action or proceeding falling under the Convention shall be deemed to arise under the law and treaties of the United States [and] the district court of the United States . . . shall have original jurisdiction . . . regardless of the amount in controversy."[116] This provision is plainly stated and has not been a source of dispute over federal court jurisdiction when the original action requests enforcement of an arbitration provision or recognition of an arbitral award. On the other hand, the power of a federal court to grant a request for removal has been more contentious. Section 205 of the New York Convention provides that "[w]here the subject matter of an action or proceeding in a State court *relates to* an arbitration agreement or award falling under the Convention, the defendant . . . may remove such action or proceeding to the district court [and that] the ground for removal need not appear on the face of the complaint . . . ."[117] In *Beiser v. Weyler*,[118] the court provided a thorough examination of why a federal court has jurisdiction over a dispute "relating to" international commercial arbitration. The court concluded that the term "relates to" should be interpreted broadly and based on its plain meaning a "district court will have jurisdiction under § 205 over just about any suit in which a defendant contends an arbitration clause falling under the [New York Convention] provides a defense."[119] The court went on to say that, "[a]s long as the defendant's assertion is not completely absurd or impossible, it is at least conceivable that the arbitration clause will impact the disposition of the case. That is all that is required to meet the low bar of relates to."[120] Once the court interpreted the terms of Section 205, it went further and explained that the reason the bar for federal court jurisdiction was set so low was to further Congress' intent.[121] Congress wanted to ensure that international arbitration agreements are handled at the federal level for uniform enforcement, and when a federal court found that an

116 *Id*. § 203.

117 *Id*. § 205 (emphasis added).

118 284 F.3d 665 (5th Cir. 2002).

119 *Id*. at 669.

120 *Id*.

121 *Id*. at 674.

arbitration agreement was binding on the parties that decision was "a decision on the merits, entitled to issue preclusion and subject to appellate review."[122]

A federal court has also ruled on the enforceability and preclusive effect of an arbitral award obtained in a foreign forum decided under the principles of the UNCITRAL Model Law. In *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*,[123] where a federal court ruled on the enforceability and preclusive effect of an arbitral award obtained in a foreign forum decided under the principles of the UNCITRAL Model Law, the court upheld an injunction issued by the district court preventing the defendant in the original action from seeking an invalidation of the arbitral award in a foreign court.[124] In *Karaha*, the original plaintiff had obtained an award from an arbitral tribunal in Switzerland pursuant to the agreement that required the tribunal use UNCITRAL as the controlling law of arbitration.[125] Once the plaintiff obtained the arbitral award it filed for and was granted recognition and enforcement in a U.S. district court.[126] The defendant sought to have the award itself and the enforcement order invalidated in an Indonesian court, and as a result the plaintiff was granted an injunction from the district court barring the defendant from seeking relief from the arbitral award.[127] The circuit court reasoned that the district court had the authority to issue the injunction in furtherance of the New York Convention and that "[c]oncerns for international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce agreements to submit disputes to binding international arbitration."[128]

The most relevant aspect of this case is that it shows a recognition and acceptance of the UNCITRAL principles by our courts, and once enforcement is granted the court's judgment will give preclusive effect to the arbitral award for domestic courts as well as foreign courts.

A logical question that is raised after reading the FAA and the corresponding New York and Inter-American Conventions is what will a court do if presented with a arbitration award that is obtained in a forum State that is not a signatory to either Convention. The court in *Weizmann*

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122 *Id*.

123 500 F.3d 111 (2d Cir. 2007).

124 *Id*. at 120.

125 *Id*. at 113.

126 *Id*.

127 *Id*.

128 *Id*. at 125 (quoting *Mitsubishi*, 473 U.S. at 629).

Inst. of Sci. v. Nechis,[129] held that "the Convention [did] not appear to preempt all other law governing the recognition and enforcement of foreign arbitral awards . . . not falling under the Convention," and that the award could still be recognized and enforced, thus giving it preclusive effect, if it met the common law test for preclusion: (1) a finding that the issue(s) decided are identical and (2) a finding that the issue(s) was fully and fairly adjudicated in the other forum.[130]

In *Weizmann*, the court was asked to recognize and enforce an arbitral award obtained in Lichtenstein, a non-signatory country to the Convention. After a review of the procedures used to adjudicate the arbitration, the court found that the Lichtenstein Arbitration provided an adequate forum for the parties to resolve their disputes.[131] Sabrina M. Sudol has come to a similar conclusion as the court in *Weizmann* by stating that while the New York Convention creates a strong presumption towards the preclusive effect of arbitration award, a court can also recognize and enforce arbitral award if the traditional test for preclusion is met.[132] Sudol believes that the New York Convention acts as a codification of the overall federal policy of encouraging and facilitating international commercial arbitration and that this policy is hard to overcome based on the limited justifications for non recognition and enforcement that focus mainly on procedural defects rather than substantive law issues.[133] Sudon concludes her article by stating that the "integrated approach of using [the New York Convention] within the traditional collateral estoppel framework would ensure the arbitration's preclusive effect when it is indeed warranted."[134]

In summary, through the enforcement of the New York Convention and traditional preclusion doctrines a federal court will give preclusive effect to arbitral judgments obtained within the U.S. and abroad regardless of whether the foreign arbitral forum is a signatory of the Convention.

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129 421 F. Supp. 2d 654 (S.D. N.Y. 2005).

130 *Id*. at 674–75.

131 *Id*. at 670. The court went on to say that "[i]n the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results . . . [because preclusion[applies to issues resolved in arbitration, assuming there has been a final determination on the merits, notwithstanding a lack of confrontation of the award." *Id.* at 675–76.

132 Sabrina M. Sudol, *The U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Issue Preclusion: A Traditional Collateral Estoppel Determination*, 65 U. PITT. L. REV. 931, 931–33 (2004).

133 *Id*. at 940–41.

134 *Id*. at 950.

Pro Arbitration Bias

To what extent are your country's national laws and state courts "arbitration friendly"? Does your answer change depending on whether a state party or a state interest is directly involved in or affected by the resolution of the dispute?

The United States is arbitration friendly on both the state and federal level. Under federal common law, there is a presumption in favor of arbitration that "supersedes state law's neutrality."[135] In *Southland*, the court explained that the FAA "declared a national policy favoring arbitration."[136] Similarly, in *Mastrobuono*, the Supreme Court noted this presumption and stated that "the FAA's pro-arbitration policy does not operate without regard to the wishes of the contracting parties."[137]

The Supreme Court in *Mastrobuono* cited *Volt* and stated:

But it does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms . . . Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted.[138]

Similarly, in *Volt*, the Supreme Court rejected the notion that the FAA's pro-arbitration policy precluded enforcement of the state statute and concluded that the FAA "simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."[139]

These cases indicate that the Federal policy underlying the FAA is "arbitration friendly" and the courts will enforce contractual choice of law agreements chosen by the parties. However, it is important to note that if the parties choose, through a choice of law clause, a state statute that is

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135 Purcell, *supra* note 11, at 534; *see also* Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24-25 (1983) (stating "[a]s a matter of federal law, any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration").

136 Southland Corp. v. Keating, 465 U.S. 1, 10 (1989).

137 *Mastrobuono*, 514 U.S. at 57 (referencing *Volt*, 489 U.S. at 472).

138 *Id*.

139 *Volt*, 489 U.S. at 478.

not arbitration friendly, that choice of law provision will control over those parties even though it is preempted by the FAA in all other cases.[140]

JUDICIAL REVIEW OF AWARDS

To what extent are arbitral awards subject to control on the merits or in respect of procedural notions or matters when rendered in the U.S. or when brought for enforcement/recognition in the U.S.?

Judicial control of arbitral awards by U.S. courts can occur at different procedural stages, depending on the proactiveness or reactiveness of the unsuccessful party to the arbitration. It may apply to the U.S. court to vacate the award under Section 10 of the FAA if the award was made in the U.S.[141] Alternatively, the unsuccessful party can await the other party's request for confirmation and present its objections in the respective procedures: under Section 9 of the FAA (which refers to Section 10); under 9 U.S.C. §§ 201, 207, 208 (which refer to Articles III to V of the UN Convention and Section 9 of the FAA); or under 9 U.S.C. §§ 301, 307 (which refer to Articles 4 to 5 of the Inter-American Convention and Section 9 of the FAA), depending on whether the Conventions apply or not. Both the FAA and the Conventions establish specific grounds on which arbitral awards may be reviewed, which are generally recognized to aim at limiting judicial review to a minimum. The primary goal is to enforce the parties' agreement to submit to the arbitrator's award. Accordingly, judicial review focuses primarily on the existence and scope of arbitral jurisdiction and irregularities in the arbitral procedure (a). Only in very exceptional cases can substantive issues, such as the choice of law or its application and interpretation, be the object of judicial review (b).

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140 *Id.* at 476.

141 9 U.S.C § 10(a):

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

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Review of Procedural Issues

The grounds under Section 10(a) of the FAA and under the respective Articles V of the Conventions are not identical. Yet virtually all cases provided for in the former are also covered by the latter and should lead more or less to the same results in practice.[142] Regarding procedural questions, both regimes allow courts to review awards—or rather the tribunal's case file—regarding the respect (1) for the arbitral procedure agreed upon by the parties and (2) for due process in general.[143]

Respect for Agreed Procedure

The arbitral tribunal's failure to comply with the modalities agreed upon by the parties, either regarding its constitution or the arbitral procedure, constitutes a ground for vacating an award and for refusing its enforcement. This ground, which is specifically provided for in the Conventions in their respective Article V(1)(d), is also recognized by courts as an "excess of power" under Section 10(a)(4) of the FAA.[144] The parties may either agree on these procedural modalities specifically or by a reference to some institutional rules,[145] which are thereby incorporated into the arbitration agreement. The court's scrutiny can be expected to be rather thorough because the sanctity of the contract is at stake.[146] However, courts have been reluctant to go beyond "determining whether the procedure was fundamentally unfair."[147] In any case, "trivial departures" from the parties' agreement will be of no consequence.[148] In this respect,

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[142] *Cf.* Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 92 (2d Cir. 2005) (stating that the FAA and the New York Convention provide "overlapping coverage to the extent they do not conflict").

[143] *Cf.* Commercial Risk Reinsurance Co. v. Sec. Ins. Co., 526 F. Supp. 2d 424, 430 (S.D.N.Y. 2007) (review of due process where the arbitration agreement specifically conferred on the arbitrators the power to determine all procedural rules governing the conduct of the arbitration).

[144] *But see Encyclopaedia Universalis*, 403 F.3d at 92 (reversing a district court decision that based its decision on Section 10(a)(4) of the FAA, noting that it "declined to read into the New York Convention additional FAA defenses" (citing Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997)).

[145] *Cf.* Circle Indus. USA v. Parke Constr. Group, Inc., 183 F.3d 105, 109 (2d Cir. 1999) ("Violation of AAA Rules can, under certain circumstances, require vacatur of an arbitration award. *See* 9 U.S.C. § 10(a)(3); *id.* § 10(a)(4)").

[146] *Cf.* 9 U.S.C. § 5 ("If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed.").

[147] Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) ("Federal courts do not superintend arbitration proceedings."); LaPine v. Kyocera Corp., 2008 U.S. Dist. LEXIS 41172 (N.D. Cal. May 22, 2008) (only reviewing whether there was "complete disregard of [the] ICC Rules").

[148] Rent A Car Sys. v. Garage Employees Union, 791 F.2d 22, 25 (2d Cir. 1986); R.J. O'Brien & Assoc. v. Pipkin, 64 F.3d 257, 263 (7th Cir. 1995).

most cases concern the failure to respect the agreed appointment procedure when constituting the arbitral tribunal.[149]

Respect for Due Process in General

Irrespective of the restrictions or liberties agreed upon by the parties regarding arbitral procedure, Section 10(a)(3) of the FAA and Article V(1)(b) of the UN Convention both allow courts to review whether due process has been respected in arbitral proceedings. An award may be vacated under the former "where the arbitrators were guilty of misconduct in refusing to postpone a hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced." Under the former, recognition and enforcement may be denied if "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

Courts have interpreted both provisions restrictively. Procedural errors will only warrant vacatur or the refusal of enforcement if they result in "fundamental unfairness"[150] in the sense of denying the aggrieved party a "fundamentally fair hearing."[151] Yet, in the absence of an agreement to the contrary, "arbitrators are not bound by the rules of evidence,"[152] but "enjoy wide latitude in conducting an arbitration hearing,"[153] and are not required to "follow all the niceties observed by the federal courts."[154] Fundamental fairness is not implicated by an arbitrator's decision to forego an evidentiary hearing on the basis that there were no genuine issues of material fact in dispute.[155] Furthermore, unless a scheduling change is truly unavoidable, initially mutually

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149 Brook v. Peak Int'l, Ltd., 294 F.3d 668, 672 (5th Cir. 2002) (relying on Section 10(a)(4) of the FAA); *accord* Bulko v. Morgan Stanley DW, Inc., 450 F.3d 622, 625 (5th Cir. 2006). *See also* Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos, 25 F.3d 223, 226 (4th Cir. 1994) (relying directly on Section 5 of the FAA).

150 Teamsters Local 312 v. Matlack, Inc., 118 F.3d 985, 995 (3d Cir. 1997) (FAA).

151 International Union, UMW v. Marrowbone Dev. Co., 232 F.3d 383, 388 (4th Cir. 2000) (FAA); Intercarbon Bermuda, Ltd. v. Caltex Trading & Transport Corporation, 146 F.R.D. 64, 72 (S.D.N.Y. 1993) (FAA).

152 Bernhardt v. Polygraphic Co., 350 U.S. 198, 203-04 n.4 (1956).

153 Robbins v. Day, 954 F.2d 679, 685 (11th Cir. 1992), *overruled on other grounds*, First Options of Chicago, Inc., v. Kaplan, 514 U.S. 938, 948 (1995).

154 Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16, 20 (2d Cir. 1997) (FAA). *See also* Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974) ("By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights in favor of arbitration 'with all of its well known advantages and drawbacks'" (citing Washington-Baltimore Newspaper Guild v. Washington Post Co., 442 F.2d 1234, 1238 n.4 (D.C. Cir. 1971)).

155 Sherrock Bros. v. DaimlerChrysler Motors Co., 260 Fed. Appx. 497, 502 (3d Cir. 2008) (FAA).

agreeable time plans need not be deviated from in view of "the logistical problems of scheduling hearing dates convenient to parties, counsel and arbitrators scattered about the globe."[156] In summary, judicial review in respect of procedural issues is limited to "the minimal requirements of fairness."[157]

Substantive Review of Arbitral Awards. The Principle: No Review of the Merits

United States courts have traditionally adhered to the principle that awards should not be reviewed on the merits.[158] This position is in line with the traditional respect of contractual freedom and the courts' willingness to enforce contracts without passing on their substance.[159] By agreeing to submit to the arbitrator's award rather than entrusting the settlement to a judge, "it is the arbitrator's construction which [the parties have] bargained for."[160] Accordingly, the parties' choice is to be respected so long as the award is within the scope of the arbitration agreement and is based on a full and fair hearing of the parties without any dishonest bias; "a contrary course . . . would make an award the commencement, not the end, of litigation."[161] This principle of self-restraint of U.S. courts has been enshrined in Section 10 of the FAA regarding awards made in the U.S. and has been confirmed by the ratifications of the New York and Panama Conventions for awards made abroad.[162] These Conventions provide for only extremely limited grounds of judicial review of arbitral awards. The statutory insulation of arbitral awards from substantive review is, however, not absolute and has been pierced partially by case law

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156 *Parsons & Whittemore*, 508 F.2d at 975.

157 Ficek v. S. Pac. Co., 338 F.2d 655, 657 (9th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965) (FAA); Sunshine Mining Co. v. United Steelworkers of Am., 823 F.2d 1289, 1295 (9th Cir. 1987) (FAA). *See also* Slaney v. Int'l Amateur Ath. Fed'n, 244 F.3d 580, 592 (7th Cir. 2001); Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 298-299 (5th Cir. 2004); ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958—TOWARDS A UNIFORM JUDICIAL INTERPRETATION 310-11 (1981).

158 *See, e.g.*, Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (noting that in reviewing an award, "a district or appellate court is limited to determine whether the arbitrators did the job they were told to do—not whether they did it well, or correctly, or reasonably, but simply whether they did it").

159 *Cf.* Printing & Numerical Registering Co. v. Sampson, L.R. 19 Eq. 462 (1875) (Jessel, M.R.: "It must not be forgotten that you are not to extend arbitrarily these rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.").

160 United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

161 Burchell v. Marsh, 58 U.S. 344 (1855). *See also* Spectrum Fabrics Corp. v. Main St. Fashion, Inc., 285 A.D. 710, 714 (N.Y. App. Div. 1955), *aff'd*, 309 N.Y. 709 (N.Y. 1955); Saxis Steamship v. Multifacs Int'l Traders, 375 F.2d 577, 582 (2d Cir. 1967).

162 *Cf.* Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 ("The goal of the Convention, *and the principal purpose underlying American adoption and implementation of it*, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.") (emphasis added).

which has established two exceptions: the traditional exception of public policy and its modern corollary, the "second look doctrine" (which will both be discussed under Question 8); and the misguided exception of "manifest disregard of the law."

From "Excess of Power" to "Manifest Disregard of the Law"

Both the Conventions and the FAA provide for one ground that could theoretically imply some degree of substantive review of arbitral awards: the ground that the arbitrators exceeded the scope of their powers.[163] It is commonly accepted that these "excess-of-power" provisions are—again in line with the internationally prevailing uniform interpretation[164]—to be construed very narrowly; the object of control is only the congruency between the arbitrator's mandate in the arbitration agreement and actually exercised power and only "apparent" excess allows courts to refuse enforcement or to vacate the award.[165]

At least in the context of Article V(1)(c) of the UN Convention, courts have emphatically denied "to read this [ground] as a license to review the record of arbitral proceedings for errors of fact or law."[166] Although the same has been emphasized for Section 10 of the FAA,[167] the situation is much less clear. In *Wilko v. Swan*, the Supreme Court observed *obiter* that "interpretations of the law by the arbitrator *in contrast to manifest disregard* are not subject, in federal courts, to judicial review for error in interpretation."[168] On this basis, most circuit courts have more or less accepted the argument *a contrario sensu* that substantive review of the arbitral awards could be allowed in cases of "manifest disregard of the law".[169] It has continued to proliferate, especially

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[163] 9 U.S.C. § 201, art. V(1)(c) (UN Convention); 9 U.S.C. § 301, art. 5(1)(c) (Inter-Am. Convention); 9 U.S.C. § 10(a)(4).

[164] *Cf.* VAN DEN BERG, supra note 157, at 313, 321-22 (citing *Parsons*, 508 F.2d at 976).

[165] For Section 10(a)(4) of the FAA, see *Enter. Wheel & Car Corp.*, 363 U.S. at 598, *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209 (2d Cir. 1972), *cert. denied*, 406 U.S. 949 (1972); *DiRussa v. Dean Witter Reynolds*, 121 F.3d 818, 821 (2d Cir. 1997); *Polin v. Kellwood Co.*, 103 F. Supp. 2d 238, 264 (S.D.N.Y. 2000). For the UN Convention, see *Parsons*, 508 F.2d at 976 (relying on *Wheel & Car* and *Coenen*).

[166] *Parsons*, 508 F.2d at 977 (on the hypothetical assumption that the "manifest disregard of the law," defense could apply Article V(1)(c) of the UN Convention without deciding whether this is actually the case). *See also* Brandeis Intsel, Ltd. v. Calabrian Chemicals Corp., 656 F. Supp. 160, 165 (S.D.N.Y. 1987) (rejecting the application of the "manifest disregard of the law" under the ground of public policy, Art. V(2)(b)).

[167] *See, e.g.*, Kyocera Corp. v. Prudential-Bache T Servs., 341 F.3d 987, 1002 (9th Cir. 2003) ("The risk that arbitrators may construe the governing law imperfectly in the course of delivering a decision that attempts in good faith to interpret the relevant law, or may make errors with respect to the evidence on which they base their rulings, is a risk that every party to arbitration assumes, and such legal and factual errors lie far outside the category of conduct embraced by § 10(a)(4).").

[168] 346 U.S. 427, 436 (1953) (emphasis added), *overruled on other grounds*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989).

[169] Advest, Inc. v. McCarthy, 914 F.2d 6, 9 (1st Cir. 1990); Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997); United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 380 (3d Cir. 1995); Upshur Coals Corp. v. United Mine

since a seemingly confirming *dictum* by the Supreme Court in *First Options*,[170] justified either as a variation of Section 10(a)(4) of the FAA or as an independent common law ground.[171] The confusion about the ground's nature and actual scope has caused much doctrinal controversy and disaccord among the different circuits.[172] Some courts have construed variations of the "manifest disregard of the law" standard,[173] where the award is "arbitrary and capricious";[174] is "completely irrational";[175] "fails to draw its essence from the parties' underlying contract"[176]; or "causes significant injustice."[177] The most common formulation adopted by most courts requires a two-tier test: (1) "Did the arbitrator know of the governing legal principle yet refused to apply it or ignored it altogether?" and (2) "Was the law ignored by the arbitrators well defined, explicit and clearly applicable to the case?"[178] In principle, all courts claim that the "manifest disregard

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Workers of America, Dist. 31, 933 F.2d 225, 229 (4th Cir. 1991); Williams v. Cigna Fin. Advisors, 197 F.3d 752, 759 (5th Cir. 1999); M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 850-51 (6th Cir. 1996); National Wrecking Co. v. Int'l Broth. of Teamsters, Local 731, 990 F.2d 957, 962 (7th Cir. 1993); Lee v. Chica, 983 F.2d 883, 885 (8th Cir. 1993), *cert. denied*, 510 U.S. 906 (1993); Barnes v. Logan, 122 F.3d 820, 821-22 (9th Cir. 1997); Jenkins v. Prudential-Bache Sec., Inc., 847 F.2d 631, 634 (10th Cir. 1988); Montes v. Shearson Lehman Bros., 128 F.3d 1456, 1460 (11th Cir. 1997).

[170] *First Options*, 514 U.S. at 942 ("The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. *See, e. g.*, 9 U.S.C. § 10 (award procured by corruption, fraud, or undue means; arbitrator exceeded his powers); *Wilko*, 346 U.S. at 436–37 (parties bound by arbitrator's decision not in 'manifest disregard' of the law) . . ."). *Cf.* Williams v. Cigna Fin. Advisors, 197 F.3d 752, 759 (5th Cir. 1999) ("clear approval of the 'manifest disregard' of the law standard in the review of arbitration awards under the FAA was signaled by the Supreme Court's statement in First Options"); *accord Montes*, 128 F.3d at 1459; Barnes v. Logan, 122 F.3d 820 (9th Cir. 1997), *cert. denied*, 523 U.S. 1059 (1998); Cole v. Burns International Security Servs., 105 F.3d 1465, 1486 (D.C. Cir. 1997); *M & C Corp.*, 87 F.3d 844. *But see* Hall St. Assocs. v. Mattel, Inc., 128 S.Ct. 1396, 1404 (2008) ("We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment, see *First Options of Chicago*. . .").

[171] *Compare, e.g.*, *Kyocera Corp.*, 341 F.3d at 1002 ("the 'exceeded their powers' clause of § 10(a)(4) . . . provides for vacatur only when arbitrators purport to exercise powers that the parties did not intend them to possess or otherwise display a manifest disregard for the law."), *with* Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) ("'Manifest disregard of the law' by arbitrators is a judicially-created ground for vacating their arbitration award, which was introduced by the Supreme Court in Wilko v. Swan . . . It is not to be found in the federal arbitration law. 9 U.S.C. § 10."), *and* Deiulemar Compagnia Di Navigazione, S.p.A. v. Transocean Coal Co., 2004 U.S. Dist. LEXIS 23948 (S.D.N.Y. 2004) ("Whatever ground of review is relied upon, judicially created or statutory, judicial review of arbitration awards is very limited"). *See also* Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L., 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999) ("Instances in which the arbitrators 'exceed their powers' may include violations of public policy or awards based on a 'manifest disregard of the law.'").

[172] For a recent analysis and discussion of the "manifest disregard of the law" doctrine, see Michael A. Scodro, *Deterrence and Implied Limits on Arbitral Power*, 55 DUKE L. J. (2005). *See also* Noah Rubins, *"Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States*, 12 AM. REV. INT'L ARB. 363 (2001).

[173] *Cf.* Julian J. Moore, Note, *Arbitral Review (or Lack Thereof): Examining the Procedural Fairness of Arbitrating Statutory Claims*, 100 COLUM. L. REV. 1572, 1585 (2000).

[174] Manville Forest Prods. Corp. v. United Paperworks Int'l Union, 831 F.2d 72, 74 (5th Cir. 1987); Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1413 (11th Cir. 1990); Ainsworth v. Skurnick, 960 F.2d 939, 941 (11th Cir. 1992).

[175] Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3rd Cir. 1972); French v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 784 F.2d 902, 906 (9th Cir. 1986).

[176] *Enter. Wheel & Car Corp.*, 363 U.S. at 596; Anderman/Smith Operating Co. v. Tenn. Gas Pipeline Co., 918 F.2d 1215, 1218 (5th Cir. 1990); *Upshur Coals Corp.*, 933 F.2d at 229; Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 188, 193 n.5 (4th Cir. 1998); Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 235 (4th Cir. 2006).

[177] Williams v. Cigna Fin. Advisors, Inc., 197 F.3d 752, 762 (5th Cir. 1999).

[178] 1 MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 38:9 (2007).

of the law" standard will not allow a review of the award's merits.[179] However, sometimes the result is contrary to that principle.[180] Only few courts have restrained the concept back into the boundaries of the recognized grounds of "public policy" or "excess-of-powers,"[181] which eventually implies its simple rejection.[182] Despite the fact that there are only a few cases in which courts have actually vacated or denied enforcement of awards in application of the "manifest disregard of the law" standard,[183] its mere existence and the lack of clearly defined limits have seriously undermined the efficiency of arbitration under the FAA by spurring post-award litigation.[184]

In the recent *Hall Street* decision, Chief Justice Souter, writing for a six member majority, suggested that the Court's dicta on "manifest disregard of the law" never intended to enlarge the statutory grounds for vacating awards—but he did not resolve the question definitively.[185] This decision has, however, brought about the clarification that the parties themselves may not contractually expand the judicial review of arbitral awards. All in all, hope exists that the "manifest disregard of the law" standard for vacating and refusing enforcement of awards in its general form will be abandoned in the future.

The Role of Public Policy

What is the notion of, and the role played by, public policy in the recognition and enforcement of arbitral awards rendered abroad? Of lack of arbitrability? Internationally mandatory rules or lois

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179 All decisions cited *supra* note 169 insist that the "manifest disregard of the law" that the scope of the review is narrowly circumscribed and that courts will decline to sustain an award only in the rarest case.

180 *See, e.g.*, *Patten*, 441 F.3d at 235–36 (stating that "manifest disregard of the law is established only where the arbitrator understands and correctly states the law, but proceeds to disregard the same. . ." and proceeded to analyze in detail and to condemn the interpretation found by the arbitrator); Macromex SRL v. Globex Int'l, Inc., 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. Apr. 16, 2008) (fully reviewed—and confirmed—arbitrator's use of the UCC to interpret the CISG).

181 George Watts & Son v. Tiffany & Co., 248 F.3d 577, 579–81 (7th Cir. 2001) (stating "an arbitral order requiring the parties to violate the law (as by employing unlicensed truck drivers), and an arbitral order that does not adhere to the legal principles specified by contract, and hence unenforceable under § 10(a)(4).").

182 For one of the few decisions rejecting the "manifest disregard of the law" standard, see *Warbington Constr., Inc., v. Franklin Landmark, L.L.C.*, 66 S.W.3d 853, 858–59 (Tenn. App. 2001).

183 *Cf.* James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT'L ARB. 9, 46–47 (2004).

184 *See, e.g.*, Wien & Malkin LLP v. Helmsley-Spear, Inc., 6 N.Y.3d 471, 813 N.Y.S.2d 691 (2006) (the arbitral decision was confirmed only after two appellate courts, and the U.S. Supreme Court, had put the victorious party in arbitration through three appellate court proceedings). *Cf.* Hans Smit, *The Time is Ripe for the U.S. Court to Bury the Misconceived Doctrine of Manifest Disregard of the Law*, 16 AM. REV. INT'L ARB. 211 (2005).

185 *Hall Street*, 128 S.Ct. at 1404; *cf.* Charles H. Brower II, Hall Street Assocs. v. Mattel, Inc.*: Supreme Court Denies Enforcement of Agreement to Expand the Grounds for Vacatur Under the Federal Arbitration Act*, 12/11 ASIL INSIGHTS (May 27, 2008).

de police? To what extent do any of these reservations/notions advance primarily local or domestic notions regarding both substantive law and procedural law matters?

The Notion of Public Policy

The restrictive list in Section 10(a) of the FAA has to be understood in the light of the long-standing common law rule that courts will not enforce a contract requiring parties to violate the law or otherwise act contrary to the public welfare.[186] Accordingly, U.S. courts can refuse to enforce awards compliance with which would lead to a violation of public policy.[187] To a certain degree, finding whether an award violates public policy inevitably entails the scrutiny of its merits. The Supreme Court has curtailed all attempts to use this doctrine as a backdoor to substantive review of awards that would undermine the FAA's presumption of validity of arbitral awards. The Court has clarified that "the public policy exception is narrow" and that an award can only be vacated if it runs "contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[188]

In contrast to the common law's focus on mandatory law, the public policy notion under Article V(2)(b) of the UN Convention and Article 5(2)(b) of the Inter-American Convention is—in the tradition of the regimes for the enforcement of foreign judgments—less positivist. Both conventions provide that recognition and enforcement of an arbitral award may be refused if the court finds that "recognition or enforcement of the award would be contrary to the public policy of [the court's] country." While the public policy ground under common law focuses on the respect for mandatory rules, the Conventions are more diffuse. U.S. courts—largely in line with

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[186] McMullen v. Hoffman, 174 U.S. 639, 654–55 (1899); Sternamen v. Metropolitan Life Ins. Co., 62 N.E. 763 (N.Y. 1902); Twin City Pipe Line Co. v. Harding Glass Co., 283 U.S. 353, 356–58 (1931); Hurd v. Hodge, 334 U.S. 24, 34-35 (1948), W. R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983).

[187] Int'l Union of Elec. v. Otis Elevator Co., 314 F.2d 25, 29 (2d Cir. 1963), *cert. denied*, 373 U.S. 949 (1963); Sprinzen v. Nomberg, 46 N.Y.2d 623, 630 (N.Y. 1979); Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1111 (2d Cir. 1980).

[188] *W. R. Grace*, 461 U.S. at 766 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)); *Misco*, 484 U.S. at 43; Alberti et al. v. Morgan Stanley Dean Witter Reynolds Inc., 1998 U.S. Dist. LEXIS 11843 at *6 (S.D.N.Y. July 31, 1998), *aff'd*, 205 F.3d 1321 (2d Cir. 2000); E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 63 (2000) (referring to "positive law" instead of "the laws and legal precedent", but agreeing ". . . in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law"; more restrictive Scalia, J., concurring, at 470, who held that public policy violations would only occur when an award is clearly contrary to "actual prohibitions of the law"). *See also* David M. Glanstein, *A Hail Mary Pass: Public Policy Review of Arbitration Awards*, 16 OHIO ST. J. ON DISP. RESOL. 297, 301 (2001).

the internationally prevailing uniform interpretation[189]—understand that the public policy defense is "exceedingly narrow":[190] enforcement of a foreign award may be denied on this basis only where it is manifest that enforcement would violate the forum country's "most basic notions of justice and morality."[191] Some courts have gone as far as simply equating the public policy ground under the Conventions with the domestic public policy doctrine,[192] despite the differences in focus of the respective definitions. The review of awards for erroneous legal reasoning or misapplication of the law is, in principle, not possible on the grounds of public policy.[193]

From Arbitrability to the "Second Look" Doctrine

For a long time, as in virtually all other countries, U.S. courts have applied the so-called "public policy" exception to police against arbitrators assuming jurisdiction over public law disputes. Disputes over statutory public law rights governed by statutes enacted to enforce public policy, especially claims based on securities,[194] anti-trust,[195] or anti-discrimination laws,[196] could not be submitted to the decision of arbitrators. The sovereignty of each country to define which subject-matters are "not capable of settlement by arbitration" is also plainly recognized by the

189 *Cf.* VAN DEN BERG, *supra* note 157, at 382.

190 Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975). For the akin standard for finding foreign judgments unenforceable as against public policy, see *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981) (noting that it must be "clear cut" that the foreign judgment is "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought." (quoting RESTATMENT (SECOND) OF CONFLICT OF LAWS § 117, cmt. (c) (1971)); Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986) (stating that "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 is against public policy").

191 *Parsons*, 508 F.2d at 973–74 (referring to RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt (c), and *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198 (1918)); Fotochrome, Inc. v. Copal Co., 517 F.2d 512, 516 (2d Cir. 1975); Laminoirs-Trefileries-Cableries de Lens, SA v. Southwire Co., 484 F. Supp. 1063, 1068 (N.D. Ga. 1980); Waterside Ocean Navigation Co. v. Int'l Navigation Ltd., 737 F.2d 150, 152 (2d Cir. 1984); *M & C Corp.*, 87 F.3d at 851 n.2; Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156 F.3d 310, 315 (2d Cir. 1998); Slaney v. Int'l Amateur Athletic Fed'n, 244 F.3d 580, 593 (7th Cir. 2001); *Karaha Bodas*, 364 F.3d at 306.

192 Banco de Seguros del Estado v. Mut. Marine Offices, Inc., 230 F. Supp. 2d 427, 430 (S.D.N.Y. 2002) (referring to *Alberti*, 1998 U.S. Dist. LEXIS 11843 at 430).

193 For the "public policy" doctrine, see *Misco*, 484 U.S. at 38; *Eastern Associated Coal*, 531 U.S. at 62 (citing the former: "the fact that 'a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision.'"). For the UN Convention, see *Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc.*, 2000 U.S. Dist. LEXIS 8498, at *12 (D. Conn. March 14, 2000); *Karaha Bodas*, 364 F.3d at 306.

194 *Wilko*, 346 U.S. at 438.

195 American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821, 826-28 (2d Cir. 1968).

196 Alexander v. Gardner-Denver Co., 415 U.S. 36, 53 (1974).

Conventions.[197] The enforcement of arbitration agreements and arbitral awards covering non-arbitrable matters can be—and regularly has been - refused by U.S. courts.

It is against this background that the extremely narrow construction of the "public policy" ground both under U.S. common law and under the Conventions becomes clearer. There is no need to review arbitral awards *ex post* if all sensitive areas of public policy are excluded from arbitration *ex ante*. *Ex post* control can thus be reduced to those extreme cases in which granting leave for enforcement of the award would manifestly cause a violation of the forum's "most basic notions of justice and morality," or of "an explicit, well-defined, and dominant public policy" of the forum. This traditional equilibrium has been significantly changed by the Supreme Court's willingness to open up a number of subject matters to arbitration that had previously been excluded. Under the basic assumption that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum,"[198] the Court has progressively allowed arbitration for most public law disputes.[199]

The liberalization of arbitrability has, however, come at the price of more attentive scrutiny of the awards deciding such disputes. In the leading *Mitsubishi* decision, the Supreme Court warned 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."[200] It proceeded to soften its statement by noting that "[w]hile the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal, it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the [public law] claims and actually decided them."[201] Nevertheless, the Supreme Court warned that it would accept

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197 9 U.S.C. § 201; UN Convention, Arts. II(1), (3) ("Each Contracting State shall recognize an [arbitration] agreement . . . concerning a subject matter capable of settlement by arbitration" and "refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed"); *id.* art. V(2)(a) (enforcement "may also be refused if . . . (a) the subject matter of the difference is not capable of settlement by arbitration"); 9 U.S.C. § 301, Inter-Am. Convention, art. 5(1)(a).

198 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); *McMahon*, 482 U.S. at 229; *Montes*, 128 F.3d at 1459.

199 *Scherk*, 417 U.S. at 525–20 (Securities Exchange Act, 15 U.S.C. § 77n); *Mitsubishi*, 473 U.S. at 636–40 (Sherman Act, 15 U.S.C. §15); *McMahon*, 482 U.S. at 220 (Securities Exchange Act and RICO, 18 U.S.C. 1964); *Rodriguez de Quijas*, 490 U.S. at 478–81 (Securities Act, 15 U.S.C.S. § 771(2), overruling *Wilko v. Swan*); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26–27 (1991) (Age Discrimination in Employment Act, 29 U.S.C. § 626 (c)); Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 541 (1995) (Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. § 1303(8)).

200 *Mitsubishi*, 473 U.S. at 637 n.19.

201 *Id.* at 638.

arbitral decisions in public law disputes only "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum [so that] the statute will continue to serve both its remedial and deterrent function."[202] This is the basis of the so called "second look" doctrine,[203] under which arbitral awards are to be reviewed in order to ensure the application of mandatory rules enforcing public policy, regardless whether the contract is governed by foreign law.[204] Additionally, except for the availability of vacatur, it should not make a difference whether the award was rendered abroad or in the U.S. If an arbitral award undermine a strong public policy of the forum state, U.S. courts can: vacate the award if made inland; refuse its enforcement; or refuse to recognize its *res iudicata* effect and – by striking down also the arbitration agreement –to allow the re-litigation of the claim in court. So far, however, the Supreme Court's warning has primarily served to justify the enforcement of arbitration agreements in view of the later possibility of review. The only known case involving an international award raising questions of its compatibility with U.S. competition law suggests that U.S. courts are willing limit their review to a minimum and to defer to the findings of the arbitrators.[205]

Public Policy as a Gateway for Domestic Notions?

The public policy ground for refusing recognition or enforcement and its derivatives, i.e. the notion of arbitrability, and the "second look" doctrine, are by definition designed to advance primarily local or domestic notions of justice. They allow avoiding the application of a foreign or "arbitral" standard that is incompatible with that of the forum and ensure that the result of the

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202 *Id*. at 637.

203 *See, e.g.*, William W. Park, *Private Adjudicators and the Public Interest: The Expanding Scope of International Arbitration*, 12 BROOK. J. INT'L L. 629, 630 (1986).

204 *Cf. Mitsubishi*, 473 U.S. at 635 (Swiss law agreed by parties); *Sky Reefer*, 515 U.S. at 541 (applicable law not yet determined; potentially Japanese law); Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1364–65 (2d Cir. 1993) (English law agreed by parties).

205 Baxter Int'l v. Abbot Labs., 315 F.3d 829, 832-33 (7th Cir. 2003) ("The arbitral tribunal in this case 'took cognizance of the antitrust claims and actually decided them.' Ensuring this is as far as our review legitimately goes... If the three-corner arrangement among Baxter, Maruishi, and Abbott really does offend the Sherman Act, then the United States, the FTC, or any purchaser of sevoflurane is free to sue and obtain relief... All that matters today is that the arbitrators have concluded that the antitrust laws (and Baxter's related arguments, which we need not address) do not diminish Abbott's contractual rights--and that decision is conclusive between these parties."); Cudahy J., dissenting at 837 ("we must fulfill our judicial responsibilities and examine the effect of the outcome commanded by the arbitral award"). *See* Philip J. McConnaughay, *The Risks and Virtues of Lawlessness: A Second Look at International Commercial Arbitration*, 93 NW. U.L.REV. 453, 480–81 (1999) ("Finally, because of the prolonged absence of any 'second look' by the Supreme Court at arbitral resolutions of U.S. mandatory law claims, parties to international arbitrations including such claims are left guessing about the nature and level of judicial review they will experience at the award enforcement stage and about how to conduct their mandatory law arbitrations in the meantime.").

litigation is controlled by the local standard. However, as pointed out above, U.S. courts have—in accordance with their general deference to arbitral decisions—been most cautious in restricting these exceptions to the very minimum necessary to safeguard local standards.[206]

Moreover, U.S. courts are probably among the most liberal in (implicitly) accepting the notion of equivalence: the public policy exception and its derivatives need not come into play if the foreign law applied by the arbitral tribunal provides for remedies that not only allow aggrieved parties to vindicate their substantive rights, but also to deter the behavior the repression of which is a public policy in the U.S. Accordingly, it is even acceptable that the choice of arbitration in combination with the choice of a foreign law evades the application of the treble damages (typical for U.S. remedies advancing strong public policy) so long as the remedies or disincentives provided by the foreign law do not subvert the policy of the U.S. statute.[207]

Regarding issues of procedure, U.S. courts have not relied on public policy for reviewing procedural issues,[208] but—for international arbitration—have focused in particular on Article V(1)(b) of the UN Convention. It is worth noting that U.S. courts commonly read this provision as sanctioning "the application of the forum state's standards of due process."[209] But what may seem at first sight to be a gateway for domestic notions threatening the uniform application of the Convention,[210] is in practice much less worrisome due to the extremely narrow interpretation given to the due process standard in the context of judicial review of arbitral awards.[211]

IMPACT OF ARBITRATION PRACTICE ON U.S. CASE LAW AND LEGISLATION

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206 *See supra* text accompanying notes 188–191.

207 Roby v. Corporation of Lloyd's, 996 F.2d 1353, 1364–66 (2d Cir. 1993) ("We believe therefore that the public policies of the securities laws would be contravened if the applicable foreign law failed adequately to deter issuers from exploiting American investors. . . [But the claimants] have adequate potential remedies in England and there are significant disincentives to deter English issuers from unfairly exploiting American investors. Although the remedies and disincentives might be magnified by the application of RICO, we cannot say that application of English law would subvert the policies underlying that statute."); *accord* Bonny v. Society of Lloyd's, 3 F.3d 156 (7th Cir. 1993); Riley v. Kingsley Underwriting Agencies Ltd., 969 F.2d 953 (10th Cir. 1992). For the similar position regarding choice-of-forum clauses, see *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1998); Allen v. Lloyd's of London, 94 F.3d 923 (4th Cir. 1996), *Haynsworth v. Lloyd's of London*, 121 F.3d 956 (5th Cir. 1997), *cert. denied*, 140 L.Ed. 2d 666 (1998).

208 Although they probably could, *cf.* VAN DEN BERG, *supra* note 157, at 299, 376.

209 *Parsons*, 508 F.2d at 975 (invoking Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1067 n.81 (1961)); Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 145 (2d Cir. 1992); *Karaha Bodas*, 364 F.3d at 299.

210 *Cf.* EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 986 (1999) (pointing out that the Convention "creates an international substantive rule").

211 *See supra* text accompanying notes 150-157; *see also* VAN DEN BERG, supra note 157, at 298.

To which extent do arbitral awards or determinations influence, or may be considered as possibly influencing, state court decisions or legislative change in your country? To which extent do courts of law in your country defer to determinations made by local or international institutions in charge of administrating arbitrations? If no experience is at hand, which would be the prospective answer to these questions?

The influence of arbitral awards or determinations on U.S. case law or legislation in the sense of persuasive authority[212] seems to be minimal if not absent. Except for cases involving the determination of customary international law,[213] the author found one case in which a U.S. court—reluctantly—cites an arbitral award when discussing a point of law.[214] U.S. courts do not mention any arbitral case law even when treating matters on which there is a fairly well documented body of arbitral case law, such as on the United Nations Convention on the International Sales of Goods (CISG).[215] Accordingly, it is doubtful that U.S. courts would openly pick up legal arguments made in arbitral decisions even if put forward by the parties.

As already elaborated above, the deference of U.S. courts for arbitral awards or determinations is, in principle, well established. It is worth adding that determinations by arbitral tribunals on the existence of an arbitration agreement conferring jurisdiction to the tribunal are, in contrast, not relevant to U.S. courts. The arbitral tribunal's assessment of its own jurisdiction is merely preliminary; it is not binding on the court who will decide on the question *de novo* at the stage of confirming or setting aside the award based on that assessment.[216]

Regarding U.S. courts' deference to determinations made by arbitral institutions, there is equally little experience. It is only clear that U.S. courts refuse to grant injunctions that would allow

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[212] *Cf.* H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 263 (1987) (noting persuasive authority as "authority which attracts adherence as opposed to obliging it.").

[213] *Cf.* McKesson Corp. v. Islamic Republic of Iran, 116 F. Supp. 2d 13, 45 (D.D.C. 2000) ("The [ICSID] decision thus presents relevant evidence of international law but must still be considered in light of the other evidence available. It thus cannot be 'authoritative' in the sense that a controlling decision of law would be.").

[214] Paul Blum Co. v. Daewoo Int'l (am.) Corp. (*In re* Daewoo Int'l (am.) Corp., 2001 U.S. Dist. LEXIS 19796 at *15 (S.D.N.Y. 2001) (citing an arbitration panel decision published in 1978 in the discussion on whether INCOTERM CFR clause requires the seller to ensure the seaworthiness of the vessel). For the seemingly only other exception, see *Telenor Mobile Communs. v. Storm LLC*, 524 F. Supp. 2d 332, 347 (S.D.N.Y. 2007) (court cites a passage of the award in which the arbitral tribunal, in turn, cited a decision of the Second Circuit).

[215] For a very specific discussion about the proper degree of deference or weight to be accorded to arbitral determinations of fact in subsequent litigations in the narrow context of employment discrimination claims, see Lynlee Wells Palmer, *Trying It Again for the First Time: Judicial Treatment of Arbitral Decisions in Subsequent Title VII Cases*, 52 ALA. L. REV. 1077 (2001).

[216] *First Options*, 514 U.S. at 943–44 (for the FAA); China Minmetals Materials Imp. & Exp. Co., v. Chi Mei Corp., 334 F.3d 274, 289 (3d Cir. 2003) (applying the rule of *First Options* also under Article V(1)(a) of the UN Convention).

attacking arbitral institutions that made certain determinations according to their rules.[217] For example, where the ICC International Court of Arbitration has determined, according to Article 6(2) of the ICC Rules, that even *prima facie* there is no arbitration agreement between the parties; the only review available for the party requesting arbitration is to sue the other party to compel arbitration.[218] A U.S. court, however, may repel the arbitral institution's preliminary determination that there is no arbitral jurisdiction.[219] If, however, the institution makes a determination that is final according to its own rules, U.S. courts will defer to such determinations in respect for the parties arbitration agreement referring to these rules.[220]

UNIFORM LAW AS THE BASIS FOR ARBITRAL AWARDS TAKING EFFECT IN THE UNITED STATES

To which extent do arbitral awards rendered in your country, enforced or enforceable in your country or concerning nationals of or residents in your country apply, or may be deemed to be based on, Uniform Law? If no experience at hand, which would be your prospective answer to this question?

It is most difficult, if not impossible, to measure the degree to which arbitral awards having some effect in the U.S. apply, or can be deemed to be based on, uniform law—at least as regards substantive uniform law. Only those cases in which arbitration subsequently leads to litigation in U.S. courts offer a glimpse at what can be expected to be the tip of the iceberg. Even when searching for U.S. court decisions that involve arbitrations related to matters of international commerce that are typically targeted by uniform law, such as the predestined for CISG,[221] or the Hague Rules on Bills of Lading,[222] findings are rather rare.[223] Except for some commercial cases

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217 Global Gold Mining, LLC v. Robinson, 533 F. Supp. 2d 442, 445–47 (S.D.N.Y. 2008).

218 *Id*.

219 *Id*. at 446. For a somewhat similar case involving the Permanent Court of Arbitration in The Hague, see *Marks 3-Zet-Ernst Marks GMBH & Co. KG v. Presstek, Inc.*, 455 F.3d 7, 13 (1st Cir. 2006).

220 Gutfreund v. Weiner (*In re* Salomon Inc. Shareholders Derivative Litig.), 68 F.3d 554, 556-57 (2d Cir. 1995) (parties had agreed on arbitration under the NYSE Constitution and the NYSE Secretariat had declined to arbitrate the dispute invoking its discretion to "decline in any case to permit the use of [its] arbitration facilities," NYSE CONST. art. XI, § 3, after the defendant had alleged that the subject matter would not be arbitrable). *Cf.* JSC Surgutneftegaz v. President & Fellows of Harvard College, 2005 U.S. Dist. LEXIS 15991 (S.D.N.Y. Aug. 3, 2005) (determination of the place of arbitration under Article 13.1 of the AAA International Rules).

221 *See supra* note 215.

222 Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155 (acting as the model for the U.S. Carriage of Goods by Sea Act (1936), 46 U.S.C. §§ 1300–1315). *Cf.* Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 301 (1959) ("COGSA was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924. . . [and]

involving the choice of religious law,[224] only one court decision could be found that involved the an arbitral tribunal applying non-state rules that would qualify as uniform law—in the particular case the UNIDROIT Principles.[225] Only cases on arbitrations involving INCOTERM clauses—mere contractual clauses pre-drafted by the International Chamber of Commerce for the use in international commerce—are more frequent.[226]

The situation is somewhat different when it comes to uniform law on procedural questions. Virtually all foreign awards whose effect is invoked in the U.S. are somehow "based" on either the UN Convention or the Inter-American Convention, that ensure their enforceability. Equally, foreign awards made in countries, which have adopted the UNCITRAL Model Law, can be considered as somehow being based on uniform law, as well as international awards made in those U.S. states whose legislation has enacted the Model Law.[227] Furthermore, awards made in

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was promulgated as part of an international effort to achieve uniformity and simplification of bills of lading used in international trade."). The Hague Rules were themselves based in part on the Harter Act of 1893, 46 U.S.C. §§ 190-196 (1982). *Cf.* Sun Oil Co. v. M/T Carisle, 771 F.2d 805, 809 (3d Cir. 1985).

[223] For the Hague Rules, see, *e.g.*, *Sky Reefer*, 515 U.S. at 534; *Ibeto Petrochemical Indus. v. M/T Beffen*, 475 F.3d 56, 64 (2d Cir. 2007); *Duferco Steel v. M/V Kalisti*, 121 F.3d 321 (7th Cir. 1997); *Itel Container Corp. v. M/V Titan Scan*, 139 F.3d 1450, 1455 (11th Cir. 1998); *ASOMA Corp. v. M/V Seadaniel*, 971 F. Supp. 140, 142 (S.D.N.Y. 1997). *See, e.g.*, MCC-Marble Ceramic Ctr. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384 (11th Cir. 1998); Guang Dong Light Headgear Factory Co. v. ACI Int'l, Inc., 2008 U.S. Dist. LEXIS 35392 (D. Kan. Apr. 28, 2008); Macromex SRL v. Globex Int'l, Inc., 2008 U.S. Dist. LEXIS 31442 (S.D.N.Y. Apr. 16, 2008); Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L., 1999 U.S. Dist. LEXIS 7380 (E.D. La. May 17, 1999). For the practice of opting out of the CISG in choice of law clauses, see, *e.g.*, *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061 (N.D. Cal. 2007); *Vision Graphics, Inc. v. E.I. Du Pont de Nemours & Co.*, 41 F. Supp. 2d 93, 97 (D. Mass. 1999) (not involving an arbitration agreement).

[224] The only interesting exception are commercial cases in which the awards were based on religious law respectively. For Islamic law, see *Abd Alla v. Moursi*, 680 N.W.2d 569, 570 (Minn. Ct. App. 2004) (dispute over partnership contract settled by arbitration before an arbitration court of an Islamic mosque located in Minnesota). For Jewish law, see, *e.g.*, *Ainsworth v. Schoen*, 606 So. 2d 1275, 1276 (Fla. Dist. Ct. App. 3d Dist. 1992) (dispute over payment for shipment of goods resolved by *Bais Din*, a panel of three rabbis); *Zeiler v. Dietsch*, 2006 U.S. Dist. LEXIS 96666 (E.D.N.Y. Mar. 16, 2006) (dispute arising over a U.S.-Israeli joint venture contract decided by *Beth Din* tribunal, also a panel of three rabbis).

[225] Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc., 29 F. Supp. 2d 1168, 1173 (S.D. Cal. 1998), *aff'd*, 385 F.3d 1206 (9th Cir. 2004), *vacated on other grounds in* 546 U.S. 450 (2006) (reference by arbitral tribunal to the UNIDROIT Principles unproblematic because one of the issued to be decided was whether "general principles of international law" applied). For the possibility of choosing such non-state law in arbitrations in the U.S., see *supra* note 6.

[226] Garner Lumber Co. v. Randolph E. Valensi, Lange, Inc., 513 F.2d 1171 (4th Cir. 1975); Amoco Oil Co. v. H. Grunewald & Co., 592 F.2d 745 (4th Cir. 1979); Ruslan Shipping Corp. v. Coscol Petroleum Corp., 635 F.2d 648 (7th Cir. 1980); Phillips Puerto Rico Core, Inc. v. Tradax Petroleum, Ltd., 782 F.2d 314 (2d Cir. 1985); M. Golodetz Export Corp. v. S/S Lake Anja, 751 F.2d 1103, 1107 (2d Cir. 1985); Siderius, Inc. v. M.V. "Ida Prima,", 613 F. Supp. 916 (S.D.N.Y. 1985); Trade Arbed, Inc. v. M.V. Singapore Star, 1988 U.S. Dist. LEXIS 16299 (D. Conn. 1988); Nat'l Material Trading v. M/V Kaptan Cebi, 1997 U.S. Dist. LEXIS 24027 (D.S.C. 1997); Stemcor United States v. National Material Trading, 1998 U.S. Dist. LEXIS 11011 (S.D.N.Y. July 20, 1998); Cargill Ferrous Int'l v. Sea Phoenix MV, 325 F.3d 695 (5th Cir. 2003); Vitol S.A., Inc. v. Koch Petroleum Group, LP, 2005 U.S. Dist. LEXIS 18688 (S.D.N.Y. 2005); Coimex Trading (Suisse) S.A. v. Cargill Int'l S.A., 2005 U.S. Dist. LEXIS 6589 (S.D.N.Y. Apr. 15, 2005); Asoma Corp. v. SK Shipping Co., 467 F.3d 817, 820 (2d Cir. 2006); S.K.I. Beer Corp. v. Baltika Brewery, 443 F. Supp. 2d 313, 314 (E.D.N.Y. 2006); SMS Demag, Inc. v. ABB Transmissone & Distribuzone, S.P.A., 2008 U.S. Dist. LEXIS 25637 (W.D. Pa. Mar. 31, 2008).

[227] *See supra* text accompanying notes 39-42. *See, e.g.*, California New Regency Prods., Inc. v. Nippon Herald Films, Inc., 501 F.3d 1101, 1103 (9th Cir. 2007); HSMV Corp. v. ADI Ltd., 72 F. Supp. 2d 1122 (C.D. Cal. 1999); Conneticut Bahr. Telcoms. Co. v. DiscoveryTel, Inc., 476 F. Supp. 2d 176 (D. Conn. 2007); Illinois *In re* Baker & McKenzie v. Wilson, 2002 U.S. Dist. LEXIS 17212 (N.D. Ill. Sept. 12, 2002); Certain Underwriters at Lloyd's, London v. BCS Ins. Co., 239 F. Supp. 2d 812, 815 (N.D. Ill. 2003); Oregon Peace River Seed Co-Op, Ltd. v. Proseeds Mktg., Inc., 204 Ore.

procedures following the UNCITRAL Arbitration Rules can also be deemed based on uniform law.[228]

IMPACT OF ARBITRATION ON APPLICATION OF UNIFORM LAW IN THE UNITED STATES

What has been the impact of arbitral awards and determinations in introducing, firming up, or applying Uniform Law, including through legislative change or the action of the courts in the U.S.? Of foreign court decisions regarding arbitral awards or determinations referring to or based on Uniform Law? If no experience is at hand, what would be the prospective answer to these questions?

There is no experience at hand regarding the impact of arbitral awards and determination in introducing, firming up, or applying Uniform Law in the U.S. This impact is likely to remain minimal in view of the general reluctance of U.S. state courts to discuss legal arguments or findings by arbitral tribunals (see question 9).

Cases in which U.S. courts turned to the foreign court decisions interpreting uniform law are extremely rare and only concern the interpretation of the UN Convention. In *International Standard Elec. Corp. v. Bridas Sociedad Anonima*, the U.S. District Court for the Southern District of New York, faced with the question of how to interpret Article V(1)(e) of the UN Convention ("the competent authority of the country . . . under the law of which [the] award was made"), also cites a number of foreign court decisions contained in an affidavit by Professor George A. Berman.[229] In *Spier v. Calzaturificio Tecnica, S.p.A.*, the same court took notice of German and Italian court decisions (discussed by the parties) on whether the Italian *arbitrato*

App. 523, 529 (Or. Ct. App. 2006); Texas Sellers v. Woodlake Travel Servs., 1996 Tex. App. LEXIS 444 (Tex. App. Houston 14th Dist. Feb. 1, 1996) (application of TICAA denied for lack of "internationality" according to criteria of act).

[228] Unistrut Space Frame Sys. v. Atlantic Plate & Window Glass, 16 F. Supp. 2d 1 (D.D.C. 1996); Ceska Sporitelna, a.s. v. Unisys Corp., 1996 U.S. Dist. LEXIS 15435 (E.D. Pa. Oct. 10, 1996); Huntington Int'l Corp. v. Armstrong World Indus., 981 F. Supp. 134, 136 (E.D.N.Y. 1997); Baker Marine, Ltd. v. Chevron, Ltd., 191 F.3d 194 (2d Cir. 1999); Wal-Mart Stores, Inc. v. PT Multipolar Corp., 1999 U.S. App. LEXIS 31578 (9th Cir. Nov. 30, 1999); James Assocs. v. Anhui Mach. & Equip. Imp. & Exp. Corp., 171 F. Supp. 2d 1146, 1148 (D. Colo. 2001); Ever-Gotesco Res. & Holdings, Inc. v. PriceSmart, Inc., 2002 U.S. Dist. LEXIS 5817 (S.D. Cal. 2002); *Karaha Bodas*, 364 F.3d at 281; *Marks 3*, 455 F.3d at 9 (pathological clause); Libancell S.A.L. v. Republic of Leb., 2006 U.S. Dist. LEXIS 29442 (S.D.N.Y. May 16, 2006); Jorf Lasfar Energy Co., S.C.A. v. AMCI Exp. Corp., 2006 U.S. Dist. LEXIS 28948 (W.D. Pa. May 5, 2006); *In re* Oxus Gold PLC, 2007 U.S. Dist. LEXIS 24061 (D.N.J. Apr. 2, 2007) (based on U.K.- Kazakhstan BIT); Caja Nacional De Ahorro Y Seguros in Liquidation v. Deutsche Ruckversicherung AG, 2007 U.S. Dist. LEXIS 56197 (S.D.N.Y. Aug. 1, 2007).

[229] 745 F. Supp. 172, 177 (S.D.N.Y. 1990) (citing decision of the Supreme Court of India; the Brussels *Cour d'appel*; the French *Cour de cassation*; the German *Bundesgerichtshof*; the Spanish *Tribunal Supremo*; and the Supreme Court of South Africa).

rituale falls under the UN Convention or not.[230] There is also a similar case of the Second Circuit on the same question.[231] Only one case could be found in which a party alleged that an arbitral award was made that disregarded an interpretation that a foreign court had given to an international convention—in the case the German *Bundesgerichtshof*'s interpretation of Article 35 CISG—but that objection was refused because the arbitral tribunal had discussed the German decision.[232] These rare examples seem to confirm the general affirmation made by scholars that U.S. courts are particularly wary of using foreign decisions as persuasive authority.[233]

IMPACT OF ARBITRAL INSTITUTIONS, INTERNATIONAL ORGANIZATIONS, AND OF FOREIGN LAW ON U.S. ARBITRATION LAW AND ARBITRAL PRACTICE IN THE U.S.

What has been the impact on the fashioning of your national legislation on arbitration—domestic or international—or on arbitral awards rendered in the U.S. or concerning U.S. nationals or residents of: (a) the action of rules of international arbitral institutions (e.g. ICC, AAA and ICDR, LCIA); (b) the works of international organizations (e.g. UNCITRAL, UNIDROIT, the EU, NAFTA, OAS); and (c) foreign court decisions or legislation reflecting the influence of the action or works of institutions or organizations like the ones mentioned above? If no experience is at hand, what would be your prospective answers to these questions?

Influence of Actions and Rules of Arbitral Institutions

As already hinted above, the direct influence of arbitral institutions on the development of the law on arbitration in the U.S. seems to be minimal, if not, nonexistent. However, the rules of these institutions have an important role to play in arbitration under U.S. legislation and case law. This impact is especially important where U.S. arbitration law is permissive but requires an agreement of the parties to give special powers to the arbitrators. The probably most important example is the arbitrator's power to decide on the "arbitrability" of the dispute in the sense of whether the dispute between the parties is effectively covered by a valid arbitration agreement.

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230 663 F. Supp. 871, 874 (S.D.N.Y. 1987).

231 Europcar Italia, S.P.A. v. Maiellano Tours, 156 F.3d 310, 314 (2d Cir. 1998).

232 Medical Mktg. Int'l, Inc. v. Internazionale Medico Scientifica, S.R.L., 1999 U.S. Dist. LEXIS 7380, 5-7 (E.D. La. May 17, 1999).

233 Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369, 379 (2001); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 104 (1994).

The determination of the existence of arbitral jurisdiction for a given issue is, in principle, reserved to the courts, unless the parties have specifically agreed that the arbitrators may decide on this issue.[234] Many institutional rules establish that the arbitrators may decide on their own jurisdiction,[235] and U.S. courts have been unanimous in accepting these rules' incorporation by reference to the arbitration agreement as sufficient for finding the parties' agreement to submit also the question of "arbitrability" to arbitration.[236] In practice, this frequently leads *de facto* to the same result as under the internationally accepted *competence-competence* principle (which requires no specific agreement). Similarly, the choice of institutional rules allowing arbitrators to award attorney's fees are considered as sufficient for overcoming state laws (such as in New York)[237] that follow the prevailing "American rule" of fee-shifting.[238]

If one were to extend this reasoning, the choice of institutional rules should eventually promote the application of non-state "rules," such as the UNIDROIT Principles, the *lex mercatoria*, general principles of law, etc., as the "law" governing the substance of the dispute. For example, by the rules of the ICC, LCIA, or ICDR,[239] parties have to be prepared that—absent a binding choice-of-law clause—the arbitral tribunal may apply non-state rules or general principles of law instead of choosing an applicable (enacted) law.[240]

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[234] Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 n.7 (1960); AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 649 (1986); *First Options*, 514 U.S. at 943; China Minmetals Materials, 334 F.3d at 288–89 (affirming *Kaplan* also for international arbitration).

[235] *See* ICC Rules of Arbitration, art. 6(2); AAA Commercial Arbitration Rules, art. R-7(1); ICDR International Dispute Resolution Procedures, art. 15(1); LCIA Arbitration Rules, art. 23(1); National Association of Securities Dealers (NASD) Code, § 35; CIETAC Arbitration Rules, art. 6(1). *See also* UNCITRAL Rules, art. 21(1).

[236] *See, e.g.*, Apollo Computer, Inc. v. Berg, 886 F.2d 469, 472–73 (1st Cir. 1989) (ICC); PaineWebber Inc. v. Bybyk, 81 F.3d 1193, 1202 (2d Cir. 1996) (NASD Code); Shaw Group, Inc. v. Triplefine Int'l Corp., 322 F.3d 115, 122–23 (2d Cir. 2003) (ICC); FSC Securities Corp. v. Freel, 14 F.3d 1310, 1312–13 (8th Cir. 1994) (NASD); Wal-Mart Stores, Inc. v. PT Multipolar Corp., 1999 U.S. App. LEXIS 31578 (9th Cir. Nov. 30, 1999) (ad-hoc arbitration under the UNCITRAL Rules); Terminix Int'l Co. LP v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332 (11th Cir. 2005) (AAA).

[237] N.Y. C.P.L.R. § 7513; *see* Marrotta v. Blau, 241 A.D.2d 664, 659 N.Y.S.2d 586, 586 (3d Dep't 1997) (award of fees only permitted where "specifically provided for by statute or contract."); Bank of New York v. Fleet Bank, N.A., 176 Misc. 2d 21, 671 N.Y.S.2d 945, 948 (Sup. Ct. N.Y. Cty. 1998).

[238] *Compare* Stone & Webster, Inc. v. Triplefine Int'l Corp., 118 Fed. Appx. 546, 550 (2d Cir. 2004) (Article 31(1) and (3) of the ICC Rules ["costs for arbitration shall include . . . the reasonable legal and other costs incurred by the parties for the arbitration"] sufficient), *with* Asturiana De Zinc Mktg. v. LaSalle Rolling Mills, 20 F. Supp. 2d 670, 675 (S.D.N.Y. 1998) (AAA Commercial Rule 43 ["arbitrator may grant any remedy or relief that the arbitrator deems just and equitable"] insufficient).

[239] ICC Rules, art. 17(1) ("In the absence of any such agreement, the Arbitral Tribunal shall apply the *rules of law* which it determines to be appropriate.") (emphasis added); LCIA Rules, art. 22(3) ("If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) *or rules of law* which it considers appropriate.") (emphasis added); ICDR Rules, art. 28 ("Failing such a designation by the parties, the tribunal shall apply such law(s) *or rules of law* as it determines to be appropriate.").

[240] *Cf. Cubic Defense*, 29 F. Supp. 2d at 1173 (refusing to deny enforcement on the basis of Art. V(1)(c) UN Convention [excess of terms of submission] because of the tribunal's reference to the UNIDROIT Principles since one of the issues to be decided according to the submission agreement was whether "general principles of international law" would apply). *See also* Symeonides, *supra* note 6, at 213.

Impact of Works of International Organizations

The influence of the works of international organizations on the application of uniform law in the context of arbitration is, of course, most visible regarding the uniform law on arbitration itself. With the ratification of the UN Convention and the Inter-American Convention, and with the adoption of the UNCITRAL Model Law at state level,[241] the works of UNCITRAL and the OAS Specialized Conference on Private International Law (CIDIP) have a direct impact on aligning the U.S. with global and regional uniform law on arbitration.

As elaborated in more detail above, prospects for the U.S. legislator to reform the FAA and enact the UNCITRAL Model Law are rather uncertain.[242] Although it is accepted that any reform would have to take into consideration the Model Law, a wholesale import seems rather unlikely in view of the pride taken by U.S. lawyers in their rich experience with arbitration.[243]

Otherwise, the impact of the works of international organizations on U.S. case law is hardly visible. In one rare case, a court has turned to the UNCITRAL Model Law as the best restatement of internationally accepted rules on arbitration in order to determine a rule under U.S. law.[244] The question at stake was the degree to which courts could review the arbitrator's decision on the existence of its own jurisdiction when the parties had conferred such power to the arbitrator (through reference to the CIETAC Rules). The full review of such an arbitral finding had already been established for domestic cases in the Supreme Court's 1995 ruling in *First Options*.[245] The Third Circuit rebutted the argument that such in-depth scrutiny could not apply to genuinely international cases. In doing so, it referred both to German law and to the moderate *competence-competence* solution of the Model Law (which Germany adopted in 1998 and thereby abandoned its radical acceptance of total *Kompetenz-Kompetenz*) allowing judicial review on this point. The court then found that "[i]nternational norms of competence-competence are therefore not inconsistent with the Supreme Court's holding in *First Options*, at

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241 *Supra* text accompanying notes 39-42.

242 *Supra* text accompanying notes 56-64.

243 *Cf.* Joseph D. Becker, *Fixing the Federal Arbitration Act by the Millennium*, 8 AM. REV. INT'L ARB. 75, 75 (1997) (UNCITRAL Model Law as "an *ersatz* statute divorced from the rich and distinctively American federal experience with arbitration."); Park, *supra* note 23, at 77-78 ("Any amendment of the Federal Arbitration Act must take account of home-grown arbitration concerns and precedents. Part of the peculiar U.S. genius has been our ability to adapt (rather than adopt) inventions from abroad.").

244 *China Minmetals*, 334 F.3d at 274.

245 514 U.S. at 943.

least insofar as the holding is applied in a case where, as here, the party resisting enforcement alleges that the contract on which arbitral jurisdiction was founded is and always has been void," and held that the rule of *First Options* also applied in the context of international arbitration, especially where the lack of an arbitration agreement (such as because of forgery in the case at hand) is alleged under Article V of the UN Convention.

Regarding areas of uniform law other than arbitral procedure, it is difficult to measure the influence of works international organizations on U.S. arbitration law or on awards that have some effect in the U.S. As mentioned above, only relatively few U.S. decisions relate to international awards that are based on some kind of uniform substantive law[246]—with the exception of the larger number of cases involving INCOTERMS of the International Chamber of Commerce.[247] However, this picture should change in the future due to the U.S. courts strong pro-arbitration bias and the limited review of arbitral awards. These conditions provide a fertile ground for uniform substantive law to grow into a realistic alternative for U.S. parties (or rather their lawyers) who cannot impose U.S. law as the governing law, but do not want to see their contract governed by foreign law either. Neutral uniform law elaborated by international organizations, especially the UNIDROIT Principles, offers an increasingly attractive and practicable compromise for such situations. It can be expected that such a truly 'transnational' uniform law will increasingly govern international transactions involving U.S. parties, at least to the degree that lawyers become more familiar and comfortable with this new generation of uniform law.[248]

Impact of Foreign Court Decisions or Legislation

As mentioned above,[249] U.S. courts are particularly wary of accepting comparative arguments based on foreign doctrine, case law, or legislation. With regard to the interpretation of uniform law, few cases related to arbitration are known and have already been discussed. It seems safe to

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246 *See supra* text accompagnying notes 223-225.

247 *See supra* note 226.

248 For a contribution to making uniform transnational law more accessible, transparent, predictable, and thus reliable, see A COMMENTARY ON THE UNIDROIT PRINCIPLES ON INTERNATIONAL COMMMERCIAL CONTRACTS (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009) (The UNIDROIT Principles are analyzed and explained from a comparative perspective with the aim of allowing practitioners and students to get more familiar with them and enhancing their academic discussion and solidification).

249 *See supra* text accompanying notes 229-232.

confirm that "while a comparative approach to treaty interpretation is not unknown to American courts, it is far from firmly established or routinely adopted either."[250] It is doubtful that this will change significantly in the near future.

CONCLUSIONS

Currently, the FAA is still the main statutory law concerning international commercial arbitration in the United States. UNCITRAL has not been adopted on a federal level, but several states have adopted UNCITRAL in whole in an effort to create a more uniform arbitration system and to attract business. Because of these state statutes, there is an ongoing debate among commentators regarding whether the federal government should adopt UNCITRAL to preempt all state laws.

Arbitral opinions and awards are essentially private unless the parties agree to publication, with the exception of unofficial modes of publication. The United States is a stare decisis country in terms of judicial litigation and there are many reasons for applying this doctrine to arbitration. Arbitrators do not mechanically apply the doctrine, but it is important to promote predictability and stability of the law. Issue preclusion, similarly, is not strictly applied in arbitration.

Under the pro-arbitration policy of the FAA and the decisions by the Supreme Court in *Volt* and *Mastrobuono*, the general rule is that when parties agree to a state statute regarding international commercial arbitration or choose UNCITRAL, those provisions will be enforced. An arbitration agreement is contractual and therefore the law chosen by the parties will prevail over any FAA preemption. When parties fail to agree to a choice of law clause, the FAA applies and will preempt state laws where there is direct conflict or a conflict with the FAA's pro-arbitration policy.

In principle, judicial review of arbitral awards is limited to the narrow grounds enumerated in the FAA or in the New York or Inter-American Convention, which focus essentially on the respect for due process in arbitration. Review on the merits of arbitral awards should be restricted to cases in which enforcement of an award would violate public policy. However, most courts still recognize an additional ground under common law that supposedly allows vacating awards made

[250] Reimann, *supra* note 233, at 379.

in “manifest disregard of the law,” the scope of which is far from clear. Furthermore, as the *quid pro quo* for giving up its former interpretation of public policy as restricting arbitrability, the Supreme Court has affirmed the possibility of a so called “second look” at arbitral awards where arbitrators have been entrusted claims based on statutes that implement public policy.

The impact of arbitral case law and practice on U.S. legislation and case law is rather marginal. Arbitral decisions based on foreign law as well as foreign court decisions treating such ‘uniform law award’ are of very little, if any, relevance for the advancement of the role of uniform law in U.S. legal practice. The extremely sparse information that is available on arbitrations involving uniform law—other than arbitrations governed by the UN Convention, the Inter-American Convention or state laws enacting the UNCITRAL Model Law—does not allow one to estimate the degree to which arbitration enhances the effect of uniform law in the U.S. It is only possible to speculate that there is already a relevant number of such arbitrations. However, given the favorable framework that U.S. arbitration law provides for the application of uniform law in the context of arbitration, it can be expected that the role of commercial arbitration in making the application of transnational uniform law a reality in U.S. legal practice will grow significantly in the future.