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I. CHAPTER 1: INTRODUCTION TO INTERNATIONAL ARBITRATION

The rise of globalization has allowed both U.S. and international companies to access new markets to buy and sell their products and services. With these increased opportunities come increased risks, as commercial entities do business in jurisdictions with unfamiliar laws or customs. Many of these entities increasingly are seeking to reduce the risks of international litigation by opting to resolve their disputes through international arbitration and other forms of dispute resolution.

Companies involved in domestic arbitrations are likely familiar with many of the concepts explored in this guide. However, international arbitration poses unique challenges not faced in domestic arbitrations. First, parties to a domestic arbitration are less likely to encounter disputes over the location of the arbitration, the language of the proceedings, or the law to be applied to the dispute. Parties engaged in a domestic arbitration are also less likely to encounter the problem of cross-border discovery, which may require the assistance of the foreign government where the evidence or witnesses are located. A domestic arbitration is also likely to be conducted by attorneys with similar attitudes toward the legal process. By contrast, parties engaged in an international dispute may come from vastly different legal cultures and may find little common ground as to how the dispute should be resolved.

This introductory chapter will begin by examining the foundational documents in the practice of international arbitration. It will then discuss reasons why parties may choose to resolve their disputes through international arbitration. Finally, this chapter will provide a brief examination of the most prominent institutions involved in international arbitration.

A. The History of International Arbitration

International arbitration is a globalized form of dispute resolution based on the principle that parties can best resolve disputes through a flexible, private dispute resolution mechanism rather than litigating in national courts. International arbitration grew out an effort in the business community to create neutral forums in which parties could resolve international commercial disputes. One of the most prominent modern day arbitration institutions, the London Centre for International Arbitration (the “LCIA”), originated approximately 130 years ago. In 1883, the Court of Common Council of the City of London created a committee to establish a tribunal for the arbitration of both domestic and international disputes arising in London. Another prominent institution, the International Chamber of Commerce (the “ICC”), was created in 1919 to promote global trade and investment in the aftermath of World War I. The ICC created the Court of Arbitration in 1923 to ensure that parties engaged in global business resolve disputes through a neutral institution.

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3 Id.
International arbitration also grew in prominence with the support of the United Nations and UN-affiliated entities. The three most important efforts that the United Nations has undertaken are:

- the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), which created a set of rules for enforcing agreements to arbitrate and arbitral awards,

- the United Nations Commission on International Trade (“UNCITRAL”) arbitration rules, which provide parties with a set of straightforward rules that they can employ in conducting international arbitrations, and

- the UNCITRAL Model Law on International Commercial Arbitration (the “UNCITRAL Model Law”), which provides a model national law that countries can adopt to harmonize the practice of international arbitration globally.

The New York Convention, adopted in 1958, had two principal effects on international arbitration. First, it ensured that parties could enforce agreements to arbitrate in signatory states. Second, it ensured that a prevailing party could enforce an arbitral award in a signatory state. Currently, over 145 states have adopted the Convention. This system has enhanced the prevalence of international arbitration because parties can form arbitral agreements with the understanding that they will be able to compel arbitration if necessary, and can obtain the enforcement of the arbitral panel’s award.

In 1976, UNCITRAL created a set of model rules that parties could apply in international arbitrations. These rules are particularly helpful when parties engage in ad-hoc arbitration. As the UNCITRAL rules provide a default option for parties engaged in arbitration, parties are free to contract around them. UNCITRAL also has created a model arbitration clause that parties can include in their contracts to ensure that the UNCITRAL Rules will apply in a future dispute.

In 1985, UNCITRAL created a model law on international arbitration. The UNCITRAL Model Law was intended to standardize national law pertaining to international arbitrations. The UNCITRAL Model Law does not purport to regulate arbitral disputes that are purely domestic. Additionally, the Model law only applies to arbitrations that are commercial in

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6 Id. at art. 3.
9 Id. at art. 1(1).
11 Id. at art. 1(3).
Therefore, the model law does not apply to non-commercial arbitrations, such as boundary disputes between states. Many nations, including Australia, India, South Korea, Russia, Spain, and several U.S. states, including Florida, Illinois, and California have enacted legislation based on the model law. Nations that have enacted the model law send a strong signal to contracting parties that they strongly support international arbitration. The model law pertains only to the national law governing arbitration – not the substantive law that will be used to determine whether a party is entitled to relief in a commercial dispute.

B. Other Forms of International Alternative Dispute Resolution

In addition to arbitration, other forms of alternative dispute resolution are prominent in the international arena. Some of the leading ADR devices are briefly discussed below.

International mediation generally involves a non-binding, confidential determination by a third-party decision-maker. Mediation is generally flexible, as parties have control over the rules that will apply to the proceeding. The role of the mediator is to help facilitate settlement. Parties generally submit relevant documents to the mediator to assist the mediator in evaluating the validity of the claims. The mediator may also request that the parties provide memoranda concerning the issues in dispute. There is a premium placed on confidentiality, in part, because the parties involved in a mediation hope to resolve the dispute before it grows into a larger conflict that may attract additional attention. The mediator may recommend a particular settlement or work with the parties to negotiate an acceptable settlement amount. The major international arbitral institutions also have structured international mediation programs, and many parties choose to submit the disputes to mediation instead of arbitration.

International mediation offers certain advantages. First, parties can seek to resolve a dispute without the time and cost associated with arbitration. They also can opt to air their dispute in a non-confrontational setting. This allows parties to examine the strength of their case

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12 Id. at art. 1(1).
14 See UNICTRAL Model Law, art. 28.
15 See AAA-ICDR International Mediation Rules, art. 1, http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_002008&_afrLoop=127556937912009&_afrWindowMode=0&_afrWindowId=194b04embr_1%40%3F_afrWindowId%3D194b04embr_1%26_afrLoop%3D127556937912009%26doc%3DADRSTG_002008%26_afrWindowMode%3D0%26_adf.ctrl-state%3D194b04embr_53 (last visited Nov. 15, 2012) (“The parties by mutual agreement may vary any part of these Rules including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.”).
16 Id. at art. 7(d).
17 Id. at art. 7(c).
18 Id.
19 See id. at art. 7(d), 7(e).
20 See e.g., AAA-ICDR International Mediation Rules.
based on the input received from the mediator. Finally, parties can walk away if they are dissatisfied with the mediator’s recommendation.

Of course, mediation is not without problems. As noted, mediation is non-binding and the mediator has no ability to compel the parties to take steps to resolve the dispute. Mediation is unlikely to be successful if the parties hold starkly different positions regarding what constitutes an appropriate settlement. If mediation is unsuccessful, parties can choose to resolve the dispute through judicial proceedings or arbitration.21

Parties also can engage in mini-trials to resolve international disputes.22 Under this approach, parties submit written briefs and present evidence to a panel that assists the parties in reaching a settlement. The goal is to allow the parties to present their evidence in a limited adversarial proceeding. Under the American Arbitration Association (the “AAA”) procedures, a neutral chair or panel adjudicates the dispute along with senior management from both parties,23 and works with the parties to reach a settlement.24 The senior management on the panel is able to obtain more information about the dispute and to see the strengths and weaknesses of both positions.25 If the parties cannot reach a settlement, they can either abandon the proceedings or submit the dispute to another form of alternative dispute resolution, such as arbitration.26 Thus, mini-trials have the advantage of allowing both parties to evaluate the strength of each side without the time and cost of a full-scale arbitration.

Another form of alternative dispute resolution is conciliation.27 In a conciliation, the parties use a third party to meet separately with each side to try to resolve the dispute.28 The conciliator focuses on reducing the tension and acrimony that accompanies a commercial dispute. The conciliator may request additional information or evidence from the parties.29 The conciliator can directly propose a settlement to the parties in a manner that differs from mediation, where the mediator attempts to work with the parties to formulate a reasonable settlement.30 However, a conciliator cannot bind the parties to a settlement. Therefore, conciliation is often employed in situations where the relations between the two parties have worsened, but both parties prefer to settle the dispute without formal legal proceedings.

21 See e.g., LCIA International Mediation Rules, art. 9 (“Unless they have agreed otherwise, and notwithstanding the mediation, the parties may initiate or continue any arbitration or judicial proceedings in respect of the dispute which is the subject of the mediation.”)
24 Id.
25 Id.
26 Id.
27 See e.g, UNICTRAL Conciliation Rules.
28 See id. at art. 7.
29 See id. at art. 5.
30 Id. at art. 7(4).
C. Power and Discretion of Arbitral Panel

Arbitrators retain substantial discretion over the arbitral process. The panel retains the ability to take steps that are necessary to ensure an equitable outcome in the dispute. For example, under the International Chamber of Commerce Arbitration Rules, the panel retains the ability to enact interim measures such as ordering a party to preserve evidence. The panel may also request that additional evidence or witnesses be presented to the panel. For example, the International Bar Association (the “IBA”) Rules of Evidence, which are commonly employed in international arbitration, grants the panel the ability to appoint an expert witness if it believes such expert will help to resolve the dispute.

Of course, the arbitration panel also has discretion to resolve the substantive disputes in question. Unlike an American court, which may apply the rules of evidence in a formulaic manner to exclude certain evidence, arbitrators generally attempt to ensure a reasonable outcome that resolves the dispute in an equitable manner. This is especially important if the parties have a long-standing commercial relationship that can continue despite the present dispute. Thus, arbitrators are unlikely to resolve the dispute on a technicality or by interpreting the substantive law in a manner that runs contrary to the general commercial practice involved. Parties often consider selecting an arbitrator who is an expert in a specific industry, because such expertise may help the arbitrator understand the nature of the dispute and how it can be resolved.

Of course, the power of the arbitral panel is limited to the parties involved in the arbitration itself. For example, the panel has no power to compel national court systems to assist in the arbitration process. Additionally, the panel has no power over third parties, which limits the panel’s ability to resolve multiparty disputes. The arbitration panel has the ability to issue a third-party subpoena, but has no corresponding ability to compel a third-party to abide by such request without the assistance of a national court system.

D. Reasons for Preferring International Arbitration

There are several important reasons why parties choose to resolve their disputes through international arbitration. This section briefly highlights the advantages of international arbitration, which are explored in greater depth throughout the guide.

1. Neutral Forum

As compared to traditional cross-border litigation, international arbitration provides a neutral forum for parties to resolve their commercial disputes. Contracting parties can choose the seat (location) of the arbitration and the rules that will govern the dispute. By contrast, if a dispute is resolved by litigation, a defendant may be forced to litigate in the state of the plaintiff’s choosing, and could even be subject to biased legal proceedings. Additionally, the litigant may have less experience with the foreign legal system that governs the dispute. An

32 See e.g., IBA Rules on the Taking of Evidence in International Arbitration (2010), art. 6(1).
agreement to arbitrate reduces such uncertainty and ensures that each party has a role in selecting the applicable law and the arbitration panel itself.

2. Discovery

The rise of expansive discovery in civil litigation is another reason that many parties prefer international arbitration. In the United States, state and federal courts offer parties liberal discovery. The rise of e-discovery has exacerbated this trend, as parties must retain and produce large collections of electronic data.

International arbitration has historically been characterized by limited discovery. While depositions can occur by agreement of the parties, they are comparatively less common in international arbitration than in litigation. Document requests in international arbitration should be narrowly tailored to seek evidence relevant to the dispute at hand. This is in contrast to the practice of many attorneys in civil law nations, who draft broad discovery requests in the hope that they find anything relevant to support their case. Under the IBA Rules on the Taking of Evidence in International Arbitration (the “IBA Rules of Evidence”), a request to produce documents must provide a description of each document requested and a statement as to why each document is relevant to the dispute. Upon objection of a party to a request to produce, the arbitral panel has the discretion to determine whether a particular request is unnecessarily broad or unnecessary. Nevertheless, despite these constraints, the trend in international arbitration is toward more expansive discovery, which has lead several commentators to argue that international arbitration now has more expansive discovery than the narrow discovery allowed in many civil law nations.

International arbitrations often involve cross-border discovery. Documents may be located outside of the seat of arbitration, and a party may refuse to produce such evidence. If necessary, parties can compel discovery through the assistance of national courts. For example, under 28 U.S.C. §1782(a), parties can seek the assistance of the U.S. District Court where the evidence is located in order to compel the production of such evidence. Thus, discovery disputes in international arbitration may require additional litigation in national courts.

34 IBA Rules of Evidence, art. 3(3).
35 Id.
36 Id. at art. 3(7).
38 See In re Roz Trading, Ltd., 469 F.Supp.2d 1221, 1228 (N.D. Ga. 2006) (holding that §1782 applies to international arbitrations). For an-depth discussion of this subject, see infra Chapter 10.
39 In re Roz Trading, 469 F.Supp.2d at 1228.
3. **Confidentiality**

Confidentiality is a key reason that many parties choose to resolve their disputes through international arbitration. Courtroom litigation can lead to negative news coverage. This in turn, can damage a business’s reputation. By engaging in a confidential arbitration, parties can attempt to avoid the release of such details to the public. This can be accomplished via a confidentiality provision in the arbitral clause itself or in a post-dispute agreement. While a confidential arbitration generally allows the parties to avoid the public disclosure of proprietary or other sensitive information, it may not prevent the disclosure of more general information such as the existence of the dispute itself because publicly traded corporations must disclose material disputes to investors. Further, if a party seeks to obtain the recognition or enforcement of an arbitral award in a national court system, such a proceeding would necessarily compromise at least some of the confidentiality of the arbitration, including the amount of the award.

4. **Non-Precedential Judgment**

Parties may also choose to arbitrate their disputes in order to avoid establishing binding precedent. If a party engages in certain commercial practices, it may be concerned that an adverse court judgment will affect future litigation involving the same legal question. The arbitration process, in contrast, gives a party the opportunity to examine the strength or weakness of a claim, and to adjust their business practices in order to prevent future disputes over the same issue.\(^{40}\)

5. **Flexibility**

Flexibility is another reason that parties select international arbitration over litigation. Arbitral rules operate as default rules. They provide parties a set of guidelines that allow for a straightforward approach to resolving an international dispute. However, parties can (and do) contract around these default rules based on the unique circumstances of each conflict. For example, the IBA Rules of Evidence are often applied to adjudicate evidentiary disputes in international arbitration. The preamble to the Rules states:

> Parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part, to govern arbitration proceedings, or they may vary them or use them as guidelines in developing their own procedures. The Rules are not intended to limit the flexibility that is inherent in, and an advantage of, international arbitration, and Parties and Arbitral Tribunals are free to adapt them to the particular circumstances of each dispute.\(^{41}\)

This flexibility allows a party to assert input into the arbitral process itself – potentially a major advantage. Below is a brief overview of several of the critical issues that parties face in

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\(^{40}\) See David Hechler, *We Can Work It Out: An In-House Group Pushes for Reform in International Arbitration*, Corporate Counsel 18, Feb. 1, 2010 (noting that in-house counsel re-examine their contracts based on the results of international arbitration).

\(^{41}\) IBA Rules of Evidence, Preamble (2) (2010).
the arbitral process: the selection of the arbitral forum, the seat of arbitration, the language of the proceedings, the choice of law, and the selection of the arbitral panel.

**Selection of the Arbitral Forum:** A party involved in an international arbitration faces an important decision in selecting the arbitral forum. The parties can include the arbitral forum in the arbitral clause itself or they can designate a specific forum after the dispute has arisen. The parties can select a specific institution or they can agree to an ad-hoc arbitration using a specific arbitrator (or arbitrators) and a set of arbitral rules. The selection of a specific arbitral forum or ad-hoc panel allows parties the ability to avoid litigating in courts that could prove hostile to their interests and can prevent parallel proceedings whereby litigation is initiated in numerous countries.

**Seat of Arbitration:** The location of the arbitration is another important consideration. If the arbitration agreement does not provide for the seat of arbitration, the parties should examine whether the applicable rules provide a default location. For example, the default seat of the London Court of International Arbitration is, unsurprisingly, London. Additionally, the panel may retain the right to designate its own location. The seat of arbitration is critical because a party may seek the assistance of the national court system, and the ability to obtain such assistance will turn on the national law of the seat of arbitration. Additionally, parties should examine whether the host state allows an arbitral award to be appealed. The rise of the UNCITRAL Model Law and the widespread adoption of the New York Convention have ensured that many states have similar national laws that govern international arbitration. Thus, parties can reduce uncertainty by selecting a seat that has a strong bias in favor of international arbitration, and a national court system that will provide support, if necessary, as the arbitration proceeds.

**Language of the Proceedings:** The language of the arbitral proceedings is generally determined independently from the seat of the arbitration, and is usually specified in the arbitral clause. The language of the proceedings is important because it affects how evidence will be presented to the tribunal. If a witness speaks a different language than the language of the proceeding, the party presenting the evidence will generally bear the cost of translation. If evidence includes documents in different languages, the documents may have to be translated to the language governing the arbitration. The major arbitral institutions generally conduct proceedings in numerous languages.

**Choice of Law:** Parties have the ability to determine the substantive law of the dispute. Choice of law provisions are not unique to international arbitration, as such clauses are found in

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43 ICDR International Arbitration Rules, art. 13(1).
45 See e.g., ICDR, About the ICDR, http://www.adr.org/about_icdr (last visited Nov. 15, 2012) (noting that the ICDR has case managers who are fluent in 13 languages). 

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many contracts. However, arbitration allows parties to select arbitrators that are experts in the substantive law that will apply to the dispute. For example, parties engaged in a dispute governed by Delaware law can select arbitrators who are well-versed in the corporate law of that state.

The procedural rules that govern the arbitration proceeding will generally be the arbitral rules of the arbitral institution selection by the parties. However, parties may still retain some control over the procedural rules that will govern the dispute by contracting around the default rules of the arbitral institution. Thus, parties should include language regarding both the substantive law and the procedural rules that govern an arbitral dispute in the contract or post-dispute agreement.

**Selection of the Arbitral Panel:** The ability to select the arbitrator or arbitrators adjudicating the dispute is one of the major advantages to international arbitration. Parties often select arbitrators based on their expertise in a specific area of law or the subject matter of the dispute. The arbitral panel is generally made up of one or three arbitrators. Unless the parties determine an alternative approach for selecting the panel, the arbitrations are chosen in accordance with the arbitration rules of the institution conducting the arbitration. Article 10 of the UNCITRAL Model Law states that if there is no agreement to the contrary, three arbitrators shall be the default total for an arbitral panel. However, arbitrations can use either one or three arbitrators, and there are several different methods for selecting the panel. For example, under the SCC rules, each side selects an arbitrator, and the SCC selects the third arbitrator.

6. **Finality**

International arbitration offers parties the ability to obtain finality in their dispute in a manner that is distinct from ordinary litigation. The two most important principles that ensure finality in international arbitration are: (1) the lack of appeals, and (2) the enforceability of awards. Parties cannot ordinarily appeal an arbitration judgment. After an award is issued, parties can request that the panel clarify the arbitral award. A party may request such a

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46 See Duncan Mackay and Kathleen Bryan, *Ad Hoc Arbitration Keeps Costs Down*, Nat’l J. (Nov. 16, 2009) (Col. 1) (observing that in-house counsel and business representatives involved in the dispute prefer to have arbitrators who are experts in the subject-matter of the dispute).

47 UNCITRAL Model Law, art. 10. However, other institutions believe that a single arbitrator should be the default option. For example, Article 5 of the AAA-ICDR rules states, “If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case.”


49 See e.g., SCC Arbitration Rules, art. 41(1).
clarification in order to obtain additional detail concerning the award or to correct a typographical error.\(^50\)

However, some parties choose to include contractual clauses that allow a losing party to appeal the judgment in national courts.\(^51\) The enforceability of such clause will turn on the national law of the state where judicial review is sought. In *Hall Street Associates v. Mattel*, the U.S. Supreme Court held that a clause that grants judicial review of an arbitration award is impermissible in certain instances.\(^52\) The Court held that the only grounds for vacating or modifying an arbitration award are the specific justifications laid out in the §§10 and 11 of the Federal Arbitration Act (the “FAA”).\(^53\) This ruling affects international arbitrations conducted in the United States because a losing party in such a proceeding can attempt to have the award vacated or modified under the FAA.\(^54\) If a party makes such a challenge, the reviewing court can only vacate or modify the award based on the grounds outlined in the FAA.\(^55\)

An arbitral award is also easier to enforce than an ordinary court judgment. The New York Convention has a strong pro-enforcement bias, and most nations have incorporated the Convention into their national legal systems. Because the Convention provides only narrow grounds for refusing to enforce arbitration awards, nations that have adopted the Convention generally enforce awards. Section V of the Convention offers very limited defenses to

\(^50\) See *id.* (“Within 30 days of receiving an award, a party may, upon notice to the other party, request that the Arbitral Tribunal correct any clerical, typographical, or computational errors in the award, or private an interpretation of a specific point or part of the award. If the Arbitral Tribunal considers the request justified, it shall make the correction or provide the interpretation within 30 days of receiving the request.”).

\(^51\) See *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 579 (2008) (the arbitral agreement in question stated, “[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: (i) where the arbitrator's findings of facts are not supported by substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous.”)

\(^52\) *Id.* at 586.

\(^53\) *Id.* at 582 n. 4. The Court noted that, under Title 9 U.S.C. § 10(a) (2000 ed., Supp. V), a reviewing court may vacate an arbitral award: "(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."

Title 9 U.S.C. § 11 (2000 ed.) a reviewing court may modify or correct an award:
"(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award. "(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted. "(c) Where the award is imperfect in matter of form not affecting the merits of the controversy. "The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

\(^54\) *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F. 3d 15, 21 (2d Cir. 1997).

\(^55\) *Id.* at 587.
enforcement, such as the lack of proper notice of the appointment of the arbitrator or the setting aside of an award by the competent authority of the country in which the award was made.\textsuperscript{56} Courts can also refuse to recognize and enforce an arbitral award if the subject matter of the award is not enforceable by arbitration under the law of the country where enforcement is sought or if enforcement would be contrary to public policy.\textsuperscript{57} For example, the Second Circuit has reversed the enforcement of an arbitration award where the panel denied one party “the opportunity to present its claim in a meaningful manner.”\textsuperscript{58} If the party opposing enforcement cannot prevail on one of these grounds, the award will be enforced. A full discussion of defenses to enforcement is found in Chapter 15.

7. Speed

International arbitration often allows parties to resolve disputes in a shorter time frame than litigation. First, international arbitrations generally have a shorter time frame for discovery than is provided in many courts. Further, international arbitration provides a clear forum for dispute resolution, eliminating the need for numerous lawsuits in different forums. Additionally, as previously noted, arbitration awards are not ordinarily appealable. Parties can eliminate months, or even years of additional litigation if they do not need to litigate appeals.

Speed advantages are not always realized. Commentators have noted that international arbitrations are becoming increasingly lengthy as commercial disputes grow in size and scope.\textsuperscript{59} In civil law countries, where discovery and briefing are curtailed, arbitrations may provide no speed advantage.\textsuperscript{60} Additionally, some arbitrators have delayed completing hearings or issuing awards, a problem that could arise when the panel itself fails to commit sufficient time to the arbitral process.\textsuperscript{61}

8. Cost

Some businesses prefer arbitration, when it is available, over litigation as a means to reduce costs. The cost of conducting the arbitration itself may be substantial, as the parties must pay filing fees to the arbitration institution and the hourly rates of the arbitrators are often similar to the hourly rate of the parties’ legal counsel. However, international arbitration offers some unique cost saving opportunities that make it an attractive method for resolving commercial disputes. Corporations have become increasingly concerned about juries issuing extraordinarily large judgments that will have a material impact on their operations. Parties can reduce potential costs by selecting arbitrators who are experts in the subject matter of the dispute and who can

\textsuperscript{56} New York Convention, art. V(1).
\textsuperscript{57} Id. at art. V(2).
\textsuperscript{58} Iran Aircraft Industries v. Avco Corp., 980 F. 2d 141,146 (2d Cir. 1992).
\textsuperscript{59} See Seidenberg, supra note 37 (discussing how international arbitration is beginning to resemble litigation as cases become more complex and require expansive discovery).
\textsuperscript{60} See Stromberg, supra note 33, 1363-1366 (examining how attorneys from civil law countries have had to adapt to more expansive discovery in international arbitration in recent years).
\textsuperscript{61} See Lawrence Newman and David Zaslowsky, Tribunal Efficiency in International Arbitration, N.Y. LAW. J. 3, May 27, 2010 (discussing the criticism of arbitrators and how tribunals can organize the arbitration process more efficiently).
employ their unique background or training to reach a reasonable damages award. Parties may also incorporate clauses in their contract requiring that the loser of the arbitration pay the prevailing party’s attorney’s fees and costs.\(^{62}\) Additionally, parties can reduce risk by contractually eliminating the ability of the panel to award certain types of damages, including punitive damages.

### E. Ad-Hoc Arbitration

An arbitration institution is a private organization that administers arbitrations according to formal rules and procedures. Many corporations choose to arbitrate their disputes in ad-hoc proceedings rather than through an arbitration institution. The chief benefit of an ad-hoc approach is that the parties will not have to pay fees for an institution to administer the arbitration. Ad-hoc arbitrations are sometimes concluded in less time than arbitrations conducted through an arbitration institution, such as the International Chamber of Commerce, because institutions have additional oversight and bureaucracy.\(^{63}\) Parties are free to select their own arbitrators who can administer the arbitral rules that are agreed upon by the parties. The UNCITRAL model arbitration rules are frequently adopted by parties engaged in ad-hoc arbitrations because these rules are well-known by arbitrators and provide straightforward procedural rules to govern the dispute. Another set of rules that parties may employ are the International Institute for Conflict Prevention & Resolution (the “CPR”) International Arbitration Rules. The CPR rules emphasize limited discovery and focus on reducing litigation costs.\(^{64}\) Parties are also free to create their own arbitral rules. Parties may also employ a specific set of rules (such as the UNCITRAL rules) and then supplement or amend the rules with their own specific guidelines regarding important issues, including discovery, appeals, or damages. However, as illustrated by *Hall Street Associates*, a court reviewing an award may not enforce every provision included in an arbitration agreement.

There are drawbacks to ad-hoc arbitration. First, the parties may have difficulty reaching an agreement regarding how the arbitration should proceed after the dispute has already arisen. Additionally, the parties need to determine which rules will apply. As noted, the parties can select the rules of an existing arbitral institution or create their own. However, an ad-hoc arbitrator may have less experience in administering certain rules as compared to an arbitrator that has served for an arbitral institution for an extended period of time.

Furthermore, ad-hoc arbitrations cannot rely on the assistance of an arbitration institution if such a need arises. Additionally, the parties must ensure that any ad-hoc proceedings operate

\(^{62}\) *See e.g.*, SCC Arbitration Rules, art. 44 (“Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.”)

\(^{63}\) *See Mackay & Bryan, supra* note 46, at 16 (observing that “[t]he average ICC Case takes approximately two years to be resolved, as opposed to less than one year for an ad hoc arbitration.”).

in accordance with the New York Convention or the award may not be enforceable. The
standardization of arbitrations through the major arbitral institutions helps to avoid such
problems, including possible non-enforcement.

F. Discussion of the Major Institutional Arbitral Regimes

The rise of international arbitration has lead to a corollary rise in the prominence of the
major global arbitration institutions. This section provides a brief discussion of the major
international institutions. The rules of each institution can be found in the Appendix.

International Chamber of Commerce: The International Chamber of Commerce is one
of the preeminent global institutions for dispute resolution. In 2009, 817 cases were filed in the
ICC involving parties from 128 different nations. The ICC offers a host of alternative disputes
resolution services, including arbitration mediation, and dispute boards. The ICC supervises
the arbitral process, but there are no restrictions on the seat or language of the arbitration, the
law of the arbitration, or the nationality of the arbitrators.

Parties that wish to commence arbitration before the ICC must file a request with the
ICC’s Secretariat, who transmits the request to the ICC’s Secretary General. The Secretary
General then refers the case to the Arbitral Panel itself. At the beginning of the arbitration, the
parties must fill out a form called the “terms of reference” that identifies preliminary matters,
including the issues in dispute and the place of arbitration. The Arbitral Panel conducts the
proceedings, and issues an award that is reviewed by the Court itself. If the court approves the
award, it is then transmitted to the parties. The ICC’s review of the panel’s award before the
award is issued to the parties is unique in international arbitration.

London Center for International Arbitration: The London Centre for International
Arbitration is a non-profit corporation and one of the preeminent global arbitration institutions.
The LCIA was the earliest arbitral institution, created in 1883. In 2008, 215 arbitration requests
were commenced in the LCIA. The LCIA rules prefer the appointment of a single arbitrator

visited Nov. 15, 2012).
68 See ICC, Request for Arbitration, http://iccwbo.org/Products-and-Services/Arbitration-and-
ADR/Arbitration/ICC-Arbitration-process/Request-for-Arbitration,-Answer-to-Request,-Emergency-
69 Id.
70 Id.
71 Id.
(last visited Nov. 15, 2012).
instead of a three-person panel.\textsuperscript{75} In the majority of cases that have been filed in the LCIA, English substantive law and English procedural law have been applied.\textsuperscript{76} The LCIA conducts arbitrations in many different areas of international commerce, including telecommunications, insurance, construction, and shipping.\textsuperscript{77} Approximately 90\% of arbitrations conducted by the LCIA occur in London, but 80\% of these do not involve parties from the United Kingdom.\textsuperscript{78} In 2010, the LCIA began hearing disputes in India through an independent subsidiary, LCIA India.\textsuperscript{79} The parent body in London does not directly manage the day to day affairs of LCIA India, but it can provide assistance if necessary.\textsuperscript{80}

\textbf{Stockholm Chamber of Commerce}: The Arbitration Institute of the SCC was established in 1917.\textsuperscript{81} The U.S. and the Soviet Union utilized the SCC to provide dispute resolution in East-West Trade disputes during the Cold War.\textsuperscript{82} In 2009, 215 cases were filed in the SCC.\textsuperscript{83} The most common types of disputes that were filed in 2009 included disputes involving supply agreements, service agreements, and share purchase agreement/company acquisitions.\textsuperscript{84} Approximately half the cases that are currently before the SCC involve a non-Swedish party.\textsuperscript{85}

\textbf{American Arbitration Association’s International Centre for Dispute Resolution}: The International Centre for Disputes Resolution (the “ICDR”) was created in 1996 to expand the American Arbitration Association’s ability to adjudicate international business disputes.\textsuperscript{86} The ICDR has offices in the United States, Europe, and Mexico.\textsuperscript{87} The ICDR is headquartered in New York City.\textsuperscript{88} Given its United States roots, the ICDR is a preferred venue for American companies engaged in international arbitration.\textsuperscript{89} In its short history, the ICDR has made a strong effort to become a more globalized organization through the creation of cooperative

\textsuperscript{75} See LCIA Arbitration Rules, art. 5.4 (“A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise, or unless the LCIA Court determines that in view of all the circumstances of the case a three-member tribunal is appropriate.”).

\textsuperscript{76} LCIA, Director General’s Report (Nov. 2009), supra note 73.


\textsuperscript{78} See The Bar of England and Wales, American Lawyer S3 (Oct. 2007).

\textsuperscript{79} Neha Chauhan, Fledgling London Court of International Arbitration hears first two cases in India, Legally India, available on Westlaw at 2010 WL 23534186 (Nov. 25, 2010).

\textsuperscript{80} Id.


\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id.

\textsuperscript{85} Id.

\textsuperscript{86} ICDR, About the Center for International Dispute Resolution, http://www.adr.org/about_icdr (last visited Nov. 15, 2012).

\textsuperscript{87} Id.

\textsuperscript{88} AAA-ICDR International Arbitration Rules, art. 1(c).

agreements with 62 arbitral institutions in 43 nations. The ICDR states that such “agreements enable arbitration cases to be filed and heard virtually anywhere in the world.”

The ICDR rules give the arbitral panel widespread discretion in determining the scope of discovery. Additionally, there is no specific seat for arbitration in the ICDR. The administrator of the arbitration may make the initial determination regarding the seat of arbitration, subject to the ability of the panel itself to determine the seat of arbitration.

**International Centre for Settlement of Investment Disputes:** The International Centre for Settlement of Investment Disputes (the “ICSID”) is a global institution that hears disputes between states and global investors. Foreign states are generally protected from suit by the doctrine of sovereign immunity. However as states have become increasingly engaged in commercial transactions with private parties, the need for a dispute resolution mechanism to resolve disputes between foreign governments and private parties grew in importance. Parties can voluntarily submit their dispute to ICSID, but once the process has been commenced, it cannot be withdrawn. ICSID’s case law has steadily increased in the last decade, with the rise of bilateral investment treaties and global trade. In fiscal year 2010, 27 new proceedings were filed in the ICSID – a 12% increase from fiscal year 2009.

**World Intellectual Property Organization:** The World Intellectual Property Organization (the “WIPO”) is an agency within the United Nations that was created to protect intellectual property at the global level. The WIPO Arbitration and Mediation Center was

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90 ICDR, *About the Centre for International Dispute Resolution*, supra note 86.
91 AAA-ICDR International Arbitration Rules, art. 19(2), 19(3). Article 19(2) states, “The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.” Article 19(3) states, “At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.
92 Id. at art. 13(1). Article 13(1) states, “If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration within 60 days after its constitution. All such determinations shall be made having regard for the contentions of the parties and the circumstances of the arbitration.”
94 ICSID Convention, art. 45(1) (“Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions”).
97 Id.
established in 1994 to provide alternative dispute resolution for cross-border international property disputes.97

Since its creation, the WIPO Center has administered over 220 mediation and arbitration disputes.98 Forty-four percent of the cases that have been filed pertain to patent disputes.99 The WIPO center has heard disputes regarding a host of intellectual property issues, including copyright, IT agreements, trademarks, and telecommunications-related agreements.100 WIPO mediation and arbitration proceedings take place in a number of different venues in the United States and several European states, inducing France, Germany, Ireland, Italy, the Netherlands, Switzerland, and the United Kingdom.101

G. Other Arbitral Organizations

There are numerous other institutions involved in the process of international arbitration. In the United States, there are several international arbitration institutions based in major commercial centers. For example, the Chicago International Dispute Resolution Association (the “CIDRA”) provides parties with access to arbitrators in the Chicago area, including experts in specific industries and areas of law.102 Europe also has many arbitral institutions that provide international arbitration and mediation services. Two prominent institutions are the European Court of Arbitration and the German Institute of Arbitration.103

As Asia has become a center for international trade and commerce, the importance of international arbitration has grown in the region. Two prominent institutions are the Hong Kong International Arbitration Centre (the “HKIAC”) and the Singapore International Arbitration Centre (the “SIAC”). The HKIAC handles both international and domestic arbitrations. In 2009, 309 international arbitration cases were filed in the HKIAC.104 The SIAC was created in 1991 to provide a forum for alternative dispute resolution in Asia.105 In 2009, 160 new cases were filed

99 Id.
100 Id.
101 Id.
Therefore, these two institutions are growing and are likely to be important institutions as Asia grows in global economic prominence.

* * *

This introduction has provided a brief explanation of why parties may choose to engage in international arbitration, and the benefits and drawbacks of this method of alternative dispute resolution. The chapters that follow provide a guide to the process of international arbitration, from the commencement of arbitration to the completion of the process and the enforcement of the arbitral award.

II. CHAPTER 2: ROLE OF NATIONAL LAW


Before an arbitration occurs, the panel must determine which rules will apply. This involves two key decisions. First, the panel must apply choice of law rules to determine the applicable substantive law. Second, the panel must determine which procedural rules will dictate the arbitral process.

1. Substantive Rules of Arbitration


Choice of law provisions in arbitration agreements generally should be honored. Nonetheless, arbitration clauses often do not indicate the substantive law to be applied. When the arbitration clause does not refer to a particular body of substantive law but the contract elsewhere contains a choice-of-law provision, it remains undetermined as to whether an arbitration panel must apply the indicated substantive law or choice of law rules. Often, a contract will designate the place in which the arbitration is to be held. While the chosen situs does not alone require the panel to apply the substantive local law of that place, the situs

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107 In re Smith Barney, Harris Upham & Co. v. Luckie, 647 N.E.2d 1308, 85 N.Y.2d 193, 201 (N.Y. 1995) ("parties are at liberty to include a choice of law provision in their agreement, and the parties’ choice will be honored unless the chosen law creates a conflict with the terms of, or policies underlying, the FAA."); UNIFORM ARBITRATION ACT, Prefatory Note (2000) ("The contractual election to proceed under state law instead of the FAA will be honored presuming that the state law is not antithetical to the pro-arbitration public policy of the FAA.").
109 Id. at § 30.5.
110 Id. at § 30.3.
election may provide some evidence of the parties’ intent to apply the same substantive law in the absence of an express choice-of-law provision.\textsuperscript{111}

In the United States, the Uniform Arbitration Act (the “UAA”), the FAA, and various state statutes are silent on how arbitrators ought to use substantive law to determine the issues presented.\textsuperscript{112} Similarly, none of the rules of any of the international arbitration agencies state a position on how the arbitrator must apply substantive law, if at all.\textsuperscript{113} In \textit{Mastrobuono v. Shearson Lehman Hutton}, 514 U.S. 52, the United States Supreme Court held that when an arbitration clause does not specify the substantive law, a general choice of law provision elsewhere in the contract does not restrict an arbitrator’s authority.\textsuperscript{114} Given the limited nature of judicial review of arbitration awards, a choice of law provision other than in the arbitration clause does not place any real limitations on the arbitrator to determine the case as he deems appropriate.\textsuperscript{115} Generally, however, Domke suggests that when parties refer to a governing substantive law, the arbitrator should apply the basic principles of contract construction with respect to the parties’ choice of substantive law.\textsuperscript{116}

b. \textbf{Determining Whether the FAA or State Law Applies}

In the U.S., the FAA applies to maritime transactions and to contracts evidencing transactions involving interstate or foreign commerce where the parties voluntarily entered into an arbitration agreement.\textsuperscript{117} The United States Supreme Court has held that, based on Congress’ authority under the Commerce Clause, the FAA constitutes a body of federal substantive law applicable by both state and federal courts.\textsuperscript{118} In diversity actions, the FAA preempts conflicting

\textsuperscript{111} Restatement (Second) of Conflicts of Laws § 218 cmt. b (2010) (“Provision by the parties that arbitration shall take place in a certain state may provide some evidence of an intention on their part that the local law of this state should govern the contract as a whole. This is true not only because the provision shows that the parties had this particular state in mind; it is also true because the parties must presumably have recognized that arbitrators sitting in that state would have a natural tendency to apply its local law.”).

\textsuperscript{112} 2 Domke on Commercial Arbitration at § 30.1.; see, \textit{e.g.}, Uniform Arbitration Act (2000); 9 U.S.C. § 1 et. seq. (2010).

\textsuperscript{113} 2 Domke on Commercial Arbitration at § 30.1.

\textsuperscript{114} \textit{Mastrobuono v. Shearson Lehman Hutton, Inc.}, 514 U.S. 52, 63-64 (1995).

\textsuperscript{115} 2 Domke on Commercial Arbitration at § 30.5.

\textsuperscript{116} \textit{Id.} at § 30.5.

\textsuperscript{117} 9 U.S.C. § 2 (2010).

state law. However, state law applies in diversity actions not falling under the FAA (i.e. suits not arising from maritime or commerce transactions).

There is a strong default presumption that the FAA, and not state law, supplies the substantive rules for arbitration in agreements involving commerce. However, parties may agree to state law rules for arbitration if they set forth contractually their intent to do so; a general choice-of-law clause within the arbitration clause will not suffice to change the presumption that the FAA arbitration rules apply. The parties’ agreement to utilize state law rules will be upheld even when state law rules for arbitration are inconsistent with the rules set forth in the FAA, so long as the state law rules do not create an express conflict with the terms of, or policies underlying, the FAA. This is because arbitration under the FAA is a matter of consent and not coercion, and parties are generally free to structure their arbitration agreements as they see fit.

It should be noted that the FAA does not confer jurisdiction on federal courts. Thus, for district courts to hear suits brought under the FAA, there must be an independent basis of jurisdiction, such as diversity of citizenship or a claim in admiralty. Otherwise, a lawsuit regarding arbitration must be brought in state court.

119 Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 272 (1995) (FAA pre-empts state law); Perry, 482 U.S. at 491 (in a diversity action, the FAA preempted an “unmistakably conflicting” state law).
120 Bernhardt v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 200, 203, 205 (1956) (state law applies in diversity action in which arbitration agreement did not involve a maritime transaction or evidence a transaction involving commerce).
121 2 Domke on Commercial Arbitration at § 30.1.
122 Id. at § 30.1; In re Smith Barney, 85 N.Y.2d at 201; UNIFORM ARBITRATION ACT, Prefatory Note (2000) (“a clearly expressed contractual agreement by the parties to an arbitration contract to conduct their arbitration under state law rules effectively trumps the preemptive effect of the FAA”).
123 Allied-Bruce Terminix Co., 513 U.S. at 272 (“state courts cannot apply state statutes that invalidate arbitration agreements”); In re Smith Barney, 85 N.Y.2d at 201, 203-4 (“In the absence of any express conflict between the provisions of the FAA and [State]’s arbitration law or some express congressional intent to occupy the entire field of arbitration in commercial disputes, the FAA will be found to preempt State law only to the extent that the State law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”); UNIFORM ARBITRATION ACT, Prefatory Note (2000) (“If the parties elect to govern their contractual arbitration mechanism by the law of a particular State and thereby limit the issues that they will arbitrate or the procedures under which the arbitration will be conducted, their bargain will be honored – as long as the state law principles invoked by the choice-of-law provision do not conflict with the FAA’s prime directive that agreements to arbitrate be enforced.”).
126 Id. at 25-6 (“Simply raising federal-law claims in the underlying arbitration is insufficient to supply this ‘independent basis.’”).
127 Id. at 26.
2. Procedural Rules of Arbitration

The parties to an arbitration agreement may also agree on the procedural rules of the arbitration.\(^\text{128}\) There are several ways in which parties can contractually provide for the arbitration procedure. These include reference to the rules of an agency or association that administers arbitration, reference to a situs of arbitration, or reference to a particular arbitrator.

When the parties’ arbitration agreement provides for dispute resolution under the rules of an agency or an association that administers arbitration, the procedural rules of that provider will be adopted.\(^\text{129}\) Reference to the rules of an agency or association that administers arbitration in arbitration clauses is common practice, and such a reference is deemed to incorporate the rules of that particular agency or association.\(^\text{130}\) The AAA is the leading agency for the administration of cases, from filing to closing.\(^\text{131}\) Its Commercial Arbitration Rules govern AAA arbitrations, including the conduct of parties, arbitrators, and the administering agency.\(^\text{132}\) Other well-known agencies include JAMS,\(^\text{133}\) which describes itself as the largest private alternative dispute resolution provider in the world, and the Financial Regulator Authority, Inc. (the “FINRA”), which operates the largest dispute resolution forum in the securities industry.\(^\text{134}\)

When the parties’ arbitration agreement provides for a situs of the arbitration, the procedural law relating to arbitration at that place will usually be applied.\(^\text{135}\) It is not unusual for an arbitration clause to state, for example, that “arbitration shall be held under [STATE] law,” or “arbitration proceedings to be held in accordance with the law of [STATE].”\(^\text{136}\) Such statements probably refer to the procedural statutory provisions of that state applicable to the arbitration and not to substantive law.\(^\text{137}\) Indeed, as noted above, it is unusual for arbitration clauses to contain a

\(^{128}\) 1 Domke on Commercial Arbitration § 8.23 (2010).
\(^{129}\) Id.
\(^{130}\) Id. at § 8.21.
\(^{131}\) AAA, About American Arbitration Association, http://www.adr.org/aaa/faces/s/about?_afrLoop=1281045944033269&_afrWindowMode=0&_afrWindowId=ak37t3yg_124#%40%3F_afrWindowId%3Dak37gt3yg_124%26_afrLoop%3D1281045944033269%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dak37gt3yg_172 (last visited Nov. 15, 2012).
\(^{132}\) AAA, Rules and Procedures, http://www.adr.org/aaa/faces/rules?_afrLoop=1281087302389306&_afrWindowMode=0&_afrWindowId=ak37gt3yg_194#%40%3F_afrWindowId%3Dak37gt3yg_194%26_afrLoop%3D1281087302389306%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dak37gt3yg_206 (last visited Nov. 15, 2012).
\(^{135}\) 2 Domke on Commercial Arbitration at § 30.3.
\(^{136}\) Id. at § 30.4.
\(^{137}\) Id.
reference to substantive law. The specified procedural rules provide a framework for the arbitration process, enforcement of the arbitration agreement, and the award.

When the parties’ arbitration agreement provides for an arbitrator, even when the situs is not expressly mentioned, that choice of arbitrator is often considered to also include the choice of forum, so that the procedural law of the arbitrator’s residence or the hearing location will be applied. For example, in the New York case of *Gilbert v. Burnstine*, 174 N.E. 706, a contract provided for arbitrators in London, and the court interpreted the contract as being governed by English law. The court said, “Defendant’s agreements without reservation to arbitrate in London according to the English statute necessarily implied a submission to the procedure whereby that law is there enforced.”

It should be noted there is no federal policy favoring any certain set of procedural rules. Instead, the federal policy is simply to ensure the enforceability of arbitration agreements, like all other contracts, according to their terms.

B. The New York Convention’s Treatment Of National Law

In the U.S., the New York Convention applies to arbitration awards where at least one of the parties to the arbitration is foreign. The Convention addresses the recognition and enforcement of both arbitration agreements and arbitration awards. Article I of the New York Convention states that it applies to arbitral awards “made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.” However, the New York Convention permits certain reservations related to Article I. Specifically, a party to the New York Convention may “declare” that it will apply the New York Convention: (1) “to the recognition and enforcement of awards made only in the territory of another Contracting State;” and (2) “only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”

In ratifying the New York Convention in the United States, the FAA provides:

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

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138 *Id.*
139 *Id.* at § 30.1.
140 *Id.* at § 30.3.
142 *Id.*
143 *Volt Info.*, 489 U.S. at 476.
144 *Nicor*, 292 F. Supp. 2d at 1371.
146 *Id.* at art. I(1).
147 *Id.* at art. I(3).
the [New York] Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.  

Article II of the New York Convention requires each contracting state to recognize “an agreement in writing” for submissions of existing disputes or disputes arising in the future. The courts of the contracting states, “when seized of an action in a manner in respect of which the parties have made an agreement” to arbitrate must “refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.” In the United States, this requirement, in connection with Section 206 of the FAA, which authorizes a court to direct arbitration “in accordance with the agreement at any place therein provided for, whether that place is within or without the United States,” has been interpreted as requiring a United States court to not only stay a suit pursuant to its arbitration clause but also to order its arbitration abroad.

C. National Arbitration Statutes

1. United States

   a. Federal Arbitration Act

   In 1925, Congress enacted the FAA as a means to “set forth the delicate relationship between the role of private arbitration and the federal courts.” The purpose of the FAA was to reverse longstanding judicial hostility toward arbitration agreements that had existed at English common law and had been adopted by American Courts.

   The FAA provides for arbitration in maritime transactions and in contracts evidencing transactions involving interstate or foreign commerce that contain an arbitration agreement entered into voluntarily by the parties. The FAA authorizes a court to stay the trial of any suit or proceeding “upon any issue referable to arbitration under an agreement in writing for such arbitration” until arbitration has been held, order that “arbitration proceed in the manner provided

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150 Id. at art. II(3).
153 Allied-Bruce Terminix Co., 513 U.S. at 270-71; Volt Info., 489 U.S. at 474; In re Smith Barney, 85 N.Y.2d at 200.
for in such agreement,” and, in some cases, designate and appoint an arbitrator.155 In *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, the United States Supreme Court held that the FAA extends to the full reach of Congress’ Commerce Clause powers.156 The FAA’s presumption in favor of arbitration “carries ‘special force’ when international commerce is involved, because the United States is also a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.”157

b. Relevant State Laws Governing Arbitration

The vast majority of U.S. states have developed policies favoring arbitration and have adopted “modern” arbitration statutes that provide for the enforcement of arbitration agreements to arbitrate both existing controversies and controversies that may arise in the future.158 “Modern” arbitration statutes are designed to encourage arbitration by making arbitration more efficient and by providing for arbitration through state legislation.159 Modern statutes often include the following components:

1. Irrevocability of any agreement to submit future disputes to arbitration;
2. Power of a party, pursuant to a court directive, to compel a recalcitrant party to proceed to arbitration;
3. Provision that any court action instituted in violation of an arbitration agreement may be stayed until arbitration in the agreed manner has taken place;
4. Authority of the court to appoint arbitrators and fill vacancies when the parties do not make the designation, or when arbitrators withdraw or become unable to serve during the arbitration;
5. Restrictions on the court’s freedom to review the findings of facts by the arbitrator and his application of the law; and
6. Specification on the grounds of which awards may be attacked for procedural defects, and of time limits for such challenges.160

Many modern statutes also set minimum standards for procedure and include rules for confirming or for invalidating arbitration awards.161 Further, many of these modern arbitration

155 Id. at §§ 3-5.
156 *Allied-Bruce Terminix Co.*, 513 U.S. at 277 (“the word ‘involving,’ like ‘affecting,’ signals an intent to exercise Congress’ commerce power to the full”).
159 1 Domke on Commercial Arbitration at § 7:1.
160 Id.
161 Id. at § 6:1.
statutes incorporate either the UAA or the Revised Uniform Arbitration Act (the “RUAA”).
Modern statutes based on the Uniform Acts provide for the arbitration of future disputes in a variety of contracts. For more information on the UAA and RUAA, see below.

“Modern” statutes have been enacted in all but three states - Alabama, Mississippi, and West Virginia; in those states, only existing controversies are covered. Nonetheless, Mississippi has adopted a “modern” approach to certain specific kinds of arbitration. The District of Columbia and Puerto Rico also have enacted “modern” arbitration statutes. In contrast, some state laws cover only existing controversies. In those situations, common-law arbitration is used to fill in the gap between the state arbitration statute that only covers existing disputes and future disputes. Common-law arbitration is characterized by a unilateral revocation rule, permitting one party to terminate arbitration at any time before the arbitrator renders an award.

To highlight the specifics of a few statutes, in Georgia, the Georgia Arbitration Code repealed common-law arbitration in its entirety and must be strictly construed. By contrast, in Pennsylvania, an agreement to arbitrate is presumed to be an agreement to arbitrate under the principles applicable to common-law arbitration unless the agreement is (1) in writing and (2) expressly provides for statutory arbitration. In Michigan, one court held that when the parties’ arbitration agreement did not comply with Michigan’s arbitration statute, they effectively

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162 UNIFORM ARBITRATION ACT, Prefatory Note (2000) (as of the time of the UAA amendment, forty-nine jurisdictions had arbitration statutes, thirty-five of those had adopted the UAA, and fourteen had adopted substantially similar legislation).
163 Id. at § 6(a) (“An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract”); see, e.g., NEV. REV. STAT. §§ 38.206 - 38.248 (West 2010); UTAH CODE ANN. §§ 78B-11-101 – 78B-11-131 (West 2010).
164 1 DOMKE ON COMMERCIAL ARBITRATION AT § 7:1; see, e.g., ALA. CODE § 6-6-1, et. seq. (West 2010); MISS. CODE ANN. § 11-15-1, et. seq. (West 2010); W. VA. CODE §55-10-1, et. seq. (West 2010).
165 MISS. CODE ANN. § 11-15-1, et. seq.
167 1 DOMKE ON COMMERCIAL ARBITRATION AT § 7:1; see, e.g., ALA. CODE § 6-6-1, et. seq.; MISS. CODE ANN. § 11-15-1, et. seq.; W. VA. CODE §55-10-1, et. seq.; P.R. LAWS ANN. tit. 32, §3201 (2010).
168 1 Domke on Commercial Arbitration at § 6:2.
169 Wold Architects and Eng’r v. Strat, 713 N.W.2d 750, 755 (Mich. 2006) (“What characterizes common-law arbitration is its unilateral revocation rule. This rule allows one party to terminate arbitration at any time before the arbitrator renders an award.”).
171 Jefferson Woodlands Partners v. Jefferson Hills Borough, 881 A.2d 44, 48 (Pa. Commw. Ct. 2005) (because agreement to arbitrate did not expressly provide for statutory arbitration, the matter is governed by the principles applicable to common law arbitration); 42 PA. CONS. STAT. ANN. § 7301, et. seq. (West 2010).
agreed to common-law arbitration. In Rhode Island, the arbitration statute has been interpreted as requiring the arbitration clause in primary insurance contracts to appear either immediately above or before the testimonium clause or the signatures of the parties in order to be binding. And in Illinois, the statute provides for mandatory arbitration of civil disputes under a specific amount in controversy. Not all states’ statutory requirements have been upheld in courts.

2. Other Relevant National Law

As mentioned above, many “modern” U.S. state statutes incorporate either the UAA or the RUAA. The UAA, promulgated in 1955, establishes a process for arbitration whereby a court is required to compel arbitration on the motion of one party and is prohibited from interfering during the pendency of the arbitration proceeding. The UAA also contains provisions for the confirmation and vacation of arbitral awards. A primary purpose of the UAA was to ensure the enforceability of agreements to arbitrate in the face of hostile state law, a goal the RUAA states has been accomplished. The RUAA, adopted by the National Conference of Commissioners on Uniform State Laws and the American Bar Association in August 2000, addresses several important issues, including who decides the arbitrability of a dispute and by what criteria, whether a court or arbitrators may issue provisional remedies, how a party can initiate an arbitration proceeding, and whether arbitrators have the discretion to order discovery, issue protective orders, decide motions for summary dispositions, hold prehearing conferences, and otherwise manage the arbitration process.

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172 Wold Architects and Eng’r, 713 N.W.2d at 758-59 (parties who did not reduce their agreement to writing did not conform with the Michigan arbitration act and therefore common-law arbitration, and not the Michigan arbitration act, applied).
173 Pacheco v. Nationwide Mut. Ins. Co., 337 A. 2d 240, 241-42 (R.I. 1975) (an arbitration clause in a primary insurance contract will be of no force and effect and will not prevent the judicial determination of a claim if it is not clearly written and contained in a separate paragraph placed immediately before the testimonium clause or the signatures of the parties); R.I. Gen. Laws Ann. § 10-3-2 (West 2010) (“in all contracts of primary insurance, wherein the provision for arbitration is not placed immediately before the testimonium clause or the signature of the parties, the arbitration procedure may be enforced at the option of the insured. . . ”).
174 735 Ill. Comp. Stat. 5/2-1001A (“The Supreme Court of Illinois, by rule, may provide for mandatory arbitration of such civil actions as the Court deems appropriate in order to expedite in a less costly manner any litigation wherein a party asserts a claim not exceeding $50,000 or any lesser amount . . . ”); 1 DOMKE ON COMMERCIAL ARBITRATION AT § 6:1.
175 See, e.g., Doctors Assoc., Inc. v. Casarotto, 517 U.S. 681, 688 (1996) (finding that a notice requirement in the Montana arbitration statute was preempted by section 2 of the FAA).
176 UNIFORM ARBITRATION ACT at Prefatory Note.
177 Id.; id. at § 7 .
178 Id. at §§ 22-23.
179 Id. at Prefatory Note.
180 Id.
3. U.S. Adoption of UNCITRAL Model Law


The Model Law is designed 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 arbitrations. It 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.

Parties to an arbitration agreement should reference the UNCITRAL Model Law in their arbitration clause if they wish the Model Law to apply.

The UNCITRAL Model Law is not binding, but states may adopt it by incorporating it into their domestic law. The UNCITRAL Model Law has been adopted by several states in the United States, including California (1996), Connecticut (2000), Florida (2010, with amendments as adopted in 2006), Illinois (1998), Louisiana (2006), Oregon, and Texas.

III. CHAPTER 3: DRAFTING THE AGREEMENT TO ARBITRATE

A. Introduction

Once parties decide to use arbitration to resolve their disputes, they must draft an arbitration agreement confirming their intent. Parties often overlook the flexibility of arbitration and the degree to which they can control the terms of the arbitration agreement. Accordingly, they may omit details essential to creating a valid and enforceable agreement, or they may include too much detail and specificity and thus render the agreement unworkable. Either error risks spurring expensive and time-consuming litigation. This chapter provides an overview of

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183 1 Domke on Commercial Arbitration at § 4.2.
185 Id.
187 See Paul D. Friedland, Arbitration Clauses for International Contracts 57 (2d ed. 2007).
best practices for drafting agreements to arbitrate and highlights several important elements that parties should consider in drafting international arbitration agreements.

B. Where Arbitral Clauses Appear

Arbitral clauses typically appear either as provisions within international commercial contracts or as separate arbitration agreements executed after a dispute arises.

1. Commercial Contracts

When parties draft an arbitral clause included in an international commercial contract, they are selecting arbitration as the desired method for resolving future disputes.188 Because of the perceived advantages of arbitration over litigation, arbitral clauses are found in international commercial contracts of all varieties,189 including international credit agreements,190 licensing agreements,191 shipbuilding contracts,192 reinsurance agreements,193 sales agreements,194 and more.

2. Post-Dispute Agreements

Contracting parties who have not previously agreed to arbitrate also may agree to submit an existing dispute to arbitration. These agreements are sometimes referred to as “submission agreements.”195 In this context, parties already know the precise nature of the dispute and can more closely tailor the proceedings to the dispute.196 Some arbitral regimes, for example, the London Court of International Arbitration, provide model arbitral clauses for existing and future disputes.197 Parties always can adapt another regime’s model clause for future disputes to their existing dispute.

C. Best Practices for Drafting

There are several essential elements that every arbitral clause should address. First, the arbitral clause should set out the scope of the arbitration, or what type of dispute the parties

188 Id. at 57 n.142.
189 Id.
190 Dep’t of Econ. Policy & Dev. of the City of Moscow v. Bankers Trust Co., [2004] EWCA (Civ) 14, [2005] Q.B. 207 (Eng.) (arbitration to recover funds allegedly advanced under a credit agreement originally made between the city of Moscow and the International Industrial Bank).
195 Hanessian & Newman, supra note 186, at 8; FRIEDLAND, supra note 187, at 57 n.142, 112.
196 FRIEDLAND, supra note 187, at 112.
197 See infra Chapter 3.C.5.D.
intend to submit to arbitration.\(^{198}\) Second, the arbitral clause should clearly state whether the parties intend to make arbitration the exclusive method of dispute resolution.\(^{199}\) Third, the parties should indicate whether the arbitration decision and award will be final and binding.\(^{200}\)

1. **Scope of Arbitration**

Parties should address the scope of the arbitration at the outset. Although arbitration awards are subject to only limited challenges, awards that exceed the scope of the arbitration agreement may be unenforceable.\(^{201}\)

All-encompassing, or “broad” form arbitral clauses, apply both to contract and non-contract claims, including tort claims.\(^{202}\) Standard broad form language provides that arbitration will be used to resolve any dispute or difference “arising out of or in connection with” the contract or to any disputes “arising out of, in connection with, or relating to” the contract.\(^{203}\) At least some courts have held that an arbitral clause that merely states that arbitration applies to disputes “arising out of” or “arising under” the agreement could be interpreted to apply only to contract claims.\(^{204}\) The Supreme Court has held, however, that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”\(^{205}\)

Alternatively, parties may desire to narrowly tailor the disputes they submit to arbitration, or carve out disputes they want to resolve through litigation. Any decision to limit the scope of arbitration should be intentionally made and clear on the face of the arbitral clause. There are multiple reasons why parties may wish to limit the scope of international arbitration agreements.


\(^{199}\) Friedland, supra note 187, at 63-64.

\(^{200}\) See id. at 64 (noting that finality is a usual feature of arbitral clauses).

\(^{201}\) Hanessian & Newman, supra note 186, at 229.

\(^{202}\) See Friedland, supra note 187, at 61.

\(^{203}\) See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 397-98 (1967) (characterizing clause stating that “[a]ny controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration” as a broad arbitration clause); Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 225 (2d Cir. 2001) (noting that “[n]o fixed rules govern the determination of an arbitration clause’s scope” and finding that, “although ‘not unlimited,’” a clause governing “[a]ny dispute arising from the making, performance or termination of this Charter Party” and all disputes “arising from” the charter was a broad clause, creating the presumption that all disputes between the parties related to the agreement were subject to arbitration) (internal citations omitted); Ashford, supra note 198, at 2; Friedland, supra note 187, at 61.


\(^{205}\) Mitsubishi Motors Corp., 473 U.S. at 626 (citing Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983)).
For example, some countries, including Brazil, Finland, France, India, Ireland, Israel, Italy, Japan, Korea, South Africa, and Spain, have national laws that disfavor or limit the arbitration of intellectual property disputes.\textsuperscript{206} National laws of other countries, such as the United States, Belgium, Australia, England, and Switzerland, permit the arbitration of intellectual property disputes.\textsuperscript{207} Therefore, parties may wish to expressly carve out intellectual property disputes from arbitration.\textsuperscript{208} Moreover, U.S. courts traditionally hesitated to enforce arbitration agreements for certain types of disputes, including employment discrimination, antitrust, and securities claims, on the basis that doing so would violate public policy.\textsuperscript{209}

2. **Exclusivity of Arbitration**

If parties intend for arbitration to be their exclusive form of dispute resolution, they should clearly state this in the arbitral clause.\textsuperscript{210} Under the New York Convention, clauses that do not firmly commit the parties to arbitration will not be enforced.\textsuperscript{211} Parties can best indicate exclusivity by stating that arbitration “shall” or “will” determine all disputes arising out of or relating to the contract, rather than that disputes “may” be submitted to arbitration.\textsuperscript{212} Further, a contract should not contain a clause consenting to the jurisdiction of certain courts followed by a clause consenting to arbitration, or vice versa, because it creates ambiguity as to whether the parties intend for arbitration to be the exclusive form of dispute resolution.\textsuperscript{213}

3. **Finality of Arbitration**

One of the most salient characteristics of arbitration is the limited nature of judicial review.\textsuperscript{214} Arbitration agreements should clearly express whether the arbitration decision and award will be final and binding (as well as who will be bound) by stating that all disputes or controversies will be “finally settled” or that the arbitrators’ decision will be “final and binding.”\textsuperscript{215} An award that is “binding” resolves the dispute and is enforceable by courts against

\textsuperscript{206} Hanessian & Newman, supra note 186, at 229-30.
\textsuperscript{207} Id. at 230.
\textsuperscript{208} Id.
\textsuperscript{209} BORN & RUTLEDGE, supra note 204, at 1111-12 (citing case law). In the 1980s, the Supreme Court limited non-arbitrability by holding that federal securities and antitrust claims were arbitrable. Id. (citing, among others, Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), and Mitsubishi Motors Corp., 473 U.S. 614). In the early 1990s, the Supreme Court also held that age discrimination claims were arbitrable. Id. at 1112 (citing Gilmer v. Interstate/Johnson Lance Corp., 500 U.S. 20, 26 (1991)).
\textsuperscript{210} FRIEDLAND, supra note 187, at 63. See also infra Chapter 3.D.7 regarding split clauses, stepped clauses, and conditions precedent.
\textsuperscript{211} See New York Convention, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at 1970 WL 104417, at art. II(1) (“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which . . . may arise between them . . . concerning a subject matter capable of settlement by arbitration.”).
\textsuperscript{212} FRIEDLAND, supra note 187, at 63.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 104.
\textsuperscript{215} See ICC Rules of Arbitration, Standard ICC Arbitration Clause (“All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce . . . .”) http://www.iccwbo.org/Products-and-
the losing party. An award that is “final” is one that will not be substantively reviewed by courts. Moreover, in addition to stating that the arbitral award shall be “final and binding,” the parties can also expressly include a waiver-of-challenge clause in their agreement clearly stating that each party waives any right it may have under any laws to any form of appeal. This may also be accomplished by incorporating institutional rules that contain a waiver of post-award challenges. Some jurisdictions, however, will not allow parties to contract around challenges based on serious procedural irregularity or lack of jurisdiction.

Parties rarely want to expand judicial review. Until recently, it was unclear whether the United States would allow parties to contract for expanded judicial review of arbitral awards. The uncertainty was laid to rest in Hall Street Associates, L.L.C. v. Mattel, Inc., where the Supreme Court held that the enumerated grounds for judicial review of an arbitral award set out in the FAA are “exclusive” and cannot be expanded by contract.

4. Recommended Elements for Arbitral Clauses

Several elements, while not essential to create a valid and enforceable arbitration agreement, are nonetheless recommended because of the expense and delay associated with gap-filling these missing elements. First, it is recommended that all arbitral clauses specify the number of arbitrators. This ideally should be an odd number – generally, one for smaller contracts and three for larger, more complex matters – in order to prevent deadlocked decisions. Parties should also specify the arbitration institution chosen to administer the case.

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216 Friedland, supra note 187, at 104.
217 E.g., ICC Rules of Arbitration at art. 34(6) (“Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”); LCIA Arbitration Rules, art. 26.9 (“All awards shall be final and binding on the parties.”); UNCITRAL Arbitration Rules (1976), art. 34(2), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited Nov. 17, 2012) (“All awards . . . shall be final and binding on the parties.”); Townsend, supra note 198, at 30.
218 Hanessian & Newman, supra note 186, at 240.
219 9 U.S.C. § 1 et seq.
220 552 U.S. at 586-87.
221 Friedland, supra note 187, at 104.
222 Id. at 64, 69; Townsend, supra note 198, at 34; School of International Arbitration, Centre for Commercial Law Studies, Queen Mary, University of London, 2010 International Arbitration Survey: Choices in International Arbitration, at 25,
(if any), the procedural rules that will govern the arbitration, the place of arbitration, and the governing law. Finally, parties should specify the language for the arbitration proceedings and pleadings. Most of these recommended elements, along with the essential elements described above, are found in the model clauses of the leading arbitral institutions listed below.

5. Sample Provisions from Various Arbitral Regimes

There is no one-size-fits-all arbitral clause. The best arbitral clauses are simple and straightforward. Parties lacking experience drafting international arbitration agreements should start with a model clause from a major arbitral institution. These model clauses will contain all the essential elements necessary for the arbitral clause to be valid and enforceable, and parties can modify them to suit their needs. Model arbitral clauses from various arbitral regimes are reproduced below.

**International Centre for Dispute Resolution of the American Arbitration Association.** “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.” Because the ICDR is also a division of the AAA, parties may also use the following standard clause: “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules.” ICDR encourages parties to add the following language: “The number of arbitrators shall be (one or three)”; “The place of arbitration shall be (city and/or country)”; and, “The language(s) of the arbitration shall be ____.”

**International Chamber of Commerce.** “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the

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223 E.g., FRIEDLAND, supra note 187, at 63-64; Townsend, supra note 198, at 34. See infra Chapter 3.D.2-3.
224 Hanessian & Newman, supra note 186, at 231 (noting that it is generally advisable for the arbitration to be conducted in the language in which the contract was written, although certain countries will require arbitration to be conducted in their national languages); FRIEDLAND, supra note 187, at 64, 69-70; Townsend, supra note 198, at 34.
225 See Hanessian & Newman, supra note 186, at 228.
226 FRIEDLAND, supra note 187, at 1, 57.
227 The ICC, the AAA, and the LCIA are three of the best-known arbitral institutions. BORN & RUTLEDGE, supra note 204, at 1084. Consequently, the rules of these arbitral regimes are referenced below in the discussion of optional elements to consider when drafting arbitral clauses.
228 FRIEDLAND, supra note 187, at 1, 60-61.
230 Id.
231 Id.
International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”232

**Hong Kong International Arbitration Centre.** “Any dispute, controversy or claim arising out of or relating to this contract, including the validity, invalidity, breach or termination thereof, shall be settled by arbitration in Hong Kong under the Hong Kong International Arbitration Centre Administered Arbitration Rules in force when the Notice of Arbitration is submitted in accordance with these Rules.”233 Suggested optional language includes the following: “The number of arbitrators shall be … (one or three). The arbitration proceedings shall be conducted in … (insert language).”234

**London Court of International Arbitration.** For future disputes, the LCIA recommends the following arbitral clause: “Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the LCIA Rules, which Rules are deemed to be incorporated by reference into this clause. The number or arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [    ]. The governing law of the contract shall be the substantive law of[    ].”235

For existing disputes, the LCIA recommends the following clause. “A dispute having arisen between the parties concerning [    ], the parties hereby agree that the dispute shall be referred to and finally resolved by arbitration under the LCIA Rules. The number of arbitrators shall be [one/three]. The seat, or legal place of arbitration shall be [City and/or Country]. The language to be used in the arbitral proceedings shall be [    ]. The governing law of the contract [is/shall be] the substantive law of[    ].”236

**United Nations Commission on International Trade Law.** “Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.”237 UNCITRAL notes that parties should consider adding the following language: “(a) The appointing authority shall be … [name of institution or person]; (b) The number of arbitrators shall be … [one or three]; (c) The place of arbitration shall be … [town and country]; (d) The language to be used in the arbitral proceedings shall be ….”238

234 Id.
236 Id.
238 Id.
D. Important Considerations in Drafting Arbitral Clauses

Apart from the essential and recommended elements of arbitral clauses, discussed above, arbitral clauses can be tailored to suit the parties’ individual needs. Whether to include any of the elements described below will depend heavily on the facts and circumstances of the contract or dispute and the parties’ particular situation.

1. Confidentiality

Confidentiality is one of the principal advantages of arbitration over litigation. Court proceedings are public, but the rules of most arbitral institutions impose obligations on the arbitral tribunal and the arbitrators to maintain privacy and/or confidentiality over the arbitration proceedings, including the documents used or exchanged during the proceedings, and the arbitral award, unless the parties provide otherwise.\(^{239}\) Some national courts have found no implied duty of confidentiality in international arbitration.\(^{240}\) Most national laws\(^ {241}\) and arbitral rules,\(^ {242}\)

\(^{239}\) E.g., AAA-ICDR International Arbitration Rules (effective June 1, 2009), art. 20(4) (“Hearings are private unless the parties agree otherwise or the law provides to the contrary.”), art. 34 (“Confidential information disclosed during the proceedings by the parties or by witnesses shall not be divulged by an arbitrator or by the administrator. Except as provided in Article 27, unless otherwise agreed by the parties, or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.”)

\(^{240}\) E.g., United States v. Panhandle E. Corp., 118 F.R.D. 346, 349-50 (D. Del. 1988) (denying motion for protective order concerning documents related to arbitration proceedings held in Switzerland and noting that there is no implied duty of confidentiality in international arbitration); Esso Austl. Res. Ltd. v. Plowman (1995) 128 A.L.R. 391 (Austl.) (finding no express or implied duty of confidentiality in Australian legislation or in international arbitration); Associated Elec. & Gas Ins. Servs. Ltd., [2003] UKPC 11 (appeal taken from the Court of Appeal of Bermuda) (allowing party to rely on first arbitration award during second arbitration before a different panel in a separate indemnification dispute despite express confidentiality agreement because the first arbitration award was relevant to and decisive of the determination in the second arbitration); FRIEDLAND, supra note 187, at 76. Cf. Dep’t of Econ. Policy & Dev., [2004] EWCA (Civ) 314, [2005] Q.B. 207 (Eng.) (dismissing appeal challenging privacy of arbitration judgment and noting that privacy and confidentiality are “[a]mong features long assumed to be implicit in parties’ choice to arbitrate in England.”); Ali Shipping Corp., [1999] 1 W.L.R. 314 (Eng.) (precluding use of materials from first arbitration in subsequent arbitration because confidentiality is an implied term in commercial contracts). France, as the sole international
however, do not expressly require the parties or their counsel to maintain confidentiality, although parties may contract for confidentiality. The LCIA Arbitration Rules are a notable exception. Irrespective of the governing rules, best practices dictate that parties who desire confidentiality should so provide in their arbitration agreement or execute a stand-alone confidentiality agreement after a dispute arises. A confidentiality provision or stand-alone agreement could extend confidentiality to, among other things, briefs, pleadings, and other documents prepared for the arbitration, documents produced or exchanged as part of the arbitration, the arbitral award and any written opinion, and even the existence of arbitration itself. Generally, qualified – rather than absolute – confidentiality requirements are preferred, to account for the possibility that disclosure may be required by law or become necessary to enforce certain rights, such as interim relief or the arbitral award. Parties who choose to execute a stand-alone confidentiality agreement after a dispute arises can easily tailor the confidentiality requirements to the particular dispute. Notably, the parties can draft stand-alone confidentiality agreements to apply to the individual panel members and to accommodate a party’s desire to use evidence already developed in a prior or parallel proceeding.

Confidentiality provisions may state as follows: “Except as may be required by law, neither a party nor its representatives may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of (all/both) parties,” or “The Arbitral proponent of an absolute obligation of confidentiality, is the exception. Steven Kouris, Confidentiality: Is International Arbitration Losing One of Its Major Benefits?, 22 J. INT’L ARB. 127, 127 (2005).


242 E.g., AAA-ICDR International Arbitration Rules, arts. 20(4), 34; Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules, arts. 27(3), 46.

243 See generally FRIEDLAND, supra note 187, at 76.

244 LCIA Arbitration Rules, art. 30.1 (effective Jan. 1, 1998) (“Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.”).

245 See, e.g., ABA SECTION OF INT’L LAW, INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 183 (Barton Legum ed., 2005) (noting that “the parties need to decide, in the arbitration clause or subsequently, what degree of confidentiality shall cover the proceedings”).

246 FRIEDLAND, supra note 187, at 77; Kouris, supra note 240, at 128.

Tribunal and the parties agree to keep confidential all outcomes and awards in their arbitration, together with all materials in the proceedings that were created for the purpose of the arbitration, including testimony, and all other documents produced by another party in the proceedings not otherwise in the public domain, except to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. Parties should consult the law of the seat of the arbitration or the law of the place where enforcement may be sought when drafting the confidentiality provisions to ensure that the proposed confidentiality provision does not violate those laws. The provision can also specify the remedy for violations of the confidentiality provision.

Parties also should require witnesses and other third parties who participate in the arbitration proceedings to execute a confidentiality agreement consistent with the language of the confidentiality provision that binds the parties.

2. **Choice of Law**

Parties should include a choice of law provision in their arbitration agreement. Choice of law provisions “obviate[] the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.” Parties should clearly specify whether their choice of law applies to the law governing the arbitration agreement or the substantive law. A reference to “governing law” may be insufficient, as that term could refer to the law governing the arbitration agreement, the procedural law, or the governing substantive law. Therefore, parties should clearly specify whether their choice of law applies to any or all of the above.

a. **Law governing the arbitration agreement.**

The law governing the arbitration agreement determines the interpretation, validity, and scope of the arbitration agreement. Because an arbitration agreement is separate and independent from the main contract in which it may be found, the law governing the validity and

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248 Adapted from the LCIA Arbitration Rules, art. 30.

249 Kouris, supra note 240, at 128 (citing Associated Elec. & Gas Ins. Servs. Ltd., [2003] UKPC 11 (appeal taken from the Court of Appeal of Bermuda) (express arbitral confidentiality provision found insufficient to prevent disclosure); Commonwealth of Austl. v. Cockatoo Dockyard Pty Ltd. (1995) 36 N.S.W.L.R. 662 (arbitrator’s directions to secure confidentiality of documents were beyond the powers of the arbitrator)).

250 Id. at 139.

251 See infra Chapter 5 for more information regarding choice of law.

252 See Scherk, 417 U.S. at 516 (“A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”).

253 Id.

254 See ASHFORD, supra note 198, at 7-8.

255 Id. at 9-10; FRIEDLAND, supra note 187, at 89.
effect of the arbitration may be different from the law specified in the main contract.\footnote{Hanessian & Newman, \textit{supra} note 186, at 34.} Similarly, where parties enter into arbitration agreements after a dispute has arisen, the law governing the arbitration agreement will not necessarily be the same law as the law that governs the main contract. Few contracts expressly state the law governing the arbitration agreement. If the parties fail to specify this law, the panel ordinarily will apply the law of the place of arbitration.\footnote{ASHFORD, \textit{supra} note 198, at 9-11.}

b. \textit{Procedural law.}

The procedural law governs the conduct of the arbitration, including “internal” procedures (\textit{e.g.}, the commencement of arbitration, the appointment of the tribunal, the pleadings, evidence, and hearings) and “external” procedures (\textit{e.g.}, intervention, if any, of national courts).\footnote{ASHFORD, \textit{supra} note 198, at 9-11.} Many international conventions\footnote{See, \textit{e.g.}, European Convention, art. IX(1)(a), (providing that a ground for setting aside an arbitration award is that the arbitration agreement “is not valid under the law to which the parties have subjected it”); New York Convention, art. V(1)(d) (setting out as a ground for non-recognition or non-enforcement of an arbitral award the fact that “the arbitral procedure was not in accordance with the agreement of the parties”); League of Nations, Protocol on Arbitration Clauses, art. 2, Sept. 24, 1923 (“The arbitral procedure . . . shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.”).} and national laws\footnote{See, \textit{e.g.}, Belgian Judicial Code art. 1693(1) (“[T]he parties may decide on the rules of the arbitral procedure and on the place of arbitration.”) (English translation printed in GARY B. BORN, \textit{INTERNATIONAL COMMERICAL ARBITRATION: COMMENTARY AND MATERIALS} 418 (2d ed. 2001)); Netherlands Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), Arbitration Act, Dec. 1, 1986, art. 1036 (noting that the arbitral proceedings shall be conducted according to the parties’ agreement, or, absent an agreement, as determined by the arbitral tribunal) (English translation taken from http://www.jus.uio.no/lm/netherlands.arbitration.act.1986/1036.html (last visited Nov. 15, 2012)); Federal Statute on Private International Law, Dec. 18, 1987, art. 182(1) (Switz.) (“The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice.”) (English translation taken from the Swiss Arbitration Association web site, http://www.arbitration-ch.org/pages/en/arbitration-in-switzerland/index.html (last visited Nov. 15, 2012)); UNCITRAL Model Law, art. 19(1) (“Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”). The FAA does not expressly address the question whether parties to an international arbitration may choose a foreign procedural law. See 9 U.S.C. § 1, \textit{et seq.} However, U.S. courts are likely to enforce the parties’ choice of procedural law, because, according to the Supreme Court, “[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.” \textit{Volt Info. Sci., Inc. v. Bd. Of Tr. Of The Leland Stanford Junior Univ.}, 489 U.S. 468, 476 (1989) (in domestic arbitration, interpreting parties’ choice of law to apply California arbitration rules when those rules were designed to encourage arbitration and when doing so would not offend rules of liberal construction or any policy set forth in the FAA.)} provide that parties have autonomy to choose the applicable procedural law. Generally parties choose a “seat” of

\footnote{\textit{See}, \textit{e.g.}, European Convention, art. IX(1)(a), (providing that a ground for setting aside an arbitration award is that the arbitration agreement “is not valid under the law to which the parties have subjected it”); New York Convention, art. V(1)(d) (setting out as a ground for non-recognition or non-enforcement of an arbitral award the fact that “the arbitral procedure was not in accordance with the agreement of the parties”); League of Nations, Protocol on Arbitration Clauses, art. 2, Sept. 24, 1923 (“The arbitral procedure . . . shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.”).}
arbitration and the law of the seat becomes the procedural law.\textsuperscript{261,262} In the absence of an express choice by the parties, the arbitral tribunal will generally decide the procedural law\textsuperscript{263} – and often apply the law of the seat of arbitration as the procedural law.\textsuperscript{264}

c. \textit{Substantive law.}

The substantive law governs contract formation and performance, the parties’ rights and obligations, and the merits of the dispute.\textsuperscript{265} All international arbitral clauses should designate the governing substantive law. The rules of major arbitral institutions do not specify the governing substantive law and instead encourage parties to select the controlling law. In fact, the substantive law is often the first thing decided by the parties with respect to an arbitration clause, followed by the place of arbitration and the arbitral institution or rules.\textsuperscript{266} Outside the law of the parties’ home jurisdictions, English law and New York law are popular choices for substantive law.\textsuperscript{267} If the parties fail to choose, the arbitrators probably will apply conflicts of law rules to determine the substantive law.\textsuperscript{268} When parties designate the governing substantive law, they should, as a best practice, specifically exclude conflicts laws from the choice of law provision by stating as follows: “Any disputes arising under or in connection with this contract shall be resolved in accordance with the laws of [specify country or state] to the exclusion of its conflicts of laws rules.”\textsuperscript{269} The language “to the exclusion of its conflicts of laws rules” clearly indicates that the parties are selecting the substantive law, as opposed the conflicts laws to be applied to determine the substantive law.

Further, the placement of the parties’ choice of law clause is important. To avoid ambiguity, the choice of substantive law clause should be placed outside the arbitration clause, as

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\item \textsuperscript{261} See, e.g., \textit{Coppee-Lavalin SA/NV v. Ken-Ren Chems. & Fertilizers Ltd.}, [1995] 1 A.C. 38 (H.L.) (appeal taken from Eng.) (English law applied to govern the procedure when the parties selected London as the seat of arbitration).
\item \textsuperscript{262} See \textit{infra} Chapter 3.D.3 for more information regarding the place of arbitration.
\item \textsuperscript{263} \textit{E.g.}, Belgian Judicial Code art. 1693(1) (“If the parties do not indicate their intention . . . , the decision shall be a matter for the arbitrators.”) (English translation printed in \textit{BORN, supra} note 260, at 418); Netherlands Code of Civil Procedure (Wetboek van Burgerlijke Rechtsvordering), Arbitration Act, Dec. 1, 1986, art. 1036 (noting that absent an agreement by the parties, the arbitral proceedings shall be conducted as determined by the arbitral tribunal); Federal Statute on Private International Law, Dec. 18, 1987, art. 182(2) (Switz.) (“If the parties have not determined the procedure, the Arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.”); UNCITRAL Model Law, art. 19(2) (“Failing [an agreement by the parties], the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.”).
\item \textsuperscript{264} See generally \textit{ASHFORD, supra} note 198, at 9; \textit{BORN & RUTLEDGE, supra} note 204, at 44, 413; John B. Tieder, Jr., Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration, 20 J. INT’L ARB. 393, 394 (2003).
\item \textsuperscript{265} \textit{FRIEDLAND, supra} note 187, at 89.
\item \textsuperscript{266} \textit{2010 International Arbitration Survey: Choices in International Arbitration, supra} note 222, at 5.
\item \textsuperscript{267} \textit{Id.} at 11, 13-14.
\item \textsuperscript{268} \textit{ASHFORD, supra} note 198, at 8.
\item \textsuperscript{269} The suggested language is adapted from language appearing in \textit{FRIEDLAND, supra} note 187, at 89 n.197.
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a separate clause of the contract. If the choice of law provision is placed inside the arbitration clause, arbitrators and others could interpret the parties’ choice of substantive law merely as a selection of the procedural law.

3. Place of Arbitration

The place of arbitration—also referred to as the “seat” or “situs” of arbitration—is a legal concept that is distinguishable from (and may be different than) the physical location of the hearing. A party’s first inclination likely will be to select the seat that is most favorable to its position; such a choice presumes that the party has superior bargaining power and that its counter-party will not object to the selection. Parties will generally reject proposed seats that they do not perceive to be neutral and impartial, which would include the home jurisdictions of the contracting parties. Assuming the parties have equal bargaining power, they should choose a neutral seat.

There are five important, but nonexclusive, factors in selecting a seat for arbitration. First, the situs determines where the arbitral award is made or published. Parties therefore should select a forum that has ratified the New York Convention or the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”) to ensure enforceability.

Second, parties should select a seat that has favorable procedural laws. In the absence of an express choice by the parties, the law of the place of arbitration will generally serve as the procedural law, and, along with the institutional or ad hoc rules, set out the procedure for the

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270 Id. at 91.
271 Id.
272 Hanessian & Newman, supra note 186, at 94.
274 See id. at 230 (noting that when parties have equal bargaining power, “often the only mutually acceptable forum will be a neutral one”).
275 Id. at 94 (“The seat/place of arbitration establishes the ‘nationality’ of the arbitral award, which in turn determines which national courts have ultimate jurisdiction over the proceedings.”).
276 There are currently 145 countries party to the New York Convention. UNCITRAL, Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Nov. 15, 2012). Fiji was the most recent country to become a party to the New York Convention on September 27, 1010. Id. The United States became a party to the New York Convention on September 30, 1970, which then entered into force on December 29, 1970. Id. The United States will only apply the New York Convention to disputes arising out of legal relationships that are considered commercial under national law and will only recognize and enforce awards made in the territory of another contracting state. Id.
278 Hanessian & Newman, supra note 186, at 231.
Parties should confirm at the outset that the law of the seat will recognize the agreement to arbitrate as valid, because a court may vacate or refuse to enforce an arbitral award if the arbitration did not comply with a valid arbitration agreement or with the laws of the seat. Under the New York Convention, the fact that courts at the place of arbitration have set aside the arbitral award is a permissive ground for non-enforcement.281

Third, because the courts of the seat will have a supervisory or supportive function with respect to the arbitration, parties should choose a seat where the local courts have a reputation of supporting rather than interfering in the arbitration proceedings. France, England, and the United States all have pro-arbitration legal regimes. For example, the United States Supreme Court has held that federal policy favors arbitration and requires courts to broadly construe and vigorously enforce arbitration agreements. This federal policy in favor of arbitration is even stronger in the context of international transactions. Likewise, the English Arbitration Act provides for limited court interference in international arbitration proceedings. The

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279 Friedland, supra note 187, at 65.
280 See, e.g., TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 929-31 (D.C. Cir. 2007) (affirming dismissal of action brought by contractor to enforce award from an arbitration proceeding in Colombia, where a Colombian administrative court had nullified the award because the parties’ arbitration agreement violated Colombian law by designating the use of ICC procedural rules for the arbitration); Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Gov’t of Pak., [2010] UKSC 46 (appeal taken from Eng.) (dismissing appeal of decision to set aside arbitral award when party against whom enforcement was sought had not been a party to the arbitration agreement, such that the award was invalid under French law, which was the law of the seat of arbitration).
281 New York Convention, art. V(1)(a).
282 See Friedland, supra note 187, at 52.
283 See id.
284 Id. at 55.
285 E.g., Moses H. Cone Mem’l Hosp., 460 U.S. at 24-25 (affirming appellate court order to arbitrate and noting both the “liberal federal policy favoring arbitration agreements” and that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”); S.A. Mineracao Da Trindade-Samitri v. Utah Int’l, Inc., 745 F.2d 190, 194 (2d Cir. 1984) (affirming district court order compelling arbitration and staying litigation of certain claims pending arbitration after noting that the FAA was designed to allow parties to avoid the cost and delay of litigation, that courts have “adopted Congress’ favorable attitude towards arbitration agreements,” and that federal policy requires courts to construe arbitration clauses broadly).
286 E.g., Mitsubishi Motors Corp., 473 U.S. at 631 (“[A]t least since this Nation’s accession in 1970 to the [New York Convention], and the implementation of the [New York Convention] in the same year by amendment of the Federal Arbitration Act, that federal policy [in favor of arbitral dispute resolution] applies with special force in the field of international commerce.”) (internal citations omitted); Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1063 (2d Cir. 1993) (reversing district court order denying motion to stay litigation and compel arbitration and holding that Norwegian accounting firm that did not sign an arbitration agreement but that had knowingly received a direct benefit from it was obligated to arbitrate claim that fell within the scope of the agreement).
287 See Arbitration Act, 1996, c.23, §§ 42-45 (Eng.). Among other things, the Arbitration Act allows a court to order parties to comply with peremptory orders of the tribunal but only once an applicant has exhausted all available arbitral procedures for failure to comply with a tribunal’s order. Id. § 42(1), (3). Moreover, a court may issue orders regarding the taking of evidence of witnesses, the preservation of evidence, the sale of goods that are the subject of the proceedings, the granting of an
UNCITRAL Model Law on International Commercial Arbitration, which has been adopted by over sixty countries,288 also provides for limited court interference in international arbitration.289 Parties can select a UNCITRAL adopting country as a seat but should first research how the national courts have interpreted and applied the law.290

Fourth, parties should verify that they will be allowed to appear and practice in their selected seat. Local counsel may be an option if the seat requires that visiting lawyers get a license to practice law, or fulfill any other requirements of practicing.291

Finally, if the place of arbitration will also be the physical location of the hearing, parties should choose a seat that is equally convenient or inconvenient for both parties, taking into account such factors as transportation and lodging costs, proximity to witnesses, documents, and counsel, and the availability and adequacy of local support services.292

A wide variety of forums are used for arbitration. In 2009, for example, the ICDR administered 836 international arbitrations, the ICC administered 817 arbitrations, the China International Economic and Trade Arbitration Commission (the “CIETAC”) administered 560 international arbitrations, the LCIA administered 272 international arbitrations, the SIAC administered 114 international arbitrations, the Beijing Arbitration Commission (the “BAC”) administered 72 international arbitrations, and the Japan Commercial Arbitration Association (the “JCAA”) administered 17 international arbitrations.293 For the ICC-administered arbitrations

interim injunction or appointment of receiver, but only upon the application of a party to the arbitral proceedings and then only with the permission of the tribunal or the written agreement of the other party. Id. § 44(1), (2), (4). A court may make preliminary determinations on questions of law, but only upon the application of a party to the arbitration and only with the permission of the other parties or the arbitral tribunal. Id. § 45(1), (2).


289 See, e.g., UNCITRAL Model Law, art. 27 (allowing for court assistance in the taking of evidence, but only upon the request of the tribunal or a party to the arbitration proceeding, with the tribunal’s approval).

290 See FRIEDLAND, supra note 187, at 55.


292 FRIEDLAND, supra note 187, at 53, 64-65.

alone, 53 countries throughout the world were designated as the place of arbitration. In Europe, London, Paris, Geneva, and Zurich are popular forums for international arbitration; New York is a popular forum for international arbitration in the Americas; and Singapore and Hong Kong are popular forums for international arbitration in Asia. Moscow and mainland China are not perceived as desirable seats.

Parties can designate the place of arbitration by adding the following sentence to an arbitration clause: “The place of arbitration shall be (city and/or country).” Courts in the United States will generally not question the parties’ choice of seat. If parties choose arbitration administered by one of the major arbitration institutions such as the ICC or AAA, but fail to designate a place of arbitration, the institution will select a place of arbitration based on the totality of the circumstances. One notable exception is the LCIA which selects London as the default place of arbitration.

In non-administered arbitration, courts will generally select the place of arbitration if the parties fail to choose. A party may call on national courts to select the seat if the arbitration agreement is silent about selecting a seat, if the arbitration agreement is ambiguous or

visited Nov. 15, 2012). The ICC statistics do not distinguish between French domestic cases and international cases administered by them. Id.


297 E.g., ICDR, Guide to Drafting International Dispute Resolution Clauses, Model Short Form Standard Clause.

298 E.g., Nat’l Iranian Oil Co. v. Ashland Oil, Inc., 817 F.2d 326, 334-35 (5th Cir. 1987) (refusing Iranian oil supplier’s request to compel arbitration in Mississippi when the parties’ forum selection clause designated Tehran, Iran, as the seat). See also Snyder v. Smith, 736 F.2d 409, 419-20 (7th Cir. 1984), overruled on other grounds by Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998) (reversing order compelling domestic arbitration in Illinois when the parties’ forum selection clause designated Houston, Texas, as the seat of arbitral proceedings after noting that “[c]ourts must give effect to such freely-negotiated forum selection clauses” and that there were no “compelling or countervailing” reasons not to enforce the parties’ choice).

299 See, e.g., AAA-ICDR International Arbitration Rules, art. 13(1) (“If the parties disagree as to the place of arbitration, the administrator may initially determine the place of arbitration, subject to the power of the tribunal to determine finally the place of arbitration . . . . All such determinations shall be made having regard to the contentions of the parties and the circumstances of the arbitration; ICC Rules of Arbitration, art. 18(1) (“The place of the arbitration shall be fixed by the [International Court of Arbitration of the ICC] unless agreed upon by the parties.”); FRIEDLAND, supra note 187, at 44, 65.

300 LCIA Arbitration Rules, art. 16.1 (“The parties may agree in writing the seat (or legal place) of their arbitration. Failing such a choice, the seat of arbitration shall be London, unless and until the LCIA Court determines in view of all the circumstances, and after having given the parties an opportunity to make written comment, that another seat is more appropriate.”).

301 FRIEDLAND, supra note 187, at 54, 65.
contradictory as to the seat, or if the agreement specifies a seat, but a party regrets the decision.\textsuperscript{302} If any of the foregoing occurs, a party may decide to bring an action in court to compel arbitration in a particular location.\textsuperscript{303} In the United States, each of the three chapters of the FAA has a provision that empowers federal district courts to compel arbitration\textsuperscript{304}

4. Arbitral Awards

In addition to the essential elements of an arbitration clause, discussed above, parties may wish to address allowable damages, the currency of the arbitral award, any applicable interest, and the allocation of costs and attorneys’ fees in their agreement to arbitrate.

a. Allowable Damages.

Parties can agree to include or exclude certain types of remedies.\textsuperscript{305} For example, international arbitral panels historically have refused to award punitive damages.\textsuperscript{306} In \textit{Mastrobuono v. Shearson Lehman Hutton, Inc.}, the Supreme Court stated that arbitral tribunals in the United States may award punitive damages unless the parties prohibit punitive damages in the arbitration agreement.\textsuperscript{307} Following \textit{Mastrobuono}, the AAA amended its International Rules


\textsuperscript{303} \textit{Id.} at 690.

\textsuperscript{304} \textit{Id.} Section 4 of the FAA states provides that “[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . . The court shall hear the parties . . . [and] make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.” 9 U.S.C. § 4. Section 206 of chapter 2 of the FAA, the enacting legislation for the New York Convention, provides that “[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.” \textit{Id.} § 206. Finally, section 303 of chapter 3 of the FAA, the enacting legislation for the Panama Convention, provides that “[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.” \textit{Id.} § 303(a). Under section 303, if the agreement “does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the [Panama Convention].” \textit{Id.} § 303(b). Note that under section 4, it is unclear whether courts may compel arbitration outside their district. Section 206 eliminates this uncertainty, but contains its own ambiguity – \textit{i.e.}, whether courts may compel arbitration when the parties’ agreement fails to specify – or to unambiguously specify – an agreed seat. \textit{Compare id.} § 4, with \textit{id.} § 206; \textit{see also} Born, \textit{INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES, supra} note 302, at 690-91.

\textsuperscript{305} Hanessian \& Newman, \textit{supra} note 186, at 239.

\textsuperscript{306} FRIEDLAND, \textit{supra} note 187, at 100 (noting that “[p]unitive damages in commercial cases are virtually non-existent outside the United States.”).

\textsuperscript{307} 514 U.S. 52, 64 (1995).
to place the burden on parties who adopt the AAA International Rules to expressly state that arbitral tribunals may award punitive damages; if not, they waive the right to punitive damages.\textsuperscript{308} Therefore, parties can avoid confusion on this issue by clearly specifying whether arbitrators have the discretion to award punitive, consequential, or incidental damage awards.\textsuperscript{309}

b.  \textit{Currency.}

Most often the currency of the arbitral award is presumed to be the same as the currency used by the parties in their transaction.\textsuperscript{310} Parties can specify the currency of the arbitral award to avoid any doubt on this issue.\textsuperscript{311} Parties who choose to specify the currency should also indicate the date for converting the currency in which damages are calculated into the currency in which the award is rendered (e.g., the date of the breach of the contract, the date the arbitral award is issued, or the date on which the award is ordered to be paid) and the exchange rate to be used for the currency conversion (e.g., the official rate, the market rate, or the rate as published in a respected newspaper or journal, such as the New York Times or the Wall Street Journal).\textsuperscript{312}

c.  \textit{Interest.}

Parties can specify whether interest will be awarded, and if so, the date from which interest will accrue (e.g., the date of default) and the applicable interest rate.\textsuperscript{313} The interest rate may be left to the arbitrators’ discretion, parties may specify a rate, or they can provide a benchmark, such as the London Inter-Bank Offering Rate (the “LIBOR”).\textsuperscript{314} If the parties’ arbitration agreement does not provide for interest, the governing substantive law or procedural law will determine whether interest is included in the arbitral award.\textsuperscript{315} There is no uniform approach as to whether procedural or substantive law governs interest issues in arbitral awards.\textsuperscript{316}

\textsuperscript{308} AAA-ICDR International Arbitration Rules, art. 28(5) (“Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary or similar damages unless a statute requires that compensatory damages be increased in a specified manner. This provision shall not apply to any award of arbitration costs to a party to compensate for dilatory or bad faith conduct in the arbitration.”).

\textsuperscript{309} FRIEDLAND, supra note 187, at 102.

\textsuperscript{310} Id.

\textsuperscript{311} Id.


\textsuperscript{313} David Branson & Richard Wallace, \textit{Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach}, 28 VA. J. INT’L L. 919, 946 (1988). The following is a sample interest provision: “In the event that monetary damages are awarded for a breach or other violation of this contract, the award shall include interest from the date of the breach or violation to the date when the award is paid in full. The rate of interest shall be the prime commercial lending rate announced by the [name of bank] at its principal office [location] for 90-day loans for responsible and substantial commercial borrowers averaged over the period from the date of the breach or violation to the date the award is paid in full.” \textit{Id.}

\textsuperscript{314} \textit{Id.} at 945-46.

\textsuperscript{315} FRIEDLAND, supra note 187, at 99.

For example, England considers the liability to pay interest to be a substantive issue and the period and rate of interest to be procedural issues. In the United States, at least one district court has found interest to be a substantive issue. There, because the court had previously determined that the substantive law of India governed the arbitration award, it applied Indian law to the question of interest. The court concluded that because the Indian Arbitration Act only allows interest to be awarded from the date of a court decree confirming the award, it would not order prejudgment interest. However, it stated that if Indian courts confirmed the award with prejudgment interest, it would enforce the award and order interest as of the date the opinion was entered.

In the event that the parties do not provide for interest in the arbitration agreement, the panel has several options for resolving the interest issue. The panel can conduct a choice-of-law analysis, apply general principles of international law, or analyze the issue based on its assessment of what is fair and reasonable. In that respect, parties should pay particular attention to whether the laws of the country of enforcement permit interest awards. Arbitrators have discretion under most national legal systems and arbitral institutions to award interest. The United States, for example, has a presumption in favor of awarding prejudgment interest on arbitral awards. Other countries, including some countries in the Middle East, prohibit interest.

317 Id.
318 Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 962 (S.D. Ohio 1981)
319 Id.
320 Id. at 962.
321 Id.
322 Gotanda, supra note 316, at 50.
323 FRIEDLAND, supra note 187, at 98.
324 E.g., In re Waterside Ocean Navigation Co., 737 F.2d 150, 153-54 (2d Cir. 1984) (recognizing the power of district courts to award pre-judgment interest and finding no reason “why pre-judgment interest should not be available in actions brought under the [New York Convention]”). Waterside involved a dispute between INL, the owner of a vessel, and Waterside who agreed to hire the vessel. Id. at 151. The dispute was submitted to arbitration in London where the arbitrators awarded Waterside damages. Id. at 151. Waterside sought confirmation of the award and prejudgment interest in the Southern District of New York. Id. at 151. The court affirmed the awards but rejected Waterside’s request for prejudgment interest, finding that it lacked jurisdiction to order prejudgment interest. Id. at 151. The Second Circuit affirmed the confirmation of the five arbitration awards, id. at 152, and further held as a matter of first impression that post-award, prejudgment interest was available in actions brought under the New York Convention. Id. at 153-54. The court found that interest was appropriate in this case because (1) even though the English arbitrators lacked the power to award prejudgment interest, they granted pre-award interest, id. at 154, and (2) English law provides for post-award, pre-judgment interest, so the winning party could have recovered this if it had sought confirmation of the awards in English courts. Id.
325 See Branson & Wallace, supra note 313, at 933.
d. **Costs and Attorneys’ Fees.**

Most arbitral regimes give arbitrators discretion to allocate costs at the conclusion of the arbitration.\(^{326}\) Costs may include, among other things, arbitrators’ fees and expenses, administrative fees, and expert fees and expenses.\(^{327}\) Arbitrators also generally have discretion to allocate attorneys’ fees,\(^{328}\) even though the legal systems of some nations, including the United States,\(^{329}\) do not routinely provide for attorney fee awards to prevailing parties.\(^{330}\) Courts will approve arbitration awards of fees and costs, even in those jurisdictions where such awards are not normally made.\(^{331}\) Parties can draft the arbitral clause to give arbitrators discretionary authority to allocate costs and attorneys’ fees, divide expenses equally among the parties, award costs and fees to the prevailing party, or any other variation of the parties’ choosing.\(^{332}\)

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\(^{326}\) FRIEDLAND, *supra* note 187, at 96. See, e.g., AAA-ICDR International Arbitration Rules, art. 31 (tribunal may apportion costs among the parties); HKIAC Administered Arbitration Rules, art. 36 (effective Sept. 1, 2008) (generally the unsuccessful party will bear the costs, but the arbitral tribunal may allocate costs if it finds doing so reasonable, and the arbitral tribunal is free to allocate or award legal costs), http://www.hkiac.org/index.php/en/arbitration-rules-a-guidelines/hkiac-administered-arbitration-rules/46-hong-kong-international-arbitration-centre-administered-arbitration-rules-2#36 (last visited Nov. 15, 2012); ICC Rules of Arbitration, art. 37(1) (noting that the final award will fix the costs and determine which of the parties shall bear them or the allocation between the parties); LCIA Arbitration Rules, art. 28.1 (noting that, unless the parties’ agreement states otherwise, the tribunal shall determine the proportions in which the parties shall bear all or part of the arbitration costs and shall have the power to award legal or other costs); UNCITRAL Arbitration Rules, art. 42 (generally the unsuccessful party will bear the costs, but the arbitral tribunal may allocate costs if it finds doing so reasonable).

\(^{327}\) E.g., ICC Rules of Arbitration, art. 37(1).

\(^{328}\) Id. at art. 31 (including “reasonable legal and other costs incurred by the parties for the arbitration” as a cost of arbitration and providing that “[t]he final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties”); FRIEDLAND, *supra* note 187, at 97.

\(^{329}\) Buckhannon Bd. & Care Home, Inc. v. W.V. Dep’t of Health & Human Res., 532 U.S. 598, 602 (2001) ("In the United States, parties are ordinarily required to bear their own attorneys’ fees-the prevailing party is not entitled to collect from the loser.").

\(^{330}\) See generally FRIEDLAND, *supra* note 187, at 97.

\(^{331}\) E.g., F. Hoffmann-La Roche Ltd. v. Quigen Gaithersburg, Inc., 730 F. Supp. 2d 318, 320-24 (S.D.N.Y. 2010) (confirming final arbitration award that included attorneys’ fees and denying motion to vacate); Shaw Group, Inc. v. Triplefine Int’l Corp., No. 01 Civ. 4273(LMM), 2003 WL 22077332, at *2-3 (S.D.N.Y. Sept. 8, 2003) (denying motion to vacate attorneys’ fees award after finding no manifest error of law in arbitrator’s decision to award attorneys’ fees because, by agreeing to ICC arbitration, parties agreed that ICC Arbitration Rules would apply – including Article 31 (now Article 37), which qualifies legal fees as a cost of arbitration and allows the award to allocate costs among parties); Compagnie des Bauxites de Guinee v. Hammermills, Inc., Civ. A. No. 90-0169 (JGP), 1992 WL 122712, at *4-7 (D.D.C. May 29, 1992) (denying motion to vacate portion of arbitration award rendered by ICC arbitrator granting respondent legal costs incurred in the arbitration, including attorneys’ fees, and noting that ICC Rules expressly put petitioner on notice that legal fees could be assessed).

5. Interim Relief

Most leading arbitral regimes permit provisional relief unless the parties designate otherwise in their arbitration agreement. Similarly, national laws generally give courts the authority to grant provisional relief even if the parties' arbitration agreement is silent on the matter. However, since “provisional measures are not well established principles of law, the parties are better served by stating in expressis verbis whether they want provisional measures and, if so, which provisional measures they desire.” Parties should also consider whether to impose a liquidated damages provision to deter conduct that would violate an interim decision.

6. Discovery

Parties may wish to define the scope of discovery in their arbitration agreement. Discovery provisions may address issues such as the standard for discovery (e.g., whether discovery will be based on relevance, reasonableness, or a showing of need), the allowable forms of discovery (e.g., depositions, interrogatories, requests to produce, requests to admit, and inspections or examinations), and the time limits for discovery. Parties should also state that the arbitrators will control the scope of discovery and have the authority to resolve any discovery disputes that arise. The IBA Rules of Evidence are a good reference for drafting discovery procedures. Parties can incorporate the IBA Rules of Evidence by stating: “The arbitrators shall apply the IBA Rules on the Taking of Evidence in International Commercial Arbitration...”
If the arbitration agreement is silent on the issue of discovery, most international arbitral institutions will adopt the IBA Rules of Evidence for discovery in international arbitrations. Parties who desire full U.S. litigation-style discovery can so provide by stating as follows: “The parties shall allow and participate in discovery in accordance with the United States Federal Rules of Civil Procedure. Unresolved discovery disputes shall be submitted to the arbitrator(s).”

7. Split Clauses, Stepped Clauses, and Conditions Precedent

Split clauses explicitly carve out certain types of disputes from arbitration and are therefore an alternative to broad, all-encompassing arbitral clauses. Split clauses are often used in cases where parties want to raise certain claims or issues before a trade association or industry panel.

Stepped clauses provide for different methods of dispute resolution at different stages of the dispute. Stepped clauses are appropriate where, for example, parties want to mediate before taking claims to arbitrators. A stepped clause must be carefully drafted to avoid ambiguity as to which disputes will proceed outside of arbitration, when those disputes will be deemed complete or the method exhausted, any trigger for arbitration, and whether the clause is mandatory or merely preferred. One option is for the parties to define a time limit for the alternate dispute resolution method before unresolved disputes go to arbitration.

Like stepped clauses, conditions precedent to arbitration provide for a specific action or event to occur prior to the commencement of arbitration. While the condition precedent may be an alternate form of dispute resolution, such as mediation, it also may be a meeting among senior executives to discuss settlement or some other event. Parties drafting conditions precedent must clearly state if the condition is required or preferred, when the condition will be deemed satisfied, and whether the parties may, under limited circumstances, commence arbitration prior to its completion.

8. Arbitrator Selection and Qualifications

In addition to choosing the number of arbitrators, parties should specify how the arbitrators will be selected (or replaced) and any desired qualifications for arbitrators. Regarding selection, parties may find it most convenient to reference the rules of an arbitral regime, which may require the arbitral institution to send out lists of arbitrators from which the parties can

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341 The suggested language appears in FRIEDLAND, supra note 187, at 79.
342 Hanessian & Newman, supra note 186, at 235; FRIEDLAND, supra note 187, at 79.
343 The suggested language appears in FRIEDLAND, supra note 187, at 81.
344 See, e.g., Hanessian & Newman, supra note 186, at 229 (noting the tendency to carve out intellectual property disputes from arbitral clauses).
345 Id. at 4-6, 230 (recognizing that many arbitral clauses require other forms of dispute resolution, such as negotiation, mediation, a mini-trial, or submission to a dispute review board, before arbitration).
346 Townsend, supra note 198, at 34 (citing AAA standard clause).
347 Id.
choose their own arbitrators. In the event of an impasse among the parties, regimes can be used to select arbitrators.348 In non-administered arbitration, parties should select a primary method for the selection (and replacement) of arbitrators, and also should designate an appointing authority, such as a court, arbitral institution, or trade association, to select the arbitrators if the parties’ method of selection fails.349 Parties will not be able to choose the method for the selection (or replacement) of arbitrators if their arbitral clause is silent on this issue.350 In administered arbitration, the institutional rules generally provide a method of selection.351 In non-administered arbitration, the national courts may appoint the arbitrators.352

Parties may also specify certain minimum qualifications for arbitrators. The leading arbitral institutions require impartiality and independence;353 parties to non-administered arbitration also may wish to require that arbitrators be impartial and independent.354 Additionally, parties who want their arbitrators to have expertise in the subject matter, relevant education, or a particular nationality can provide for this in their arbitration agreement.355 Parties should avoid drafting requirements that are so specific that it would be difficult or impossible to find qualified individuals.356 Parties should also avoid naming particular individuals to serve as arbitrators.357 Finally, parties should be aware that the law of the place of arbitration may restrict the parties’ choice of arbitrators.358

349 Id. at 68.
350 Id. at 67.
351 Id. at 66.
352 Id.
353 E.g., ICC Rules of Arbitration, art. 11(1) (“Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.”), art. 11(2) (“Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence . . . .”); LCIA Arbitration Rules, art. 5.2 (“All arbitrators conducting an arbitration under these Rules shall be and remain at all times impartial and independent of the parties; and none shall act in the arbitration as advocates for any party; UNCITRAL Arbitration Rules, art. 11 (“When a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence.”); FRIEDLAND, supra note 187, at 72.
354 FRIEDLAND, supra note 187, at 72; 2010 International Arbitration Survey: Choices in International Arbitration, supra note 222, at 25-26 (noting that the most important factor in parties’ choice of arbitrator was open-mindedness and fairness).
355 E.g., Hanessian & Newman, supra note 186, at 9, 238; 2010 International Arbitration Survey: Choices in International Arbitration, supra note 222, at 25-26 (noting factors considered by parties in selecting arbitrators).
356 See FRIEDLAND, supra note 187, at 71.
357 Hanessian & Newman, supra note 186, at 8.
358 Id. at 231 (noting that, in Saudi Arabia, arbitrators must be Muslim, and in Venezuela, arbitrators must be licensed to practice law in Venezuela if Venezuelan law governs the dispute).
9. Waiver of Sovereign Immunity

States may bind themselves to arbitration of contractual disputes, and thereby waive immunity from jurisdiction. The United States Foreign Sovereign Immunities Act (the “FSIA”), for example, applies to commercial activities and provides that foreign governments and agencies implicitly waive their sovereign immunity if they agree to arbitrate disputes eligible for arbitration under U.S. law and any of the following three conditions applies: (1) the arbitration takes place, or is intended to take place, in the United States; (2) there is a treaty or international agreement concerning recognition and enforcement of arbitral awards in force in the United States that applies or may apply to the agreement or award; or (3) the underlying claim could have been brought in a U.S. court. However, U.S. courts have narrowly construed the implied waiver provisions of the FSIA. Therefore, parties who enter into arbitration agreements with foreign governments and agencies should draft an explicit and irrevocable waiver of sovereign immunity that applies to service of process, jurisdiction of courts, and post-judgment execution or attachment of assets.

10. Summary Disposition

Summary disposition is a procedure that allows arbitrators to decide dispositive issues at any stage of the case. Historically, summary disposition was unavailable in arbitration. It has been advocated by Friedland, who proposes the following clause: “The arbitrators shall have the discretion to hear and determine at any state of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue.” The ICC Rules, for example, generally provide for oral hearings. They state that (1) the tribunal may

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359 Id. at 204.
361 E.g., Mar. Int’l Nominees Establishment v. Republic of Guinea, 693 F.2d 1094, 1102-04 (D.C. Cir. 1982) (finding no waiver of Guinea’s sovereign immunity based on its agreement to submit disputes to ICSID for arbitration, even though the ICSID was seated in Washington, D.C., and arbitration “would probably take place on United States soil,” because the agreement did not contemplate a role for United States courts in compelling stalled arbitration).
362 FRIEDLAND, supra note 187, at 82.
363 Id.
364 Id. Friedland advocates for the use of the following clause: “The arbitrators shall have the discretion to hear and determine at any state of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue.” Id.
365 ICC Rules of Arbitration, art. 25(6) (“The Arbitral Tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.”).
order an oral hearing *sua sponte*, or (2) the tribunal shall hold a hearing *if* one of the parties requests it.\(^{366}\) However, courts have confirmed arbitration awards despite a party’s objections to the arbitrator’s reliance on procedures akin to summary disposition, suggesting that arbitrators may have authority to use the procedure.\(^{367}\)

11. **Consent to Entry of Judgment**

The first chapter of the Federal Arbitration Act states that U.S. courts may confirm an arbitral award at any time within one year after the award is made “*if* the parties in their agreement have agreed that a judgment of the court shall be entered upon the award . . .”\(^{368}\) This is more restrictive than the second chapter of the Federal Arbitration Act, which applies to arbitrations conducted under the New York Convention and which states that “[w]ithin three years after an arbitral award falling under the [New York Convention] is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration” and “[t]he court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said [New York Convention].”\(^{369}\)

In *Varley v. Tarrytown Association, Inc.*, the Second Circuit held that, under 11 U.S.C.\(\S\) 9, a district court could not confirm a domestic arbitration award and enter judgment on it absent a provision specifically empowering it to do so.\(^{370}\) Later decisions have largely overruled *Varley*, noting that both a description of the award as “final” and the parties’ implied consent to an entry of judgment can provide a basis for allowing courts to enter judgment on an arbitration award absent an express provision.\(^{371}\) Moreover, some recent U.S. case law explicitly holds that section 207 preempts section 9 on this issue and that the parties’ explicit consent to entry of judgment is not needed for international contracts subject to the New York Convention.

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\(^{366}\) *Id.*, art. 25(2) (“After studying the written submissions of the parties and all documents relied upon, the Arbitral Tribunal shall hear the parties together in person if any of them so requests or, failing such a request, it may of its own motion decide to hear them.”).

\(^{367}\) *E.g.*, *Matthew v. Papua New Guinea*, No. 09 Civ. 3851(LTS), 2009 WL 4788155, at *3-4 (S.D.N.Y. Dec. 9, 2009) (confirming final arbitration award despite challenge that arbitrator manifestly disregarded the law by refusing to hear evidence material to the dispute and instead dismissing, based on evidentiary submissions, petitioner’s *quantum meruit* claim as insufficient to maintain a claim under applicable law – a move that the arbitrator likened to a directed verdict in a non-jury case); *In re Arbitration Between Griffin Indus., Inc. & Petrojam, Ltd.*, 58 F. Supp. 2d 212, 219-20 (S.D.N.Y. 1999) (holding that arbitrators’ failure to hold oral hearings was not misconduct and granting motion to confirm arbitration award); *In re Arbitration Between InterCarbon Bermuda, Ltd. & Caltex Trading & Transp. Corp.*, 146 F.R.D. 64, 72-74 (S.D.N.Y. 1993) (holding that arbitrator’s refusal to hear live testimony did not provide a basis for vacating the arbitration award and confirming award).

\(^{368}\) 9 U.S.C. \(\S\) 9.

\(^{369}\) *Id*. \(\S\) 207.

\(^{370}\) 477 F.2d 208, 210 (2d Cir. 1973).

\(^{371}\) *E.g.*, *I/S Stavborg (O.H. Meling, Mgr.) v. Nat’l Metal Converters, Inc.*, 500 F.2d 424, 426-27 (2d Cir. 1974) (acknowledging, but not considering, appellee’s argument that the New York Convention provides an alternative basis for allowing the court to enter judgment on the award, because the existing language and appellant’s conduct provided a sufficient basis for doing so).
Convention, and some commentators recognize as much, but case law on this issue is limited.

As a result, parties either engaged in arbitration in the United States or potentially wishing to enforce an arbitral award in the United States should consider including an “entry of judgment” provision in their arbitration agreement as a precautionary measure. This can be accomplished with the following: “Judgment upon any award(s) rendered by the arbitrators may be entered in any court having jurisdiction thereof.”

12. Kompetenz/Kompetenz Doctrine

The Kompetenz/Kompetenz doctrine provides that arbitrators are empowered to decide their own jurisdiction. The laws of many nations recognize the Kompetenz/Kompetenz doctrine. In the United States, however, unless the parties expressly provide that arbitrators have jurisdiction to decide jurisdictional issues, courts presumptively decide those questions.

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372 Stone & Webster, Inc. v. Triplefine Int’l Corp., 118 F. App’x 546, 549 (2d Cir. 2004) (concluding that section 9, which requires parties’ express agreement to judicial confirmation, conflicts with section 207, which does not require parties’ express consent to judicial confirmation, and did not preclude the confirmation of an international arbitration award to a Taiwanese corporation); Phoenix Aktiengesellschaft, 391 F.3d at 436-37 (holding that an American licensee’s consent was unnecessary for the district court to confirm an arbitration award in favor of a German licensor because section 207 preempts the consent-to-confirmation requirement of section 9 for cases brought under the New York Convention); McDermott Int’l, Inc. v. Lloyds Underwriters of London, 120 F.3d 583, 588-89 (5th Cir. 1997) (holding that section 9 does not preempt section 207 and concluding that the consent of insured, a Panamanian corporation headquartered in Louisiana, was not necessary for the district court to confirm an arbitration award in favor of a London insurer because the New York Convention applied to the lawsuit).

373 E.g., William W. Park, Arbitration of International Contract Disputes, 39 BUS. LAW. 1783, (1984) (noting that the practice in the United States of adding language stating that “judgment upon the arbitral award may be entered in any court having jurisdiction thereof” evolved from domestic, rather than international, transactions and that “the entry of judgment stipulation may not be necessary for international arbitration.”).

374 The suggested language appears in Hanessian & Newman, supra note 186, at 241, and in FRIEDLAND, supra note 187, at 103.

375 Born & Rutledge, supra note 204, at 1095; Hanessian & Newman, supra note 186, at 229.

376 E.g., Commercial Arbitration Act, R.S.C. 1985, c. 17, art. 16(1) (Can.) (“The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”); Arbitration Act, 1996, c.23, § 30 (Eng.) (“Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to – (a) whether there is a valid arbitration agreement, (b) whether the tribunal is properly constituted, and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.”); Arbitration Act, 2002, c. 10, § 21(1) (Sing.) (“The arbitral tribunal may rule on its own jurisdiction, including any objections to the existence or validity of the arbitration agreement); UNICTRAL Model Law art. 23.1 (“The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”).

377 See, e.g., Hoswam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84-85 (2002) (concluding that courts decide questions of arbitrability, such as whether an arbitration clause binds certain parties or applies
IV. CHAPTER 4: VALIDITY OF AN AGREEMENT TO ARBITRATE

There are two major international conventions that govern the enforceability of non-domestic arbitration agreements in most countries involved in significant international trade.\(^{378}\) The first is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, better known as the New York Convention.\(^{379}\) The second is the Inter-American Convention on International Commercial Arbitration, better known as the Panama Convention.\(^{380}\) This chapter discusses each convention’s requirements for a valid and enforceable arbitration agreement.

A. New York Convention

Subject to certain authorized reservations,\(^{381}\) with respect to recognition and enforcement of arbitration agreements, the New York Convention requires signatory nations to:

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\(^{378}\) As explained \textit{supra}, Chapter 2.C.1.a, in United States courts the FAA governs the enforceability of arbitration agreements where the parties and subject matter are wholly domestic, \textit{i.e.}, do not involve foreign parties, foreign property, foreign performance, or some other connection to a foreign nation. FAA § 202.

\(^{379}\) Implemented at 9 U.S.C. § 201, \textit{et seq.}

\(^{380}\) Implemented at 9 U.S.C. § 301, \textit{et seq.}

\(^{381}\) The Convention authorizes parties to declare reciprocity and commercial reservations when signing, ratifying, or acceding to the Convention. New York Convention, art. I(3).

The United States’ declarations are typical, LEONARD V. QUIGLEY, \textit{CONVENTION ON FOREIGN ARBITRAL AWARDS}, 58 A.B.A. J. 781, 823 (1972), its reciprocity reservation reads:
The United States of America will apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting state.

New York Convention, Note by the Department of State, 21 U.S.T. 2517, 330 U.N.T.S. 38, \textit{available at} 1970 WL 104417, at *1. Given the large number of signatories, the reciprocity reservation is of dwindling practical significance. 31 Am. Jur. 3d \textit{Proof of Facts} 495, § 6. The United States’ commercial reservation reads:
The United States of America will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the United States.
1. Recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. At the request of one of the parties, refer the parties to arbitration, when the court of a Contracting State is seized of an action in a matter in respect of which the parties have made an agreement within the meaning of the Convention, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

In short, countries that have adopted the New York Convention must recognize certain types of arbitration clauses as valid and give effect to valid agreements by referring suits covered by those agreements from their domestic courts to arbitration. Each requirement for validity and enforcement is considered in detail below.

1. **The Agreement Form: Must be in writing**

The New York Convention requires that signatory nations recognize arbitration provisions contained in “agreements in writing,” defined to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

There is some disagreement in United States courts over the proper interpretation of Article II(2). A majority of courts interpret Article II(2) to reach agreements to arbitrate or stand-alone agreements that are (a) signed, (b) contained in an exchange of letters, or (c) contained in an exchange of telegrams. A minority of courts enforce an arbitration agreement contained in

Although the text suggests that parties may only subject award proceedings to these limits, in practice the limits have been applied to proceedings to compel arbitration as well, with United States courts only compelling arbitration where the forum is within the territory of a signatory nation. *Nat’l Iranian Oil Co. v. Ashland Oil, Inc.*, 817 F.2d 326 (5th Cir. 1987) (refusing to compel arbitration to non-signatory Iran and explaining that “[w]hen the United States adhered to the Convention on the Recognition and Enforcement of the Foreign Arbitral Awards . . . U.S. courts were granted the power to compel arbitration [only] in signatory countries.”); see also *Sedco, Inc. v. Petroleos Mexicanos Mexican Nat. Oil Co. (Pemex)*, 767 F.2d 1140 (5th Cir. 1985) (noting that both the United States and Mexico are signatories to the New York Convention). At least one commentator has expressed doubt about this interpretation. 2 Domke on Commercial Arbitration § 49:7 n. 14 (2010).

382 As explained *infra* Chapter 16.C, countries must recognize and enforce awards made in other signatory nations, subject to a specified exceptions. These exceptions include incapacity, invalidity, improper notice, arbitrability, procedural irregularities, and public policy, among others. New York Convention, art. V.

383 New York Convention, art. II(1).

384 *Id.* at art. II(2).

any contract, no matter how it was agreed to, but only enforce stand-alone agreements that are (a) signed, (b) contained in an exchange of letters, or (c) contained in an exchange of telegrams.\footnote{See Sphere Drake Ins. PLC v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994).}

United States courts interpret the language in Article II(2) of the New York Convention as exhaustive of the types of writings that qualify for enforcement.\footnote{See Chloe Z Fishing Co., Inc., 109 F. Supp. 2d 1236.} However, United States courts will apply general principles of contract law to supplement the Convention’s otherwise strict form requirements. Accordingly, in \textit{Oriental Commercial & Shipping Co. v. Rosseel, N.V.}, a court concluded that a party was bound to an arbitration agreement through the alter ego doctrine, even though it had not signed the agreement.\footnote{609 F. Supp. 75 (S.D.N.Y. 1985).} Other courts have relied on common law principles of contract and agency to bind non-signatory parties to arbitration agreements.\footnote{See E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S., 269 F.3d 187, 195 (3d Cir. 2001); Thomson-CSF S.A. v. American Arbitration Ass’n, 64 F.3d 773, 776 (2d Cir. 1995).} Where contract principles are not enough to bring an agreement within the ambit of one of the conventions, the agreement may nevertheless be enforceable as a matter of domestic law under Chapter 1 of the FAA.\footnote{See supra, Chapter 2.C.1.a.}


2. **Eligible Disputes:** Existing or future disputes, often limited to those of a commercial nature, that are capable of settlement by arbitration, were intended to be submitted to arbitration, and are not purely domestic

Even if in proper form, the New York Convention only requires signatory nations to recognize and enforce agreements to arbitrate certain types of matters.
First, the New York Convention applies to agreements to arbitrate “existing or future disputes,” but only on those “subject matter[s] capable of settlement by arbitration.”\(^{392}\) Whether a subject matter is capable of settlement by arbitration is a matter of domestic law, as interpreted by the court being asked to enforce the agreement.\(^{393}\) United States courts have rarely concluded that a subject matter is incapable of being arbitrated unless Congress expressly singles out categories of claims as nonarbitrable.\(^{394}\) Indeed, some courts have suggested that, like the “null and void” clause, subject matters incapable of settlement by arbitration ought to be resolved “on an international scale.”\(^{395}\)

Second, as noted above, even where a dispute could otherwise be subject to an arbitration agreement, the Convention permits signatory nations to restrict recognition and enforcement of arbitration agreements to those that concern “differences arising out of legal relationships, whether contractual or not, which are considered as commercial under [the State’s] national law.”\(^{396}\) Some nations have elected to so restrict the Convention’s reach. Because whether an agreement is commercial is a question of the enforcing nation’s domestic law, determining whether a particular court will recognize the validity of a particular agreement and refer the parties to arbitration requires a country-specific legal analysis.

Under United States law, for example, determining whether an agreement is covered by the convention requires an analysis of both statutes and case law. By statute the New York Convention applies only if the agreement “aris[es] out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described [in the domestic portion of the FAA].”\(^{397}\) Because of the judiciary’s strong policy favoring the submission of contractual disputes to arbitration, the term “commercial” has been broadly construed.\(^{398}\) Indeed, some courts have gone so far as to apply the convention to varieties of commercial disputes that are expressly excluded from arbitration under the domestic portion of the FAA.\(^{399}\)

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392 New York Convention, art. II(1).
396 New York Convention, art. I(3).
397 9 U.S.C. § 202. Section 2 of the FAA makes enforceable:
A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal . . . .
*Id.* at § 2.
398 *See, e.g., Societe Generale de Surveillance, S.A. v. Raytheon European Management and Systems*, 643 F.2d 863 (1st Cir. 1981). For examples of relationships that have been determined to be commercial, see 31 Am. Jur. 3d Proof of Facts 495, § 11.
399 Compare *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005) (applying New York Convention to employment contracts of seamen) with *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327
Third, assuming a dispute may be submitted to arbitration, it is well-recognized that a court will only enforce an arbitration agreement as to a particular dispute—i.e., order parties out of the courts and into arbitration—if it is convinced that the parties agreed to arbitrate the dispute. Such “arbitrability” questions are a common part of complex commercial disputes.

Under United States law, the task of determining if the parties agreed to arbitrate a dispute belongs to the court and is resolved by domestic law, not the law chosen by the parties in the arbitration provision, unless the parties clearly and unmistakably provide otherwise. In resolving disputes over arbitrability, some courts will refer questions regarding the scope of the arbitration provision to arbitrators where the arbitration provision is “broad” as opposed to “narrow.” However, even where the clause is narrow, courts resolve doubts about arbitrability in favor of arbitration because of the liberal federal policy favoring arbitration agreements.

Fourth, by its terms, the New York Convention only applies to non-domestic arbitration agreements. Under United States law, this means that agreements must either involve a foreign national or have an appreciable relationship with a foreign nation:

An agreement or award arising out of [a qualifying] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

The threshold showing of a relationship with a foreign nation for this purpose is minimal. And, although the Convention does not cover purely domestic disputes between United States citizens, it does cover purely foreign disputes between foreign parties brought in a United States court. In other words, although arbitrable disputes that are domestic to the United States do not fall under the convention if brought in a United States court, disputes that are entirely domestic to another Convention signatory, if brought in a United States court, do.

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(5th Cir. 2004) (refusing to apply the New York Convention to the same and noting their exclusion under the domestic portion of the FAA); see also 9 U.S.C. § 1.

400 Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 43 (3rd Cir. 1978) (“It is true that, if the parties agree that certain disputes will be submitted to arbitration and that the law of a particular jurisdiction will govern the resolution of those disputes, federal courts must effectuate that agreement. However, whether a particular dispute is within the class of those disputes governed by the arbitration and choice of law clause is a matter of federal law.” (internal citations omitted)); Chloe Z Fishing Co., Inc., 109 F. Supp. 2d at 1254.


402 See, e.g., Sedco, 767 F.2d at 1145; see also 31 Am. Jur. 3d Proof of Facts 495, § 9.


404 It does not appear to matter whether or not the nation is a signatory to the applicable convention, although there are no reported cases discussing the issue.


3. **Exceptions to Recognition: Null and void, inoperative, or incapable of being performed**

Where an agreement satisfies all of the aforementioned requirements, a court may nevertheless refuse to compel the parties to arbitrate under the New York Convention if the court concludes that the agreement is “null and void, inoperative, or incapable of being performed.” These defenses are “narrowly construed” to prevent the New York Convention’s pro-enforcement bias from being frustrated by local interests and challenges are very rarely successful.\(^{407}\)

For example, United States Courts have found an arbitration agreement “null and void” when the agreement was rendered invalid from the outset by some defect that “can be applied neutrally on an international scale,” such as “fraud, mistake, duress, and waiver,”\(^{408}\) or where the agreement contravenes fundamental policies of the forum state.\(^{409}\) The presumptive severability of arbitration clauses means that the cause of invalidity must go directly to the arbitration provision for a court to refuse to refer a party to arbitration under Article II(3).\(^{410}\) Common defenses, such as illegality of the contract’s subject matter, misrepresentation, or unconscionability, even if internationally recognized, will rarely infect the arbitration clause.

Where courts have found agreements to be “inoperative” or “incapable of being performed” it is usually for practical reasons going to the validity of the arbitration agreement.\(^{411}\) In such cases, some courts prefer to refer the parties to the arbitrator for determination of whether the agreement remains operative, or capable of being performed.\(^{412}\) At least one scholar favors this approach, at least where there is any doubt as to the continuing viability of the arbitration provision.\(^{413}\)

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\(^{408}\) Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982) (refusing to consider Puerto Rican statute as a grounds for refusal); see also Chloe Z Fishing Co., 109 F. Supp. 2d at 1259 (refusing to consider state-law unconscionability as a grounds for refusal); Oriental Commercial and Shipping Co., Ltd. v. Rosseel, N.V., 609 F. Supp. 75 (S.D.N.Y. 1985) (identifying duress, mistake, fraud or waiver as internationally recognized defenses to contract formation).

\(^{409}\) Rhone Mediterranee Compagnia, 712 F.2d 50.


\(^{411}\) See, e.g., Invista North America, S.a.r.l. v. Rhodia Polyamide Intermediates S.A.S., 503 F. Supp. 2d 195 (D.D.C. 2007) (considering whether, in a multi-party litigation, an arbitration clause was “inoperative or incapable of being performed” because one party was not a signatory to the arbitration agreement).

\(^{412}\) Fuller Co., 421 F. Supp. 938 (deferring to the arbitrator resolution of whether a subsequent agreement settled claims otherwise falling within the arbitration provision, thus making the arbitration agreement inoperative).

B. Panama Convention

The Panama Convention imposes nearly identical obligations on signatory countries. The Panama Convention was formed in 1975 at the Inter-American Conference on Private International Law as an OAS-based alternative to the New York Convention. Nineteen out of the thirty-five members of the OAS have signed the Panama Convention, but only sixteen have ratified it. Like the New York Convention, the Panama Convention is applied on the basis of reciprocity and is limited to commercial transactions. Twelve states have accepted both the New York and Panama Conventions.

Where enforcement is sought in one of these twelve states, and the requirements of both the New York and Panama Conventions are met, the Panama Convention’s choice of law provision determines which convention controls. According to that provision, the New York Convention applies unless a majority of the parties to the arbitration agreement are citizens of OAS member states that have ratified the Panama Convention.

Like the New York Convention, the Panama Convention declares “valid” certain agreements in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction. Each requirement for validity is considered in detail below. Unlike the New York Convention, the Panama Convention does not expressly order domestic courts to order parties to arbitration when asked to entertain an action that falls within the scope of an arbitration agreement made enforceable by the Convention.

1. The Agreement Form: Must be in Writing

The Panama Convention requires that arbitration agreements “be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex

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414 Organization of American States. The OAS is a regional organization established by a number of nations from the Americas to foster among member nations “an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence.” http://www.oas.org/en/about/who_we_are.asp (last visited Nov. 15, 2012).
417 Unlike the New York Convention, here the limitation appears in text of the agreement itself. Panama Convention, art. I.
420 The United States implementing legislation, however, contains such a provision. 9 U.S.C. § 303.
communication. The inclusion of telex communications makes the Panama Convention somewhat broader than the New York Convention. Ordinary principles of contract law apply in determining whether this standard is met.

2. ** Eligible Disputes: Existing or future disputes, arising with respect to a commercial transaction, intended to be submitted to arbitration, and not purely domestic **

Even if in proper form, the Panama Convention only requires signatory nations to recognize and enforce agreements to arbitrate certain types of matters.

*First*, the Panama Convention applies to existing or future disputes, but only those that arise from commercial transactions. Unlike the New York Convention, which extends to all disputes absent a nation-specific reservation, the Panama Convention’s restriction appears in its text. Whether a transaction is commercial, and whether a dispute “arises from” that transaction, are both questions resolved by the domestic law of the court asked to enforce the agreement.

United States law makes the circumstances under which a dispute is considered “commercial” under the Panama Convention coextensive with those circumstances under which a dispute is considered “commercial” under the New York Convention. Accordingly, as with the New York Convention, courts have interpreted the phrase “commercial transaction” broadly.

*Second*, the parties must have intended to submit the dispute to arbitration. Although technically a basis for vacating an award under the Panama Convention, courts treat arbitrability as a threshold requirement for depriving the parties of access to the courts, as discussed in more detail above.

*Third*, although by its terms the Panama Convention appears to apply to any agreement where a majority of the parties are citizens of signatory nations, through its incorporation of certain provisions applicable to the New York Convention, Congress limited the Panama Convention’s applicability to purely domestic disputes:

An agreement or award arising out of [a qualifying relationship] which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a

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421 Panama Convention, art. (I).
422 Siderugica Del Orinoco, 1999 WL 632870.
425 See supra Chapter 4.A.2.
426 Panama Convention, Art. V(1)(c).
427 See supra Chapter 4(a)(ii); Siderugica Del Orinoco, 1999 WL 632870.
citizen of the United States if it is incorporated or has its principal place of business in the United States.

No such restriction exists for disputes arising between citizens of another signatory.429

3. Exceptions to Recognition: None

Unlike the New York Convention, the Panama Convention does not identify circumstances under which a court is entitled to decline to enforce an otherwise enforceable arbitration provision. Accordingly, although courts may rely on general contract principles to find a defect in the formation of the arbitration agreement,430 they are not permitted to second-guess the operability or feasibility of a validly formed agreement.

V. CHAPTER 5: CHOICE OF LAW

Choice of law is an important consideration in international arbitration. As the United States Supreme Court has remarked, “[a] contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”431 Choice of law provisions “obviate[] the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.”432

In international arbitration, there is more than one “governing” law. Laws relevant to the arbitration include the law that applies to the validity, enforceability, and interpretation of the arbitration agreement, the procedural law for the arbitration, and the substantive law that applies to the merits of the dispute.433 As explained below, the parties’ choice of law will also impact the recognition and enforcement of arbitral awards.

A. Choice of Law Governing Validity of Arbitration Agreement

An arbitration agreement is separate and independent from the main contract in which it may be found. As a result, the law governing the validity of the arbitration agreement may not be the same as the law governing the underlying contract.434

Parties have the freedom to expressly choose the law to govern the arbitration agreement.435 However, few contracts expressly state the governing arbitration law. Where the

429 Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 44 (2d Cir. 1994).
430 Siderugica Del Orinoco, 1999 WL 632870.
432 Id.
435 Ashford, supra note 433, at 10.
parties fail to choose the law governing the validity of the arbitration agreement, there are three main alternatives: (1) the law of the seat; (2) the law governing the parties’ underlying contract; and (3) the law of the place of enforcement. Of those three alternatives, the law of the seat is the default choice for arbitral tribunals and national courts.

1. Arbitral Law Regarding Validity of Agreement to Arbitrate

The major international arbitral regimes contain provisions regarding the separability of arbitration clauses and their authority to decide the validity of an agreement to arbitrate. For example, the American Arbitration Association International Arbitration Rules state that “[t]he tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.” and that “an arbitration clause shall be treated as an agreement independent of the other terms of the contract.” The ICC Rules of Arbitration provide that “if any party . . . raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, . . . the arbitration shall proceed and any question of jurisdiction . . . shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the [International Court of Arbitration] for its decision pursuant to Article 6(4).” If a case is referred to the International Court of Arbitration, that Court will permit the arbitration to proceed “if and to the extent that the Court is prima facie satisfied that an arbitration agreement under the Rules may exist.” The ICC Rules state that “any decision as to the jurisdiction of the Arbitral Tribunal, except as to parties or claims with respect to which the [International Court of Arbitration] decides that the arbitration cannot proceed, shall be taken by the Arbitral Tribunal itself.”

Similarly, the LCIA Rules state that “[t]he Arbitral Tribunal shall have the power to rule on its own jurisdiction, including any objection to the initial or continuing existence, validity or effectiveness of the Arbitration Agreement.” The LCIA Rules further provide that “an

436 BORN, supra note 433, at 43.
437 ASHFORD, supra note 433, at 10; BORN, supra note 433, at 43.
438 AAA-ICDR International Arbitration Rules (effective June 1, 2009), art. 15(1), http://www.adr.org/aaa/faces/aoe/icdr/i_search/i_rule/i_rule_detail?doc=ADRSTG_002008&_afLoop=128884397201466&_afWindowMode=0&_afWindowId=18qyhhv2ib_1#%40%3F_afrWindowId%3D18qyhhv2ib_1%26_afrLoop%3D128884397201466%26doc%3DADRSTG_002008%26_afrWindowMode%3D0%26_adf.ctrl-state%3D18qyhhv2ib_57 (last visited Nov. 15, 2012).
439 Id. at art. 15(2).
442 Id.
arbitration clause which forms or was intended to form part of another agreement shall be treated as an arbitration agreement independent of that other agreement.444

2. National Law Regarding Validity of Agreement to Arbitrate

National arbitration laws are also relevant to determining the validity of arbitration agreements. Among other things, national arbitration laws often contain provisions regarding whether the arbitration agreement is valid, whether the validity and/or interpretation of the arbitration agreement is a question for the national courts or the arbitrators themselves, and whether certain claims or disputes are not arbitrable and must be resolved by the national courts.445

Like arbitral regimes, many national arbitration laws speak to the separability of the arbitration agreement and trend in favor of upholding the validity of international arbitration agreements. For example, the English Arbitration Act states that “an arbitration agreement which forms or was intended to form part of another agreement (whether or not in writing) shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, or did not come into existence or has become ineffectual,” but “shall . . . be treated as a distinct agreement.”446 The United States’ FAA provides that an agreement to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”447

Swiss law establishes the separability of an arbitration agreement from any larger contract of which it may be part,448 and also states that the substance of the arbitration agreement is valid “if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.”449

The UNCITRAL Model Law provides that an arbitration agreement is “independent of the other terms of the contract” and that an arbitral tribunal has the authority to “rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”450 Legislation based on the UNCITRAL Model Law as adopted in 1985 has been enacted in over sixty countries.451

444 Id.
445 BORN, supra note 433, at 28.
446 Arbitration Act, 1996, c.23, § 7 (Eng.).
448 Federal Statute on Private International Law, art. 178(3) (Switz.).
449 Id. at art. 178(2).
B.  Choice of Procedural Law

The procedural law governs the conduct of the arbitration, and is sometimes referred to as the curial law, the *lex arbitri*, or the *loi de l’arbitrage*. The procedural law covers a multitude of issues that can include, among other things, the arbitrators’ liability, ethical standards, appointment, and removal; lawyers’ appearances and ethical obligations; pleading and evidentiary rules; the conduct of the hearings; discovery; the arbitrators’ powers to grant remedial and provisional relief; and the award. The procedural law covers two distinct concepts: the “internal” procedures of the arbitration, such as the commencement of arbitration, the appointment of the tribunal, the pleadings, evidence, and hearings, and “external” procedures, such as intervention by national courts. While the internal procedure is usually governed by a set of rules from an arbitral institution, the external procedure is usually governed by a national law.

Parties can expressly choose the procedural law, and usually that choice will be given effect. However, even if the parties select procedural rules or a procedural law other than the

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452 ASHFORD, supra note 433, at 9.
453 BORN, supra note 433, at 43, 411-12.
454 Id. at 412.
455 ASHFORD, supra note 433, at 10-11.
456 Id. at 11.
457 Id. at 9. International conventions generally indicate that the procedural law will be either the law chosen by the parties themselves or the law of the place of the arbitration. See, e.g., the European Convention, art. IX(1)(a), (providing that a ground for setting aside an arbitration award is that the arbitration agreement “is not valid under the law to which the parties have subjected it”); New York Convention, 21 U.S.T. 2517, 330 U.N.T.S. 38, available at 1970 WL 104417 (setting out as a ground for non-recognition or non-enforcement of an arbitral award the fact that “the arbitral procedure was not in accordance with the agreement of the parties”). League of Nations, Protocol on Arbitration Clauses, art. 2, Sept. 24, 1923 [hereinafter Geneva Protocol] (“The arbitral procedure . . . shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.”). National laws also give parties the autonomy to choose. See, e.g., Belgian Judicial Code art. 1693(1) (“[T]he parties may decide on the rules of the arbitral procedure and on the place of arbitration.”) (English translation printed in BORN, supra note 433, at 418); Netherlands Code of Civil Procedure, art. 1036 (noting that the arbitral proceedings shall be conducted according to the parties’ agreement, or, absent an agreement, as determined by the arbitral tribunal); Federal Statute on Private International Law, art. 182(1) (Switz.) (“The parties may, directly or by reference to arbitration rules, determine the arbitral procedure; they may also submit it to a procedural law of their choice.”); UNCITRAL Model Law, art. 19(1) (“Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.”). The FAA does not expressly address the question whether parties to an international arbitration may choose a foreign procedural law. See 9 U.S.C. § 1, et seq. However, U.S. courts are likely to enforce the parties’ choice of procedural law, because, according to the Supreme Court, “[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate.” Volt Info. Sci., Inc. v. Bd. Of Tr. Of The Leland Stanford Junior Univ., 489 U.S. 468, 476 (1989) (in domestic arbitration, interpreting parties’ choice of law to apply California arbitration rules when those rules were designed to encourage arbitration and when doing so would not offend rules of liberal construction or any policy set forth in the FAA).
law of the seat, the law of the seat is still relevant, because local laws may contain mandatory public policy or statutory restrictions that apply to any arbitration conducted within the national territory.\footnote{BORN, supra note 433, at 415, 436-37.} Most national laws require procedural fairness and equality.\footnote{Id. at 436.} The Belgian Judicial Code also has several additional mandatory provisions. For example, it requires oral proceedings,\footnote{Belgian Judicial Code art. 1694(2) (“The arbitral tribunal shall make an award after oral proceedings.”) (English translation printed in BORN, supra note 433, at 418).} and states that although parties may have lawyers or representatives, they shall not be represented or assisted by an \textit{agent d’affaires}.\footnote{Id. art. 1694(4).} Some states proscribe the religion or nationality of the arbitrators.\footnote{Hanessian & Newman, supra note 434, at 231 (noting that, in Saudi Arabia, arbitrators must be Muslim, and in Venezuela, arbitrators must be licensed to practice law in Venezuela if Venezuelan law governs the dispute).}

Generally, when parties specify a particular “seat” of arbitration, the law of the seat will be the procedural law.\footnote{Coppee-Lavalin SA/NV v. Ken-Ren Chems. & Fertilizers Ltd., [1995] 1 A.C. 38 (H.L.) (appeal taken from Eng.) (English law applied to govern the procedure when the parties selected London as the seat of arbitration).} To maintain control and flexibility over the arbitration, parties should chose a seat that has few mandatory procedural rules and where the national courts have the reputation of not interfering with the arbitration proceeding.\footnote{ABA Section of Int’l Law, INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE 182 (Barton Legum ed., 2005); John B. Tieder, Jr., Factors to Consider in the Choice of Procedural and Substantive Law in International Arbitration, 20 J. INT’L ARB. 393 (2003).} For example, the English Arbitration Act and the UNICTRAL Model Code provide for limited court interference in international arbitration.\footnote{See, e.g., Arbitration Act, 1996, c.23, §§ 42-45 (Eng.); UNICTRAL Model Law art. 27 (allowing for court assistance in the taking of evidence, but only upon the request of the tribunal or a party to the arbitration proceeding, with the tribunal’s approval). Among other things, the Arbitration Act allows a court to order parties to comply with peremptory orders of the tribunal but only once an applicant has exhausted all available arbitration procedures for failure to comply with a tribunal’s order. Arbitration Act, 1996, c.23, § 42(1), (3) (Eng.). Moreover, a court may issue orders regarding the taking of evidence of witnesses, the preservation of evidence, the sale of goods that are the subject of the proceedings, the granting of an interim injunction or appointment of receiver, but only upon the application of a party to the arbitral proceedings and then only with the permission of the tribunal or the written agreement of the other party. \textit{Id.} § 44(1), (2), (4). A court may make preliminary determinations on questions of law, but only upon the application of a party to the arbitration and only with the permission of the other parties or the arbitral tribunal. \textit{Id.} § 45(1), (2).} London, Geneva, and New York are all cities that are widely recognized as having procedural laws favorable to arbitration.\footnote{Tieder, supra note 464, at 398.} Moreover, to facilitate recognition and enforcement of the arbitral award, the parties should choose a seat from among the countries that have adopted the New York Convention.\footnote{INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, supra note 464, at 182.}
If the parties do not expressly choose a procedural law, then the arbitral tribunal will generally decide the procedural law.\(^{468}\) Usually the law of the seat of arbitration will be chosen as the procedural law.\(^{469}\) Sometimes disputes regarding procedural law will arise, and a party will argue that another law should apply, such as the law governing the parties’ arbitration agreement or underlying contract or the law of the country in which arbitration hearings are held, if hearings are held in more than one country or in a country that is different from the specified “seat” of the arbitration.\(^{470}\) Generally, however, the fact that the parties hold arbitral hearings in a location other than the seat of arbitration will not change the procedural law from the law of the seat.\(^{471}\)

The procedural law (whether a national law or institutional rules) will provide only a broad framework, and the parties will have to agree to procedural details (such as the types and timing of submissions, evidentiary rules, discovery, time-tables, cross-examination, etc.), or submit the details to the arbitrators for decision.\(^{472}\) The UNCITRAL Notes on Organizing Arbitral Proceedings provides a nonbinding list of matters for the parties and the arbitral tribunal to consider and discuss when establishing procedural details for individual cases.\(^{473}\) Such topics include arrangements for the exchange of written submissions, practical details regarding physical evidence, witnesses, and hearings, the requirements for the filing and delivery of the

\(^{468}\) *E.g.*, Belgian Judicial Code art. 1693(1) (“If the parties do not indicate their intention . . . , the decision shall be a matter for the arbitrators.”) (English translation printed in *BORN*, supra note 433, at 418); Netherlands Code of Civil Procedure, art. 1036 (noting that absent an agreement by the parties, the arbitral proceedings shall be conducted as determined by the arbitral tribunal); Federal Statute on Private International Law, art. 182(2) (Switz.) (“If the parties have not determined the procedure, the Arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.”); UNCITRAL Model Law, art. 19(2) (“Failing [an agreement by the parties], the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.”).

\(^{469}\) See generally *ASHFORD*, supra note 433, at 9; *BORN*, supra note 433, at 44, 413; Tieder, supra note 464, at 394. Sometimes, however, international treaties will determine the procedural rules that apply if the parties fail to choose. For example, Panama Convention states that the rules of the Inter-American Commercial Arbitration Commission will apply automatically if member states do not expressly choose procedural rules for arbitration. *Inter-American Convention on International Commercial Arbitration*, https://www.aaaau.org/media/5043/inter-american%20convention%20on%20international%20commercial%20arbitration.pdf (last visited Nov. 17, 2012) (“In the absence of an express agreement between the parties, the arbitration shall be conducted with the rules of procedure of the Inter-American Commercial Arbitration Commission.”).

\(^{470}\) *BORN*, supra note 433, at 413.

\(^{471}\) *E.g.*, *Raguz v. Sullivan* [2000] NSWCA 240 (Austl.) (finding that Swiss law, as the law of the seat, governed the arbitration procedure even though the hearing took place in Australia, but noting that when the parties fail to choose a procedural law, it will *prima facie* be the law of the country where the arbitration is held because that is the country most closely connected with the proceedings). *See also* *BORN*, supra note 433, at 44 n.258.

\(^{472}\) *BORN*, supra note 433, at 434 n.35, 437.

\(^{473}\) *INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE*, supra note 464, at 174.
arbitral award, and more.\textsuperscript{474} The IBA Rules of Evidence also provide supplementary rules on the presentation of evidence and the conduct of evidentiary hearings.\textsuperscript{475}

\textbf{C. Choice of Substantive Law}

The substantive law is the law that governs contract formation and performance, the parties’ rights and obligations, and the merits of the dispute.\textsuperscript{476} The substantive law may be the laws of a particular nation, or it may be a set of rules or general principles.\textsuperscript{477}

Parties can expressly choose the substantive law that will govern their dispute.\textsuperscript{478} International arbitrators and national courts will generally uphold parties’ choice of law clauses, except where the parties’ choice of law violates mandatory national laws or public policies.\textsuperscript{479} Examples of public policies that may override parties’ choice of law agreement include discrimination prohibitions, usury restrictions, fair competition protections, constitutional


\textsuperscript{475} \textsc{international} \textsc{litigation} \textsc{strategies} \textsc{and} \textsc{practice}, \textit{supra} note 464, at 175.

\textsuperscript{476} \textsc{Ashford}, \textit{supra} note 433, at 10; \textit{See} Paul D. Friedland, \textit{Arbitration Clauses for International Contracts} 89 (2d ed. 2007).

\textsuperscript{477} \textsc{Born}, \textit{supra} note 433, at 556-57. For example, parties may wish for an arbitration to proceed \textit{\textquotedblleft ex aequo et bono\textquotedblright} or for the arbitrator to act as \textit{\textquotedblleft amiable compositeur.\textquotedblright} \textit{Id.} at 556. Generally speaking, this means that the arbitrators are not bound to apply a particular set of legal rules to decide the dispute, but may decide the dispute based on general notions of fairness, equity, and justice. \textit{Id.} at 557. Most institutional rules authorize arbitrators to act as \textit{amiable compositeur} or to decide the arbitration \textit{ex aequo et bono only} if the parties specifically authorize it. \textit{Id. See, e.g.,} ICC Rules of Arbitration, art. 21(3) (\textit{The Arbitral Tribunal shall assume the powers of an amiable compositeur or decide \textit{ex aequo et bono only} if the parties have agreed to give it such powers.}); LCIA Arbitration Rules, art. 22.4 (\textit{The Arbitral Tribunal shall only apply to the merits of the dispute principles deriving from \textit{\textquoteleft ex aequo et bono\textquoteright}, \textit{amiable composition\textquoteright} or \textit{\textquoteleft honourable engagement\textquoteright} where the parties have so agreed expressly in writing.}); \textit{See also} Netherlands Code of Civil Procedure (\textit{Wetboek van Burgerlijke Rechtsvordering}), Arbitration Act, Dec. 1, 1986, art. 1054(3) (\textit{The arbitral tribunal shall decide as amiable compositeur if the parties by agreement have authorised it to do so.}); Federal Statute on Private International Law, Dec. 18, 1987, art. 187(2) (\textit{Schw.) (\textit{The parties may authorize the Arbitral tribunal to decide \textit{ex aequo et bono.\textquoteright}; UNCITRAL Model Law, art. 28(3) (\textit{The arbitral tribunal shall decide \textit{ex aequo et bono or as amiable compositeur only} if the parties have expressly authorized it to do so.}). Civil law states are more likely to enforce these choice of law agreements; enforcement is less established in common law jurisdictions. \textsc{Born}, \textit{supra} note 433, at 557 (comparing \textit{Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekeringen [1962] 2 Lloyd\textquotesingle s Rep. 257, 264 (noting that arbitrators must generally \textit{apply a fixed and recognizable system of law\textquoteright}, with \textit{Eagle Star Ins. Co. v. Yuval Ins. Co. [1978] Lloyd\textquotesingle s L. Rep. 357 (upholding agreement for \textit{amiable compositeur})).

\textsuperscript{478} \textsc{Ashford}, \textit{supra} note 433, at 10. \textit{See also} Arbitration Act, 1996, c.23, § 46(1) (Eng.) (\textit{The arbitral tribunal shall decide the dispute – (a) \textit{in accordance with the law chosen by the parties as applicable to the substance of the dispute . . . .\textquoteright}); UNCITRAL Model Law, art. 28(1) (\textit{The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.}).

\textsuperscript{479} \textsc{Born}, \textit{supra} note 433, at 42, 525-26, 545-46.
guarantees, and protections for economically inferior parties. In rare circumstances, national laws will limit the enforceability of the parties’ choice of law if the chosen law lacks a reasonable relationship to the parties’ transaction.

If the parties fail to choose, the arbitrators will apply conflicts of law rules to determine the substantive law. Generally, the arbitral tribunal has the authority to apply whatever conflicts laws it deems appropriate. However, sometimes the arbitrators’ selection of conflicts laws will depend on an applicable international treaty, the law of the seat, or the conflicts rules of other interested states. For example, under Swiss law, the arbitrators must apply the conflicts rules “with which the case has the closest connection” if the parties do not agree to the choice of substantive law. Finally, the institutional rules chosen by the parties may also inform the arbitrators’ selection of conflicts laws. The rules of most leading arbitration institutions will grant the arbitrators freedom and flexibility to select the applicable substantive law, even authorizing the arbitral tribunal to directly apply a substantive law without going through a conflicts analysis. An arbitral tribunal authorized to directly select the substantive law to govern the parties’ dispute may consider a variety of factors, including the nationality of the parties, the nature of the dispute or harm, the jurisdiction that will be most affected by the arbitration award, and, for contract disputes, the place of contract creation and performance, the parties’ intent, the place with the most significant contacts, and the terms of the contract itself.

Judicial review of the arbitrators’ choice of law decisions concerning the application of substantive law is generally minimal. In ATSA of California, Inc. v. Continental Insurance Co., for example, the Ninth Circuit vacated a district court’s decision to apply Egyptian law to

480 Id. at 559 (citing case law).
481 Id. at 545-46. Most jurisdictions do not impose the reasonable relationship restriction, however. See id. at 546. International arbitrators, as well, rarely refuse to apply the parties’ choice of law because of the transactions lacks a sufficient connection to the state, because to do so would ignore the reality that parties will intentionally select a national law precisely because it lacks any connection to their transaction. Id. at 547, 552.
482 ASHFORD, supra note 433, at 8, 10; BORN, supra note 433, at 42, 526; Tieder, supra note 464, at 400.
483 See, e.g., Arbitration Act, 1996, c.23, § 46(3) (Eng.) (“If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”); UNCITRAL Model Law, art. 28(2) (“Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”).
484 Id. at 567-568.
486 Id. supra note 433, at 528.
487 Id. at 43, 528, 531. See, e.g., AAA-ICDR International Arbitration Rules, art. 28(1) (“Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.”); ICC Rules of Arbitration, art. 21(1) (same); LCIA Arbitration Rules, art. 22.3 (same); UNCITRAL Arbitration Rules (1976), art. 35(1), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited Nov. 17, 2012) (same).
488 Tieder, supra note 464, at 400-01.
489 BORN, supra note 433, at 541-42 (citing case law).
resolve a commercial dispute that had been submitted to arbitration and held that the arbitrators had the authority to determine the applicable law. An arbitrator’s error in choosing the applicable substantive law is also not a basis for refusing to recognize or enforce an arbitral award under the New York Convention.

D. Choice of Law Governing Enforcement of Arbitral Awards

1. Arbitral Regime

Arbitrators have no legal authority to enforce arbitral awards. Instead, if the losing party does not comply with the arbitration award, the winning party must seek enforcement of the arbitral award through the national courts. Nonetheless, arbitral tribunals will generally do everything within their power to ensure that an arbitral award is enforced.

2. National Law

As the arbitral tribunals themselves cannot enforce arbitral awards, this responsibility falls to the national courts. There are two tiers for the enforcement and/or recognition of arbitral awards. First, courts of primary jurisdiction – courts in the country under the law of which the arbitral award was made – review the validity of the arbitral award under domestic law and can set aside the award on any ground recognized by local law, and the annulment will be effective in all jurisdictions. Second, courts of secondary or enforcement jurisdiction are the courts in which a party seeks to have an arbitral award recognized or enforced. Courts of secondary jurisdiction review the enforceability of a foreign arbitral award under the applicable international treaty and the national implementing legislation, and can refuse to enforce an arbitral award based on any ground enumerated therein. A court of secondary jurisdiction’s refusal to enforce an arbitral award is effective only within that jurisdiction, however; it does not bind courts in other jurisdictions from enforcing the award.

Parties to the New York Convention, for example, must recognize arbitral awards as binding and enforce them. Courts in contracting states can refuse to recognize or enforce arbitral awards only under only limited circumstances, where the losing party offers proof of the following: (1) the parties to the arbitration agreement were under some incapacity or the

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490 754 F.2d 1394, 1396 (9th Cir. 1985).
491 BORN, supra note 433, at 541.
492 INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE, supra note 464, at 184.
493 Id.
494 ICC Rules of Arbitration, art. 42 ("In all matters not expressly provided for in these Rules, the [International Court of Arbitration] and the Arbitral Tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the Award is enforceable at law.").
496 Id.
497 Id.
498 Id.
499 New York Convention, art. III.
arbitration agreement was invalid; (2) the losing party was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was unable to present its case; (3) the arbitral award exceeded the scope of the parties’ agreement; (4) the composition of the arbitral tribunal or the arbitral procedure did not comply with the parties’ agreement or the law of the country where the arbitration took place; (5) the arbitral award has not yet become binding or was set aside by a court of the country in which, or under the law of which, the arbitral award was made; (6) the dispute is not arbitrable under the law of the country where recognition or enforcement is sought; or (7) the recognition or enforcement of the award would be contrary to the public policy of the country where recognition or enforcement is sought. While the New York Convention limits the grounds under which courts of secondary jurisdiction can refuse to enforce arbitral awards, it does not limit the grounds that courts of primary jurisdiction may use to vacate or set aside arbitral awards.

Courts are generally pro-enforcement. In some case, national courts will exercise their discretion to enforce arbitral awards, even if a ground for non-enforcement exists under the New York Convention. For example, courts in the United States narrowly interpret the public policy ground for non-enforcement and apply it only for violations of the “most basic notions of morality and justice.” Further, in *AAOT Foreign Economic Association (VO) Technostroyexport v. International Development & Trade Services, Inc.*, the Second Circuit confirmed an arbitral award despite allegations that the arbitral tribunal was corrupt because the losing party knew of the facts relevant to the alleged corruption and had nonetheless participated in the arbitration. Nonetheless, parties should carefully investigate the performance under the New York Convention of each of the countries in which they conduct business to confirm the tendency of national courts in those countries to enforce arbitral awards.

The European Convention on International Commercial Arbitration (the “European Convention”) and the Panama Convention provide grounds for the non-recognition and non-enforcement of arbitral awards that are similar to the grounds enumerated by the New York Convention. The Panama Convention may be used to enforce an arbitral award made within the Western Hemisphere with respect to any commercial transaction. United States law provides that the Panama Convention will govern if both the New York Convention and Panama Conventions apply.

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500 *Id.* at art. V.
501 BORN, supra note 433, at 707-08.
503 139 F.3d 980, 982 (2d Cir. 1998).
505 See European Convention, art. IX(1); Panama Convention, art. V.
507 *Id.*
a. **Examination of National Arbitration Laws**

National arbitration legislation provides for the confirmation or vacation of arbitral awards that are “made” locally.\(^{508}\)

English arbitration law allows courts to set aside arbitral awards for “serious irregularity.”\(^{509}\) A “serious irregularity” is an irregularity that “has caused or will cause substantial injustice to the applicant.”\(^{510}\) Examples of serious irregularities include situations where (1) the tribunal fails to comply with its general duties to act fairly and impartially and to avoid unnecessary delay or expense; (2) the tribunal exceeds its powers; (3) the tribunal fails to conduct the arbitral proceedings according to the procedures agreed upon by the parties; (4) the tribunal fails to address all the issues submitted to it; (5) any arbitral or other institution or person with powers regarding the arbitral proceedings exceeds its powers; (6) the effect of the award is uncertain or ambiguous; (7) the award is obtained by fraud or contrary to public policy; (8) the arbitral award fails to comply with certain formalities (such as the requirements that the award shall be written and signed by all the arbitrators, contain the reasons for the award, and state the seat of the arbitration and the date when the award is made); or (9) there is an admitted irregularity in the conduct of the proceedings or the award.\(^{511}\) In such circumstances, the court may remit the arbitral award to the tribunal for reconsideration, set aside the arbitral award in whole or in part, or declare the award to be of no effect.\(^{512}\)

According to Swiss arbitration law, proceedings to set aside arbitral awards are also limited. Arbitral awards may be set aside when (1) the arbitrator was incorrectly appointed or the tribunal was incorrectly constituted; (2) the arbitral tribunal wrongly concluded that it had jurisdiction; (3) the arbitral award exceeded the claims submitted to the arbitral tribunal or did not resolve all of the parties’ claims; (4) the parties did not receive equal treatment or a right to be heard; or (5) the award violates public policy.\(^{513}\) However, if neither party has a domicile, habitual residence, or business establishment in Switzerland, the law allows the parties to expressly agree to exclude all set aside proceedings, or, in the alternative, to limit them to one or more specific grounds.\(^{514}\)

In the United States, the FAA provides limited circumstances under which federal courts may vacate an arbitral award. In particular, the FAA provides that vacation is available:

1. where the award was procured by corruption, fraud, or undue means;
2. where there was evident partiality or corruption in the arbitrators . . . ;
3. where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the

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\(^{508}\) BORN, *supra* note 433, at 706, 764-65.
\(^{509}\) Arbitration Act 1996, c.23, § 68(1) (Eng.).
\(^{510}\) *Id.* § 68(2).
\(^{511}\) *Id.* § 68(3).
\(^{512}\) Federal Statute on Private International Law, Dec. 18, 1987, art. 190(2) (Switz.).
\(^{513}\) *Id.* at art. 192(1).
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.515

Finally, the UNCITRAL Model Law also limits actions to set aside arbitral awards. Courts in countries adopting the UNCITRAL Model Law may only do so if there is proof that (1) a party to the arbitration agreement suffered from some incapacity or the arbitration agreement was invalid; (2) the losing party to the arbitration did not receive proper notice of the appointment of the arbitrator or the arbitral proceedings or was unable to present his case; (3) the arbitral award exceeds the scope of arbitration; (4) the composition of the arbitral tribunal or the arbitral procedure did not comply with the parties’ agreement; (5) the subject matter of the dispute was not capable of settlement by arbitration; or (6) the award conflicts with public policy.516 An application to set aside the arbitral award must occur within three months of receiving the award.517

National arbitration legislation also contains provisions for the recognition and enforcement of arbitral awards.518 English arbitration law, for example, does not require courts to enforce arbitral awards when there is proof that the tribunal lacked jurisdiction to make the award.519 Swiss arbitration law simply follows the enforcement and recognition provisions of the New York Convention.520 In the United States, courts “shall confirm the award unless [they] find[] one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”521 Any request to refuse or defer enforcement must be made within three years after the award was made.522 Finally, under the UNCITRAL Model Law, the grounds for refusing recognition or enforcement are principally the same as the grounds for vacating or setting aside an arbitral award, listed above, although without the three-month statute of limitations.523

VI. CHAPTER 6: COMPOSITION OF ARBITRATION PANEL AND LOCATION OF ARBITRATION

One distinguishing feature of arbitration, in contrast to litigation, is the ability of the parties to choose the member(s) of the arbitral tribunal. The process and appointment of the arbitrator(s) is an important consideration when entering into an arbitration agreement. As one

516 UNCITRAL Model Law, art. 34(2).
517 Id. at art. 34(3).
518 BORN, supra note 433, at 706.
519 Arbitration Act, 1996, c.23, § 66(3) (Eng.).
520 Federal Statute on Private International Law, Dec. 18, 1987, art. 194 (Switz.).
521 9 U.S.C. § 207.
522 Id.
523 UNCITRAL Model Law, art. 36(1).
commentator explains: “the quality of the arbitral tribunal . . . makes or breaks the process.”

In addition, the seat (or location) of arbitration is a critical consideration for parties engaged in international arbitration.

A. Composition of Arbitral Panel

1. The Number of Arbitrator(s)

Because of the importance of the arbitrators, when drafting an arbitration agreement parties should carefully consider the number of arbitrators and the process by which the arbitrators are selected. Regardless the process, the number of arbitrators should always be uneven in order to avoid a tie. There are strategic considerations associated with selecting the number of arbitrators. As noted by the IBA Guidelines for Drafting International Arbitration Clauses (the “IBA Guidelines”), “[t]he number of arbitrators has an impact on the overall cost, the duration and, on occasion, the quality of the arbitral proceedings.”

Typically, parties choose one or three arbitrators. Three arbitrators are preferable in most situations for two primary reasons. First, a three-member panel is better equipped “to address complex issues of fact and law, and may reduce the risk of irrational or unfair results.” A three-person panel may be more appropriate where the amount in dispute is large or the facts are complex. Another advantage to a three member arbitral panel is that in most cases a party is able to select an arbitrator who will ensure the nominating party is properly heard. Although a party-selected arbitrator must maintain his or her impartiality and independence, a party can select an arbitrator with favorable experience and background. As with common law judges, those factors color perceptions. A single arbitrator may be preferable in specific circumstances, such as a dispute involving relatively non-complex issues or where the parties desire to reduce costs.

If the parties are not able to agree to the number of arbitrators, arbitral institutions provide fall-back or default rules for the appointment of arbitrators. The IBA Guidelines provide that the arbitral institution can decide the number of arbitrators if the parties fail to agree.

525 See REDFERN & HUNTER, supra note 524, at 183-84.
526 IBA Guidelines for Drafting International Arbitration Clauses (the “IBA Guidelines”) (2010), ¶ 26.
527 See REDFERN & HUNTER, supra note 524, at 157, 182, 184; IBA Guidelines, ¶ 26.
528 See REDFERN & HUNTER, supra note 524, at 9, 184.
529 IBA Guidelines, ¶ 26.
530 See REDFERN & HUNTER, supra note 524, at 184-85.
531 See id. at 185.
532 See id. at 184-85; AAA-ICDR International Arbitration Rules (effective June 1, 2009), art. 7(1), http://www.adr.org/aaa/faces/aoe/icdr/i_search/i_rule/i_rule_detail?doc=ADRSTG_002008&afrLoop=1288884397201466&afrWindowMode=0&afrWindowId=18qyhhv2ib_1#%40%3F_afrWindowId%3D18qyhhv2ib_1%26_afrLoop%3D1288884397201466%26doc%3DADRSTG_002008%26_afrWindowMode%3D0%26_adf.ctrl-state%3D18qyhhv2ib_57 (last visited Nov. 15, 2012).
533 See REDFERN & HUNTER, supra note 524, at 184-85.
534 See IBA Guidelines, ¶ 27.
AAA International Arbitration Rules provide that one arbitrator is the default, but the arbitrator may in his or her discretion increase the number to three if he or she determines it is appropriate. The UNCITRAL Arbitration Rules provide that in most situations the default number of arbitrators is three.

2. Selecting the Arbitrator(s)

The parties can themselves choose the arbitrators or may delegate that power to an arbitration institution, the arbitral tribunal or a national court. In the most common method for appointing arbitrators, each party selects one arbitrator. Those two arbitrators then select the third arbitrator, who will be the presiding arbitrator, or the two parties may themselves agree to the third arbitrator. The parties can also jointly appoint an arbitrator if the arbitration agreement only provides for one arbitrator. If there are more than two parties involved in the arbitration, the parties can either agree upon the arbitrators or allow for the institution to appoint the panel.

When choosing the arbitrator(s), it is recommended that at least one arbitrator be a lawyer (and if the panel is comprised of only one member, then that member should be a lawyer). A good arbitrator should also have: (1) “an adequate working knowledge of the language in which the arbitration is to take place;” (2) an “awareness of the world of international trade relations and of different traditions, aims and expectations of the people of the world;” and (3) most importantly, “good experience in the law and practice of arbitration.”

If there is a dispute regarding the method of selection and appointment of the arbitrator(s), the AAA International Arbitration Rules state that the administrator will appoint the arbitrators. Similarly, where the parties themselves fail to establish the tribunal, the UNCITRAL Arbitration Rules provide that the appointing authority shall constitute the tribunal. The IBA Guidelines generally provide that where there is an unresolved dispute or other failure by the parties to agree, the institution is able to step in and select the arbitrators.

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535 See AAA-ICDR International Arbitration Rules, art. 5.
537 See REDFERN & HUNTER, supra note 524, at 9, 182-83; IBA Guidelines, ¶ 30-34.
538 See REDFERN & HUNTER, supra note 524, at 185; IBA Guidelines, ¶ 35; UNCITRAL Arbitration Rules, art. 9(1).
539 See REDFERN & HUNTER, supra note 524, at 185; IBA Guidelines, ¶ 30, 35; UNCITRAL Arbitration Rules, art. 9(2).
540 See REDFERN & HUNTER, supra note 524, at 184.
541 See UNCITRAL Arbitration Rules, art. 10.
542 See REDFERN & HUNTER, supra note 524, at 195.
543 Id. at 196-98.
544 See AAA-ICDR International Arbitration Rules, arts. 6(3)-(5).
545 See UNCITRAL Arbitration Rules, art. 10.
546 See IBA Guidelines, ¶ 30-34.
The IBA Guidelines stress the importance of designating an appointing authority for ad hoc arbitrations. In ad hoc arbitrations, there is no institution automatically empowered to resolve an impasse between the parties, and absent the designation of an appointing authority by the parties, the decision often reverts to the courts at the place of arbitration, an often lengthier and more disruptive process.

3. Selection and Examination of Available Arbitrators

Given the importance of the arbitrator to the fair and effective adjudication of a party’s claim(s), a party should perform substantial due diligence on potential arbitrators. A party should consult their respective arbitral institution for a list of potential arbitrators and should attempt to secure recommendations from other attorneys in the relevant area of law.

A party may also wish to interview prospective arbitrators. Care must be taken, however, to avoid discussing with the potential arbitrator more than is required to explain the general nature of the controversy and to determine the potential arbitrator’s qualifications, experience, availability, and potential conflicts. In particular, “there should be no probing of the prospective arbitrator’s views on the merits of the case, nor should party representatives take the opportunity to test their forthcoming submissions of fact and law.”

The AAA International Arbitration Rules provide:

No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator, or with any candidate for appointment as party-appointed arbitrator except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate’s qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.

4. Challenging Selection of an Arbitrator

Where there is a reasonable (or justifiable) question as to an arbitrator’s impartiality or independence, a party can challenge that arbitrator. The UNCITRAL Arbitration Rules and the AAA International Arbitration Rules both emphasize the importance of the arbitrator’s

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547 See id.
548 See id.
550 See REDFERN & HUNTER, supra note 524, at 198-99.
551 Id. at 198.
552 AAA-ICDR International Arbitration Rules, art. 7(2).
553 See REDFERN & HUNTER, supra note 524, at 207.
“impartiality [and] independence,” and provide means for a party to challenge an arbitrator where there are “justifiable doubts” as to the “arbitrator’s impartiality or independence.”

As explained in the AAA International Arbitration Rules, a prospective arbitrator must disclose “any circumstance likely to give rise to justifiable doubts as to the arbitrator’s impartiality or independence.” Such disclosures are often provided in a disclosure statement, which generally provides the respective parties with the most relevant information about the prospective arbitrator. Also, the disclosure statement is often the basis for challenging a prospective arbitrator because of potential or actual conflicts. It is important to note that this obligation is ongoing – i.e., an arbitrator is required to immediately disclose any circumstances that would compromise his or her impartiality as such circumstances arise.

Both UNCITRAL Arbitration Rules and the AAA International Arbitration Rules provide that a party wishing to challenge the selection of an arbitrator must do so within 15 days after being notified of the appointment of the arbitrator or within 15 days of becoming aware of circumstances that can cause justifiable doubts as to the arbitrator’s impartiality or independence. Depending on the arbitral regime in force, the party challenging an arbitrator generally must send notice to either the other parties or to the administrator, if one has been appointed. The administrator in turn notifies the other parties.

Generally, if all the parties agree to the challenge, then arbitrator must withdraw. The challenged arbitrator may also withdrawn on his or her own. If the parties do not come to an agreement on the challenge, then the appointing authority or administrator decides the challenge. If there is no appointing authority or administrator, then the decision may revert to the courts at the place of arbitration.

If an arbitrator is successfully challenged, the replacement arbitrator must be appointed by the same method that was used to appoint the challenged arbitrator. Accordingly, if the arbitration panel consists of three arbitrators, and the challenged arbitrator was selected by the claimant, the claimant can then choose the replacement arbitrator. If a replacement arbitrator is appointed, the new tribunal can decide whether particular hearings or presentations by the parties should be repeated.

554 UNCITRAL Arbitration Rules, art. 12; AAA-ICDR International Arbitration Rules, art. 8.  
555 AAA-ICDR International Arbitration Rules, art. 7(1); see also REDFERN & HUNTER, supra note 524, at 204 (“The requirement of disclosure is a continuing duty that continues throughout the arbitration.”); UNCITRAL Arbitration Rules, art. 11.  
556 See UNCITRAL Arbitration Rules, art. 11.  
557 See id. at art. 13; AAA-ICDR International Arbitration Rules, art. 8.  
558 See AAA-ICDR International Arbitration Rules, art. 8(3).  
559 See id.  
560 See id. at art. 9; UNCITRAL Arbitration Rules, art. 13(4).  
561 See AAA-ICDR International Arbitration Rules, art. 10.  
562 See id. at art. 11(2).
5. Determination of Arbitrator’s Fees

Determining the amount of the arbitrator’s fees is a collaborative process. Under the AAA International Arbitration Rules, the AAA discusses an appropriate daily or hourly rate with the parties and the arbitrators.\(^{563}\) If the parties are unable to agree, the AAA has the discretion to establish the final terms of compensation.\(^{564}\) Under the UNCITRAL Rules, the arbitrators themselves propose the terms of compensation to the parties.\(^{565}\) The parties may negotiate the terms with the arbitrators. Again, if the parties are unable to agree, the administrator is entitled to establish the final terms of compensation.\(^{566}\)

In general, parties should consider the following primary factors when determining the arbitrators’ compensation: (1) size of the matter, (2) complexity of the matter, and (3) time spent.\(^{567}\) The parties may want to also consider the arbitrators’ stated rates of compensation and any other relevant factors.\(^{568}\) Disagreements regarding the arbitrators’ fees are generally resolved by the administrator or appointing authority.\(^{569}\)

In practice, the following three methods of assessing fees are used: (1) \textit{ad valorem} – “the fee is calculated as a proportion of the amounts in dispute;” (2) “time spent” – “establishes an hourly or daily rate for work done by an arbitrator on the case;” and (3) “fixed fee” – “the sum payable to the arbitrator by way of remuneration is fixed at the outset without direct reference either to the amounts in dispute or to the time which the arbitrator spends on the case.”\(^{570}\)

The arbitrator’s fees along with the other arbitration costs are generally borne by the unsuccessful party.\(^{571}\) The arbitral tribunal, however, may allocate the costs between the parties if such “apportionment is reasonable, taking into account the circumstances of the case.”\(^{572}\)

B. Seat of Arbitration (Location)

The seat (or location) of arbitration is a critical consideration for parties engaged in international arbitration.\(^{573}\) The seat of arbitration is critical because a party may have to turn to the national government where the arbitration is occurring if it needs to take legal action against the arbitral panel itself, such as attempting to remove an arbitrator.\(^{574}\) This is especially important if a party must obtain interim measures from a national court before the arbitration has

\(^{563}\) \textit{See id.} at art. 32.
\(^{564}\) \textit{See id.}
\(^{565}\) \textit{See UNCITRAL Arbitration Rules, art. 41(3).}
\(^{566}\) \textit{See id.} at art. 41(4).
\(^{567}\) \textit{See UNCITRAL Arbitration Rules, art. 41; AAA-ICDR International Arbitration Rules, art. 32.}
\(^{568}\) \textit{See UNCITRAL Arbitration Rules, art. 41; AAA-ICDR International Arbitration Rules, art. 32.}
\(^{569}\) \textit{See UNCITRAL Arbitration Rules, art. 41; AAA-ICDR International Arbitration Rules, art. 32.}
\(^{570}\) \textit{REDFERN & HUNTER, supra} note 524, at 228.
\(^{571}\) \textit{See UNCITRAL Arbitration Rules, art. 42; AAA-ICDR International Arbitration Rules, art. 31.}
\(^{572}\) \textit{UNCITRAL Arbitration Rules, art. 42; AAA-ICDR International Arbitration Rules, art. 31.}
\(^{573}\) \textit{See REDFERN & HUNTER, supra} note 524, at 159; IBA Guidelines, ¶ 20-21.
\(^{574}\) \textit{See REDFERN & HUNTER, supra} note 524, at 81-82; IBA Guidelines, ¶ 21.
concluded. Additionally, parties should examine whether the host state allows an arbitral award to be appealed. The rise of the model law and the widespread adoption of the New York Convention have decreased the importance of the seat of arbitration because many states have similar national laws that govern international arbitration. Nonetheless, states can reduce uncertainty by selecting a seat that has a strong bias in favor of international arbitration, and a national court system that will provide support, if necessary, as the arbitration proceeds.

1. Default Location of Various Arbitral Regimes

   If the parties are unable to agree to the seat of arbitration and the parties are arbitrating under an arbitral regime, then that arbitral regime generally provides default rules to determine the seat of arbitration.

   The AAA states that the administrator will determine the initial place of arbitration. After the arbitral tribunal has been constituted, the tribunal then has 60 days to determine the final location. Location decisions “shall be made having regard for the contentions of the parties and the circumstances of the arbitration.” In addition, “[t]he tribunal may [with sufficient written notice to the parties] hold conferences or hear witnesses or inspect property or documents at any place it deems appropriate.”

   UNCITRAL provides that the arbitral tribunal will choose the location “having regard to the circumstances of the case.” In addition, “[t]he arbitral tribunal may meet at any location it considers appropriate for deliberations.”

   The London Court of International Arbitration states that the default location is London.

2. Party Selected Location

   a. Arbitrating in Different States

   As a best practice, the parties should specify in their arbitration agreement where the seat of arbitration will be located. As the IBA Guidelines explain, the seat of arbitration is important because it affects the following “practical considerations:

575 See IBA Guidelines, ¶ 21.
576 See REDFERN & HUNTER, supra note 524, at 272-75.
577 See id. at 159, 274-75.
578 See AAA-ICDR International Arbitration Rules, art. 13(1).
579 See id.
580 Id.
581 Id. at art.13(2).
582 UNCITRAL Arbitration Rules, art. 18.
583 Id.
neutrality, availability of hearing facilities, proximity to the witnesses and evidence, the parties’ familiarity with the language and culture, willingness of qualified arbitrators to participate in proceedings in that place. The place of arbitration may also influence the profile of the arbitrators, especially if not appointed by the parties. Convenience should not be the decisive factor, however, as under most rules the tribunal is free to meet and hold hearings in places other than the designated place of arbitration.585

In addition, as the seat of arbitration is the “juridical home of the arbitration. . . . this choice has important legal consequences under most national arbitration legislations as well as under some arbitration rules.”586 For example, while the seat of arbitration does not generally govern the substantive law to be applied in the proceeding the location does determine certain procedural aspects of the arbitration.587

Also, the location determines which national court system will provide assistance (by appointing or replacing arbitrators in the absence of party agreement) and possibly cause problems for the proceedings, e.g. issuing a stay of the arbitration proceedings. The location also determines which court system will have jurisdiction to hear post-award challenges and “may affect the enforseeability of the award under applicable international treaties.”588 Therefore, to ensure the enforceability of the award, it is important that the seat of arbitration be a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention.589

b. UNCITRAL Model Law

The UNCITRAL Model Law on the “Place of Arbitration” roughly tracks the UNCITRAL Arbitration Rules and AAA International Arbitration Rules. The UNCITRAL Model Law provides that

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing

585 IBA Guidelines, ¶ 20.
586 Id., ¶ 20.
587 See REDFERN & HUNTER, supra note 524, at 83-84.
588 IBA Guidelines, ¶ 21.
589 See REDFERN & HUNTER, supra note 524, at 83-84; IBA Guidelines, ¶ 22.
witnesses, experts or the parties, or for inspection of goods, other property or documents.  

VII. CHAPTER 7: CONSOLIDATION AND MULTIPARTY ARBITRATION

Modern international arbitration, as with much civil litigation, is often the subject of multiple parties and disputes. Civil litigation is able to reduce the difficulties associated with multiple parties and disputes through consolidation and joinder, devices which enable the streamlining of the litigation and the reduction of conflicting judgments, costs, and time.

Although consolidation and joinder could be of great benefit to international arbitration, these devices are generally not available in international arbitration because of the requirement of party consent. Without the consent of all the parties to an arbitration, the consolidation of other actions or disputes into that arbitration or the joinder of additional parties is nearly impossible, barring some provision in the respective arbitration agreements providing for consolidation or joinder.

As this chapter will explain, the consolidation of multiple disputes into one arbitration and the joinder of third parties into an arbitration is often desirable but rarely achieved because of the requirement that all parties consent to the consolidation or joinder.

Nevertheless, although consolidation and joinder are often unavailable in an international arbitration, this chapter will explain that a nonsignatory to the arbitration agreement may still be bound to the arbitration agreement or award through the operation of the “group of companies” doctrine or the operation of private law, such as assumption and agency, among others.

A. Consolidation of Multiple Arbitrations

The consolidation of multiple arbitrations is desirable where several parties are involved in related but separate actions. The advantages of consolidation are savings in time and money and the issuance of a decision by one tribunal to bind the parties rather than a multiplicity of proceedings and decisions, which may conflict with one another.  

The primary difficulty with consolidation, however, is that it generally requires the consent of the parties. This consent requirement is discussed in further detail below.

1. Existence of Multiple Disputes

Multiple disputes are common in modern international arbitration. Take, for example, a plastic toy manufacturer in mainland China. If a toxic compound was found in a toy, arbitration may involve raw material suppliers in Russia, parts manufacturers in Taiwan, and a

subcontractor in Hong Kong. Rather than individual arbitrations between each party in the supply and manufacturing chain, an expensive and time consuming process, a solution may be to consolidate the various arbitrations into one arbitration before a single arbitrator or panel.

2. Consent Requirement

The primary roadblock to consolidation is that arbitration is fundamentally predicated on the consent of the parties. Without the consent of all the parties to the arbitration, consolidation cannot occur.

As the ICC’s Commission on International Arbitration explained:

The difficulties of multi-party arbitrations all result from a single cause. Arbitration has a contractual basis; only the common will of the contracting parties can entitle a person to bring a proceeding before an arbitral tribunal against another person and oblige that other person to appear before it. The greater the number of such persons, the greater the degree of care which should be taken to ensure that none of them is joined in the proceeding against its will.592

To that end, the Working-Group of the ICC Commission on International Arbitration suggested that parties include a multi-party arbitration clause within their arbitration agreements.593 It is unclear, however, how widespread this practice is.

For institutional arbitrations, the ICC and the LCIA, provide for the consolidation of multiple arbitrations in particular circumstances. As the ICC states:

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

a) the parties have agreed to consolidation; or
b) all of the claims in the arbitrations are made under the same arbitration agreement; or

c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal

593 See id. at ¶ 113 (“In a multilateral relationship, whether involving a single contract or several related contracts, it may be appropriate or necessary to have a multi-party arbitration clause.”).
relationship, and the Court finds the arbitration agreements to be compatible.\textsuperscript{594}

For its part, the LCIA states that absent an agreement by the parties to the contrary, the arbitral tribunal has the power:

to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.\textsuperscript{595}

In \textit{ad hoc} arbitrations, it is difficult to acquire the necessary consent to consolidate from all the relevant parties. The refusal by one or more parties to consolidate prevents the efficient arbitration of the claims. And where such consent is not forthcoming from a party, the arbitral panel and other parties generally have little recourse.

Even without the necessary party consent, one method to achieve an effect similar to consolidation is for the same arbitrator(s) to be appointed to both arbitrations.\textsuperscript{596} Currently, this practice is most likely to succeed where a national court appoints the arbitrator(s).\textsuperscript{597} Nevertheless, parties can contract to include such a provision in their arbitration agreement. For such a provision to work effectively, however, all the potential parties would need to agree to this provision in their arbitration agreements.

Another potential solution is national legislation permitting a national court to consolidate arbitrations.\textsuperscript{598} The Netherlands and Hong Kong have passed legislation permitting two or more related arbitrations to be consolidated in certain circumstances.\textsuperscript{599}

Consolidation enabled by national legislation suffers from several legal and practical problems.\textsuperscript{600} First, “[t]he different arbitration agreements may differ in their provisions as to number and method of appointment of arbitrators, as to the relevant rules of arbitration, [and] as to the power to issue interim awards . . . .”\textsuperscript{601} Second, the arbitration agreements “may also differ

\begin{itemize}
\item \textsuperscript{595} LCIA Arbitration Rules (effective Jan. 1, 1998), art. 22(h), http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx (last visited Nov. 17, 2012).
\item \textsuperscript{596} See REDFERN & HUNTER, \textit{supra} note 591, at 171-73.
\item \textsuperscript{597} See \textit{id.} at 172.
\item \textsuperscript{598} See \textit{id.} at 173.
\item \textsuperscript{599} See \textit{id.}
\item \textsuperscript{600} See \textit{id.}
\item \textsuperscript{601} \textit{Id.}
\end{itemize}
To illustrate, one difficulty that can arise in a consolidation concerns the method of appointment of the arbitrators and the impact on the enforceability of the arbitration award. In many international arbitrations, three arbitrators are chosen for an arbitral panel. The general process of arbitrator selection is that the two opposing parties each choose one arbitrator and the third is chosen by the party-chosen arbitrators or an institution or appointing authority. This selection process is typically a part of the arbitration agreement(s). If two or more arbitrations are consolidated, however, each party cannot choose their own arbitrator as there are probably more parties than arbitrators. As a consequence, the arbitration award arguably is not enforceable under the New York Convention. As explained by the New York Convention, an arbitration award is unenforceable where “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.”

The IBA Guidelines recommend that arbitration agreements contain language to deal with some of the probable issues arising from multiparty and multi-contract arbitration.

The most direct method for parties to reduce the chance of parallel proceedings is to provide for the consolidation of related arbitrations in the arbitration agreements. If, however, the parties do not wish for related arbitrations to be consolidated, they should ensure this is reflected in the relevant arbitration agreements.

Also, to reduce the chance of parallel proceedings the parties should ensure the arbitration agreements (or clauses) in the related contracts are compatible with each other. One method to ensure compatibility is for the parties to incorporate a specific dispute resolution protocol in the related contracts. A second option is for the parties to include identical or complementary arbitration agreements in their contracts. In particular, the arbitration agreements should specify the same set of rules, place of arbitration, number of arbitrators, substantive law, and language of arbitration. As well, the arbitration agreements should clearly

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602 Id. at 174.
603 Id.
604 See id. at 170.
607 See id. at ¶¶ 110-11.
608 See id. at ¶ 111.
609 See id. at ¶¶ 106-07.
610 See id. at ¶ 108.
611 See id.
612 See id.
state that “a tribunal appointed under one contract has jurisdiction to consider and decide issues related to the other related contracts.” 613

The IBA Guidelines also provide the following recommendations to ameliorate the arbitrator appointment and enforceability problems that may arise in consolidation. Regarding the appointment of a sole arbitrator, the IBA Guidelines recommend that the arbitration agreement provide that the arbitrator “be appointed jointly by the parties, or absent agreement, by the institution or appointing authority.” 614 If the arbitral panel is composed of three arbitrators, then the arbitrators can be appointed jointly, by the institution or appointing authority, or each “side” can appoint one of the arbitrators with the third chosen by the other two arbitrators or by the institution or appointing authority. 615 If an arbitrator is selected by each side, it is important that each of the parties for a side is treated equally in the appointment process. 616 Regarding this “side” selection process, the IBA Guidelines recommend that the arbitration agreements provide that if one side cannot agree to an arbitrator then all the arbitrators will be appointed by the institution or appointing authority. 617 Such provisions in the arbitration agreement can increase the probability of a successful consolidation and protect the enforceability of the award under the New York Convention.

**B. Third Parties in International Arbitration**

As a general rule, a party must consent to the arbitration in order to be bound by the arbitration agreement or award. 618 In the usual course, a party’s consent is manifested by written consent to the arbitration agreement. 619 A third party, however, may be bound in an international arbitration to an arbitration it did not agree to in the first instance by (1) the “group of companies” doctrine or (2) the “operation of general rules of private law, principally on assignment [and] agency . . . .” 620

The “group of companies” doctrine permits an arbitral panel to conclude that an arbitration agreement should bind a non-signatory where the two companies, the signatory and the non-signatory, were part of the same group of companies (e.g., a parent and subsidiary) and the non-signatory participated in the negotiation, performance, or termination of the contract subject to the arbitration agreement. 621 This doctrine is rather controversial and often operates as a broader analog to the “piercing the corporate veil” doctrine. 622 Although courts in countries

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613 Id.
614 Id. at ¶ 98.
615 See id.
616 See id. at ¶ 99.
617 See id.
618 See REDFERN & HUNTER, supra note 591, at 148.
619 See id.
620 Id.
621 See id. at 149; Stavros Brekoulakis, Multiparty and Multicontract Arbitration, QFinance, http://www.qfinance.com/contentFiles/QF02/g1xtn5q6/12/0/multiparty-and-multicontract-arbitration.pdf (last visited Nov. 15, 2012); PETER ASHFORD, HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 32 (2009).
622 See REDFERN & HUNTER, supra note 591, at 148-49.
such as the United States, England, and France have at times accepted the “group of companies” doctrine these courts have at others times either refused to recognize the doctrine or expressed great skepticism regarding its application.\textsuperscript{623} Other countries, such as Switzerland, flatly reject the doctrine.\textsuperscript{624}

The general rules of private law provide other avenues by which a party that did not sign an arbitration agreement may otherwise be bound by it. For example, where a contract is assignable, the arbitration agreement may, depending on the jurisdiction, be presumed to have been assigned to the assignee. From Redfern and Hunter’s survey, German law presumes the arbitration agreement is assigned.\textsuperscript{625} Under French and New York law, however, the assignee must have expressly agreed to the arbitration agreement.\textsuperscript{626}

Whether and how an agent can bind its principal to an arbitration agreement also varies across countries.\textsuperscript{627} From Redfern and Hunter’s survey, Switzerland and Austria “require the principal expressly to authorize an agent to enter into an arbitration agreement on its behalf in order for a principal to be bound by such an agreement . . . .”\textsuperscript{628} “Under Italian, French, and German law[, however,] no particular form of authorization is required.”\textsuperscript{629}

The other rules of private law that may bind a non-signatory to the original arbitration agreement include: succession by operation of law; novation, where the “original parties to a contract agree that a new party will replace one of the original parties;” and possibly estoppel.\textsuperscript{630}

Turning to the United States, the case law recognizes five theories under which a nonsignatory may be bound to an arbitration agreement: incorporation by reference; assumption; agency; veil-piercing/alter ego; and estoppel.\textsuperscript{631} Incorporation by reference operates where the agreement between a signatory party and a nonsignatory party incorporates by reference the arbitration agreement.\textsuperscript{632} Assumption may bind a nonsignatory to an arbitration agreement where the nonsignatory’s conduct indicates it is assuming the obligation to arbitrate.\textsuperscript{633} Agency operates according to the traditional principles of agency law.\textsuperscript{634} Veil piercing/alter ego operates where the “corporate relationship between a parent and its subsidiary [is] sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other.”\textsuperscript{635} Finally, estoppel binds the nonsignatory to an arbitration agreement where the

\begin{footnotes}
\footnotetext{623}{See id. at 150.}
\footnotetext{624}{See id.}
\footnotetext{625}{See id. at 151.}
\footnotetext{626}{See id.}
\footnotetext{627}{See ASHFORD, supra note 621, at 33.}
\footnotetext{628}{REDFERN & HUNTER, supra note 591, at 152.}
\footnotetext{629}{Id.}
\footnotetext{630}{ASHFORD, supra note 621, at 33-34.}
\footnotetext{631}{See Thompson-CSF v. Am. Arbitration Ass’n, 64 F.3d 773, 776 (2d Cir. 1995).}
\footnotetext{632}{See id. at 777.}
\footnotetext{633}{See id.}
\footnotetext{634}{See id.}
\footnotetext{635}{Id.}
\end{footnotes}
nonsignatory knowingly and directly benefitted from the contract or agreement that contained the arbitration language.636

C. Basis for Third Party Joinder

As with consolidation, joinder is another method to streamline litigation and reduce conflicting judgments, costs and time. Joinder, however, suffers from a similar difficulty in that each of the parties to the international arbitration and the party to be joined must consent to the joinder. Without such consent, which is not always granted, joinder is often impossible.

US law illustrates the inapplicability of joinder to international arbitration. Although US law recognizes mandatory and permissive joinder, the Federal Rules of Civil Procedure “cannot be employed to mandatorily or permissively compel a third party in arbitration.”637 A third party can only join a case through the consent of all the parties to the case.638

Also, the institutional rules are very restrictive regarding the use of joinder.639 The ICC court permits joinder where:

[t]he additional party is a signatory to the arbitration clause upon which the reference is founded . . . ; [t]he Respondent must raise claims against the new party; and [t]he new party must either have a full opportunity to participate in the constitution of the Arbitral Tribunal or consent to any existing Tribunal.640

The LCIA states that absent an agreement by the parties to the contrary, the arbitral tribunal has the power:

to allow, only upon the application of a party, one or more third persons to be joined in the arbitration as a party provided any such third person and the applicant party have consented thereto in writing, and thereafter to make a single final award, or separate awards, in respect of all parties so implicated in the arbitration.641

For its part, the AAA International Arbitration Rules do not have a provision regarding joinder.642

636 See id. at 778-80.
637 THOMAS H. OEHMKE, 3 COMMERCIAL ARBITRATION § 62:4 (2011); see also ASHFORD, supra note 621, at 30 (noting that US law is largely silent on joinder in arbitration).
638 OEHMKE, supra note 637, at § 62.4.
639 See ASHFORD, supra note 621, at 28-30.
640 Id. at 29.
641 LCIA Arbitration Rules, art. 22(h).
642 See AAA-ICDR International Arbitration Rules (effective June 1, 2009), http://www.adr.org/aaa/faces/aoe/icdr/i_search/i_rule/i_rule_detail?doc=ADRSYG_002008&_afrLoop=1288884397201466&_afrWindowMode=0&_afWindowId=18qyhhv2ib_1#%40%3F_afWindowId
Regarding joinder and intervention, the IBA Guidelines stress that no general clause in an arbitration agreement could possibly deal with the complexities in a given arbitration. 643 That said, the IBA Guidelines recommend that the arbitration agreement:

provide that notice of any proceedings commenced [under the arbitration agreement] be given to each contracting party regardless of whether that contracting party is named as respondent. There should be a clear time period after that notice for each contracting party to intervene or join other contracting parties in the proceedings, and no arbitrator should be appointed before the expiry of that time period. 644

The UNCITRAL Rules provide that:

[t]he arbitral tribunal may, at the request of any party, allow one or more third persons to be joined in the arbitration as a party provided such person is a party to the arbitration agreement, unless the arbitral tribunal finds, after giving all parties, including the person or persons to be joined, the opportunity to be heard, that joinder should not be permitted because of prejudice to any of those parties. 645

The national laws of most countries, including the United States, do not deal with the joinder of new parties in an arbitration. 646 Although the Netherlands, Belgium, Iran, and Italy do permit the joinder of new parties, their “laws[, however,] require the consent of the existing parties and the new party.” 647 In other words, although these countries are not silent on the issue they still require party consent for joinder in an arbitration.

Given the difficulty in acquiring consent from the required parties for joinder or intervention in an arbitration, a nonparty may be able to protect their rights without joining or intervening in the arbitration by suing for a declaratory judgment or injunctive relief. As Oehmke explains:

By suing for a declaratory judgment or injunctive relief, that third party just might secure summary judicial relief before the arbitrator issues an award. Then, that court decision may be cited as the law of the case in an effort to influence the arbitral decision. Note,

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643 See IBA Guidelines, ¶¶ 101-03 (emphasis in original).
644 Id. at ¶ 103 (emphasis in original).
645 UNCITRAL Arbitration Rules (1976), art. 17(5),
646 See ASHFORD, supra note 621, at 30.
647 Id.
however, litigation is always vulnerable to a stay in the face of a competing arbitration.648

VIII. CHAPTER 8: COMMENCING ARBITRATION

If parties have agreed to be bound by the rules of a major institutional arbitral regime, the steps for commencing arbitration are generally straightforward and specific. While the major institutions all have their own set of rules regarding commencing arbitration, there is considerable overlap. This chapter is intended to provide a general overview of these rules and to highlight common themes among the rules of the major institutions.

Initially, it is worth noting that, if the parties did not agree to conduct their arbitration in accordance with a major institution’s rules (i.e., the parties are engaged in an ad hoc arbitration), it may be difficult to commence and respond to an arbitration request. Specifically, the parties may be forced to create their own set of detailed rules and procedures, instead of conducting the arbitration according to an existing framework. This can be time-consuming and tedious. For this reason alone, parties should agree in their arbitration agreement to be bound by the rules of a specific arbitral institution. If the parties did not include such language in their arbitration agreement, it is advisable for the parties to adopt an institution’s rules before commencing the arbitration.

A. Filing the Notice of Arbitration

An arbitration begins by one party filing a notice of arbitration. The filing party should ensure that it has complied with any pre-filing requirements. For example, the contract between the parties may require that the parties seek to resolve the dispute between themselves in good faith before commencing an official arbitration. Accordingly, the filing party should consult the governing contract for any such pre-filing requirements.

As a general matter, the rules governing notice are intended to give both the respondent and the arbitration institution a sense of the nature of the dispute so that both entities can take the appropriate next steps. A review of the various arbitration institutions’ rules governing notice reveals the following as key elements of a notice of arbitration:

1) A demand that the dispute be referred to arbitration;649
2) The names and contact information (including addresses and telephone numbers) of the parties;650

648 OEHMKE, supra note 637, at § 62.4.
649 UNCITRAL Arbitration Rules (1976), art. 3(3)(a), http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf (last visited Nov. 17, 2012); AAA-ICDR International Arbitration Rules (effective June 1, 2009), art. 2(3)(a), http://www.adr.org/aaa/faces/aoe/icdr/i_search/i_rule/i_rule_detail?doc=ADRSTG_002008&_afrLoop=128884397201466&_afrWindowMode=0&_afrWindowId=18qyhhv2ib_1%40%3F_afrWindowId%3D18qyhhv2ib_1%26_afrLoop%3D128884397201466%26doc%3DADRSTG_002008%26_afrWindowMode%3D0%26_adf.ctrl-state%3D18qyhhv2ib_57 (last visited Nov. 19, 2012).
3) A specific reference to the arbitration agreement (and clause therein) that is invoked, and the underlying contract out of which the dispute arises;\textsuperscript{651}
4) A description of the claim being made, including the underlying facts supporting the claim;\textsuperscript{652}
5) The relief or remedy sought, including an indication of any amounts claimed;\textsuperscript{653} and
6) A proposal regarding the number of arbitrators, and the language and place of arbitration, if this has not already been agreed upon.

While the above list is a useful starting point, parties should consult the controlling arbitration rules for any additional requirements, such as payment of fees, etc.

\textbf{B. Service of Process}

Proper service of process is crucial. The failure to provide proper notice can compromise the enforceability of any award made by the panel. The New York Convention, the governing authority on enforcement of arbitration awards, notes that an award may not be enforceable if the non-filing party was not provided proper notice.\textsuperscript{654}

The model rules are similar in their requirements for notice. Most allow for any form of service, including via messenger, registered mail (to the addressee’s last known address), fax, email, or “any other means that provides a record of the sending thereof.”\textsuperscript{655} Parties should ensure that any record of service is maintained.

\textbf{C. Administrative Issues}

After arbitration has commenced, most rules call for the appointment of an administrator charged with facilitating the arbitration. The administrator assists with appointing the arbitrators and will often resolve certain disputes between the parties. The administrator also acts as a liaison between the institution, the parties, and the panel, and ensures that the institution’s rules and procedures are being followed.\textsuperscript{656}

\textsuperscript{650} UNCITRAL Arbitration Rules, art. 3(3)(b); AAA-ICDR International Arbitration Rules, art. 2(3)(b). The notice should also include the names and contact information of the party’s counsel, if available.
\textsuperscript{651} UNCITRAL Arbitration Rules, art. 3(3)(c)-3(d); AAA-ICDR International Arbitration Rules, art. 2(3)(c)-3(d). Copies of these agreements should be attached to the notice.
\textsuperscript{652} UNCITRAL Arbitration Rules, art. 3(3)(e); AAA-ICDR International Arbitration Rules, art. 2(3)(e).
\textsuperscript{653} UNCITRAL Arbitration Rules, art. 3(3)(f); AAA-ICDR International Arbitration Rules, art. 2(3)(f).
\textsuperscript{654} New York Convention, 21 U.S.T. 2517, 330 U.N.T.S. 38, \textit{available at} 1970 WL 104417, at art. V(1)(b). If these items have already been agreed upon, they should be restated in the notice.
\textsuperscript{655} Arbitration Institute of the Stockholm Chamber of Commerce Arbitration Rules (entered into force Jan. 1, 2007), art. 8(2), http://cn.cietac.org/Hezuo/4_5.pdf (last visited Nov. 17, 2012); \textit{see also} UNCITRAL Arbitration Rules, art. 2(1); ICDR Arbitration Rules, art. 18(1).
\textsuperscript{656} \textit{See generally} UNCITRAL Arbitration Rules, art. 6; AAA-ICDR International Arbitration Rules, art. 1(c).
Also, as a general matter, the panel has broad discretion to conduct the proceedings however it deems appropriate.\textsuperscript{657} The panel should conduct the proceedings with an eye towards a timely and efficient resolution of the dispute, but is free to bifurcate and separate hearings and issues as appropriate.\textsuperscript{658}

D. Statement of Claim

Claimants must, within a period of time set by the panel, file a statement of its claim.\textsuperscript{659} Under some rules, the statement of claim must be filed along with the initial notice of arbitration.\textsuperscript{660} The statement of claim must include the following elements:

1) The parties’ names and contact information;\textsuperscript{661}
2) A statement of facts supporting the claim;\textsuperscript{662}
3) The issues in dispute;\textsuperscript{663}
4) The relief or remedy sought and the amount claimed;\textsuperscript{664}
5) The legal grounds or arguments supporting the claim;\textsuperscript{665}
6) Copies of the contract between the parties, including the arbitration agreement;\textsuperscript{666} and
7) Other documents or evidence relied upon in support of the claim.\textsuperscript{667}

The parties may use the initial statement of claim to seek summary judgment on issues that can be addressed through a preliminary determination (i.e., ancillary claims that are not subject to an issue of material fact). In fact, such dispositions are encouraged: the Preamble to the IBA Rules of Evidence provides that: “Each Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, the issues that it may regard as relevant and material to the outcome of the case, including issues where a preliminary determination may be appropriate.”\textsuperscript{668} This may aid a party in narrowing the claims at issue and reducing the scope of the arbitration.

E. Costs of Commencing Arbitration

Since arbitrations are conducted privately (i.e., outside the court system), the parties have to bear the costs for virtually everything that is done. Most notably, the parties have to pay the

\begin{footnotesize}
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\item[\textsuperscript{657}] UNCITRAL Arbitration Rules, art. 17(1); AAA-ICDR Internaitonal Arbitration Rules, art. 16(1).
\item[\textsuperscript{658}] AAA-ICDR International Arbitration Rules, art. 16(3).
\item[\textsuperscript{659}] UNCITRAL Arbitration Rules, art. 20(1).
\item[\textsuperscript{660}] AAA-ICDR International Arbitration Rules, art. 2(3).
\item[\textsuperscript{661}] Id. at art. 2(3)(b); UNCITRAL Arbitration Rules, art. 20(2)(a).
\item[\textsuperscript{662}] UNCITRAL Arbitration Rules, art. 20(2)(b); AAA-ICDR International Arbitration Rules, art. 2(3)(e).
\item[\textsuperscript{663}] UNCITRAL Arbitration Rules, art. 20(2)(c).
\item[\textsuperscript{664}] Id. at art. 20(2)(d); AAA-ICDR International Arbitration Rules, art. 2(3)(f).
\item[\textsuperscript{665}] UNCITRAL Arbitration Rules, art. 20(2)(e).
\item[\textsuperscript{666}] Id. at art. 20(3).
\item[\textsuperscript{667}] Id. at art. 20(4).
\item[\textsuperscript{668}] See e.g., IBA Rules on the Taking of Evidence in International Arbitration (2010), Preamble 3.
\end{itemize}
\end{footnotesize}
arbitrators, court reporters, and administrative staff. These costs are normally borne by the state in conventional litigation. The parties also have to pay to rent facilities used for hearings and meetings, which is another cost not found in conventional litigation. As an example of how much parties can pay in administrative and arbitrator’s fees, the ICC charges administrative fees of $45,015 and a per arbitrator fee of between $32,767 and $141,900 for a $5 million dispute.\footnote{\textsuperscript{669} ICC Appendix III, art. 4, http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/ (last visited Nov. 26, 2012).}

The panel fixes the costs of the arbitration. Generally, the following items are defined as “costs”:

1) Each arbitrator’s fees and expenses;\footnote{\textsuperscript{670} AAA-ICDR International Arbitration Rules, art. 31(a); UNCITRAL Arbitration Rules, art. 40(2)(a).}
2) The costs of any assistance required by the tribunal, including any experts retained;\footnote{\textsuperscript{671} AAA-ICDR International Arbitration Rules, art. 31(b); UNCITRAL Arbitration Rules, art. 40(2)(c).}
3) The administrator’s fees and expenses;\footnote{\textsuperscript{672} AAA-ICDR International Arbitration Rules, art. 31(c); UNCITRAL Arbitration Rules, art. 40(2)(f).}
4) Travel and other expenses incurred by witnesses, to the extent approved by the tribunal;\footnote{\textsuperscript{673} UNCITRAL Arbitration Rules, art. 40(2)(a).}
5) Costs incurred in connection with an application for interim or emergency relief;\footnote{\textsuperscript{674} AAA-ICDR International Arbitration Rules, art. 31(c).}
6) The successful party’s costs of legal representation.\footnote{\textsuperscript{675} Id. at art. 31(d).}

Unlike the American system, under some arbitral institutions, the costs of the arbitration are borne by the unsuccessful party or parties.\footnote{\textsuperscript{676} UNCITRAL Arbitration Rules, art. 41(1).} In some instances, this means that the unsuccessful party must pay for the successful party’s legal fees.\footnote{\textsuperscript{677} AAA-ICDR International Arbitration Rules, art. 31.} The panel, however, has the discretion to allocate costs between the parties as it sees fit.\footnote{\textsuperscript{678} UNCITRAL Arbitration Rules, art. 42(1); AAA-ICDR International Arbitration Rules, art. 31.}

In some arbitrations, parties may be required to provide an advancement for the costs of the arbitration. The administrator or the panel has the discretion to determine whether and how much should be paid as an advancement.\footnote{\textsuperscript{679} UNCITRAL Arbitration Rules, art. 43(1); AAA-ICDR International Arbitration Rules, art. 33.} The panel or administrator will often consider some or all of the following criteria in making such a determination: (1) the legitimacy of the underlying claim; (2) the claim’s chances of success; (3) the type of relief sought (i.e., if only...
injunctive relief is sought, an advancement may be less appropriate); and (4) the existence of any agreement that each party shall bear its own costs.680

Under some institutions’ rules, the claimant only may be required to pay the advancement.681 The rationale behind this rule is that the respondent is considered “innocent until proven” guilty, and thus, should not have to expend considerable money defending itself, unless the claimant’s claims are shown to be meritorious.682 In other instances, both parties are required to provide an advancement for the costs.683 The administrator may also seek additional security from the parties as proceedings progress.684 However, after the final award has been made in the arbitration proceeding, the administrator is required to perform an accounting and reapportion costs as appropriate.685

In the event of a counter-claim, the counter-claimant may be asked to provide an advancement for the costs of its counter-claims.686

F. Jurisdiction

The arbitration panel has the power to rule on its own jurisdiction, and also has the power to make final rulings regarding the existence, scope, or validity of the arbitration agreement.687 Some rules also give the panel the authority to determine the validity of the contract that contains the arbitration clause.688 The arbitration clause is considered to be a separate agreement from the other terms of the contract. In other words, even if the contract is found to be null and void, the arbitration clause contained therein could still be valid.689 This is known as the “doctrine of separability.”690 However, as discussed in the following chapter, national courts have the “final word” regarding the tribunal’s jurisdiction.691 That is, parties frequently challenge the tribunal’s jurisdiction, both as to its ability to make an award, and also as to its ability to rule on the scope and validity of the arbitration agreement itself.

G. Potential Interim Relief

Most model rules grant arbitrators the authority to provide interim relief to help preserve the status quo between the parties, pending resolution of the dispute. The UN’s model rules are

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680 See PETER ASHFORD, HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 2 (2009).
681 AAA-ICDR International Arbitration Rules, art. 33(1).
682 ASHFORD, supra note 680, at 223.
683 UNCITRAL Arbitration Rules, art. 43(1).
684 AAA-ICDR International Arbitration Rules, art. 33(2); UNCITRAL Arbitration Rules, art. 43(2).
685 AAA-ICDR International Arbitration Rules, art. 33(4); UNCITRAL Arbitration Rules, art. 43(5).
687 AAA-ICDR International Arbitration Rules, art. 15(1); UNCITRAL Arbitration Rules, art. 23(1).
688 AAA-ICDR International Arbitration Rules, art. 15(2); UNCITRAL Arbitration Rules, art. 23(1).
689 AAA-ICDR International Arbitration Rules, art. 15(2); UNCITRAL Arbitration Rules, art. 23(1).
perhaps the most comprehensive in discussing the scope and basis for any interim relief. Specifically, the rules note that a panel can order a party to:

1) Maintain or restore the status quo pending resolution of the dispute;
2) Take action that would prevent, or refrain from taking action that is likely to cause: (a) current or imminent harm, or (b) prejudice to the arbitration process itself;
3) Preserve any assets that may be used to pay a subsequent award; or
4) Preserve evidence that may be relevant to the resolution of the dispute.692

While the UN’s model rules note that this list of interim measures is not intended to be exhaustive, these are among the most common reasons for seeking interim relief.693 Other institutions’ rules note that panels have broad discretion in the types and scope of interim relief they can mandate.694 This includes both orders and monetary awards.695

Furthermore, similar to the standards in U.S. courts for attaining a preliminary injunction, the UN’s model rules require that the party seeking interim relief prove to the panel that: (a) the requesting party is likely to suffer harm not adequately reparable by an award of damages, and that such harm outweighs any prejudicial effect on the party against whom relief is sought; and (b) the requesting party has a reasonable likelihood of success on the merits of its claim or defense.696 While other model rules do not specifically stipulate any such requirements, the requesting party should anticipate having to establish both of the above-mentioned requirements.

The party requesting interim relief should note, however, that the panel may be entitled to seek additional security, and may condition the granting of any interim relief on the receipt of this security.697 Moreover, the requesting party can also be liable for any costs or damages caused by the interim measure, if the panel later determines that the measure should not have been granted.698

In some cases, one party may need immediate relief before the panel has even been selected. Some model rules have addressed this by allowing for a form of “emergency” interim relief. For example, the ICDR rules contain an opt-out provision dealing with emergency relief. Article 37 of the ICDR rules states that, where relief is sought before the panel is appointed, the requesting party must provide notice in writing of the relief sought and why it is immediately necessary.699 Within one business day of receiving this notice, the administrator must appoint a single emergency arbitrator.700 The disclosure of conflicts and any challenges to the emergency arbitrator must be made within 15 days of appointment.701

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692 UNCITRAL Arbitration Rules, art. 26(2).
693 Id.
694 AAA-ICDR International Arbitration Rules, art. cle 21(1); ICC Rules of Arbitration, art. 28(1).
695 AAA-ICDR International Arbitration Rules, art. 21(1)-(2); ICC Rules of Arbitration, art. 28(1).
696 UNCITRAL Arbitration Rules, art. 26(3).
697 Id. at art. 26(6); AAA-ICDR International Arbitration Rules, art. 21(2).
698 UNCITRAL Arbitration Rules, art. 26(8).
699 AAA-ICDR International Arbitration Rules, art. 37(2).
700 Id. at art. 37(3).
The emergency arbitrator can grant interim relief as he or she sees fit, but has no further power to act once the panel has been appointed. The ICC rules are similar in scope to Article 37 of the ICDR. Parties that agreed to ICC arbitration procedures after January 1, 2012, are subject to Article 29 of the ICC Rules of Arbitration unless they agreed to use other interim rules. If either party needs urgent interim measures before the arbitral panel has been appointed, it may submit an Application for Emergency Measures to the Secretariat of the International Court of Arbitration. The President of the Court will then appoint an emergency arbitrator, if the emergency arbitrator’s orders are not binding on the arbitral tribunal once it is constituted.

Parties that made ICC arbitration agreements prior to January 1, 2012 had the option of agreeing to a separate body of ICC rules known as the Pre Arbitral Referee Procedure. Those rules provide protections similar to those located in Article 29 of the updated ICC Rules.

1. Use of National Courts to Obtain Interim Relief

Some parties choose to seek interim relief through a court system, rather than through the panel. The use of national courts to obtain interim relief poses two issues: (a) whether such recourse is permitted under the arbitration agreement; and (b) whether and when national courts have the jurisdiction to order interim relief.

As for the first issue, seeking interim relief through a national court is permitted under all of the major institutions’ model rules. Specifically, if the requesting party seeks interim relief from a judicial authority (i.e., the court system), or if the requesting party seeks enforcement of an interim measure through such an authority, the requesting party has not waived the arbitration agreement, nor is such recourse considered to be incompatible with the agreement to arbitrate. It is unclear whether an ad hoc agreement to arbitrate (i.e., an agreement that is not subject to an institution’s rules) would permit recourse to a judicial authority. This is another reason it is highly recommended to adopt a set of model rules to govern the arbitration.

However, the second issue is more difficult to resolve. The English Arbitration Act affords English courts the jurisdiction to provide any interim relief needed to support arbitral proceedings, even if the seat of the arbitration is outside England, Wales, or Northern Ireland. The Act also states that English courts can only act where specifically authorized by the panel (or by both parties), or where the panel is unable to act. Thus, English courts not only have the

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701 Id.
702 Id. at art. 37(5)-(6).
703 ICC Rules of Arbitration, art. 29(6).
704 ICC Rules of Arbitration, art. 29, app. V.
705 ICC Rules of Arbitration, art. 29(3).
707 UNCITRAL Arbitration Rules, art. 26(9); AAA-ICDR International Arbitration Rules, art. 21(3).
709 Id. at § 44(4)-(5).
power to order interim relief in connection with an arbitration occurring both in and outside England, but the courts are also required to defer to the panel. Other countries, such as Germany, have adopted language similar to that present in model rules: “It is not incompatible with an arbitration agreement for a court to grant, before or during arbitral proceedings, an interim measure of protection relating to the subject-matter of the arbitration upon request of a party,” thus vesting German courts with the ability to provide interim relief in connection with an arbitration.\textsuperscript{710}

Several U.S. state legislatures have allowed for state courts to provide interim relief in an international arbitration.\textsuperscript{711} In federal courts, however, the matter is less clear. In \textit{McCreary Tire & Rubber Co. v. CEAT S.p.A.},\textsuperscript{712} the Third Circuit held that Article II(3) of the New York Convention did not afford any discretion to courts to take action where parties have agreed to arbitrate. Specifically, Article II(3) of the New York Convention states that “[t]he court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”\textsuperscript{713} In contrast to the language of many of the model institutions, the court held that seeking recourse through the court system was incompatible with an agreement to arbitrate because courts are required to “refer the parties to arbitration.”\textsuperscript{714} On the other hand, in \textit{Borden, Inc. v. Meiji Milk Products Co.},\textsuperscript{715} the Second Circuit held that, under the New York Convention, courts have the authority to “entertain[] an application for a preliminary injunction in aid of arbitration.”\textsuperscript{716} Distinguishing \textit{McCreary}, the court held that seeking recourse through the court system was “consistent with [the New York Convention’s] provisions and its spirit.”\textsuperscript{717}

2. Enforcement of Interim Arbitration Awards

Naturally, one of the biggest concerns with attaining interim relief (or even permanent relief) from the panel is whether such an order or award is enforceable. In the traditional court system, the judge can enforce any of its rulings by holding a non-compliant party in contempt of court. Arbitrators, on the other hand, are private citizens, acting at the behest of private parties and a private institution. Arbitrators have less coercive power and no inherent authority to enforce their rulings. This precarious level of authority not only applies to the disputants, but also to third parties. For example, if the panel determines that the respondent’s assets should be preserved, the panel may need to compel not only the respondent but also the respondent’s bank to comply with its order.\textsuperscript{718}

\textsuperscript{710} Zivilprozessordnung “ZPO” § 1033.
\textsuperscript{712} 501 F.2d 1032, 1037 (3d Cir. 1974).
\textsuperscript{713} New York Convention, art. II(3).
\textsuperscript{714} \textit{McCreary Tire & Rubber}, 501 F.2d at 1037.
\textsuperscript{715} 919 F.2d 822, 826 (2d Cir. 1990).
\textsuperscript{716} \textit{Id.} at 826.
\textsuperscript{717} \textit{Id.}
\textsuperscript{718} Ashford, supra note 680, at 77.
The New York Convention directly addresses the issue of enforceability of any decisions made by the panel: “[e]ach contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”

Though the Convention does not specifically reference interim awards, enforcement of such awards is implicit, given the pro-enforcement nature of the Convention’s language. Furthermore, Article V of the Convention articulates eight exceptions to the presumption of enforceability, and none of these exceptions cite interim awards as not being enforceable in a national court.

H. Appointment of the Arbitral Panel

The appointment of the arbitral panel is another key aspect to commencing arbitration. This process is discussed in Chapter 6.

IX. CHAPTER 9: RESPONSE TO FILING OF ARBITRATION

Now that we have discussed the procedures for commencing an arbitration, it is appropriate to discuss how to respond to a notice of arbitration. Like filing a notice, responding is largely dependent on the governing institution’s rules. The focus of this chapter is to point out common themes among the major institution’s rules, but readers are encouraged to consult the rules governing their respective arbitrations.

A. Response to Notice of Arbitration or Statement of Defense

As discussed in Chapter 8, parties may either separately file a statement of claim and a notice of arbitration, or they may file both at once. Certain arbitral regimes, such as the ICDR and the ICC, require that the notice of arbitration include a statement of claim. Under UNCITRAL, parties have the option of including a statement of claim with their notice of arbitration.

Accordingly, respondents should be aware of what they are responding to. A good rule to follow would be to simply respond to each assertion made in the claimant’s initial filing, even if that means affirming the names and addresses of the parties.

719 New York Convention, art. III.
More specifically, in responding to a notice of arbitration, the respondent should include the following:722

a) Its full name, description and address;
b) Its comments on the nature and circumstances of the dispute giving rise to the claim(s);
c) Its response to the relief sought; and
d) Its comments on any proposals the claimant made regarding the number of arbitrators, who the arbitrator(s) should be, the place of the arbitration, the applicable law for the arbitration, the language of the arbitration, the administrator, etc.

When the respondent files a statement of defense, it should address the issues raised in the statement of claim, including any disputed facts or legal arguments.723 Also, the respondent should include copies of any documents relied on in support of its defense.724

Respondents should also take note of the deadline for their response; the respondent must file its response within a set time after receiving the claimant’s filing. This time period may be specified in the governing rules, or it may be set by the panel.725

Finally, respondents need to ensure that their response is sent to the appropriate parties, including the claimant(s), any other parties, and the administrator.726

B. Counterclaims

In filing a statement of defense, respondents also have the opportunity to bring any counterclaims against the claimant. While the rules from the major arbitral institutions are unclear as to what constitutes a proper counterclaim, given that the dispute between the parties is governed by a specific arbitration agreement, counterclaims are likely limited to those arising out of the same transaction or occurrence, rather than unrelated claims the respondent has against the claimant. Indeed, as discussed later in this chapter, the panel likely does not have jurisdiction over unrelated claims.

Respondents are permitted to assert counterclaims in their statements of defense.727 Some rules make it clear that any counterclaims must be asserted along with the statement of defense. For example, the UNCITRAL rules state that a counterclaim may only be made later in the proceedings “if the arbitral tribunal decides that the delay [in bringing the counterclaim] was

722 UNCITRAL Arbitration Rules, art. 4; AAA-ICDR International Arbitration Rules, art. 3(3).
723 UNCITRAL Arbitration Rules, art. 21(2).
724 Id. at art. 21(2).
725 Id. at art. 21(1); AAA-ICDR International Arbitration Rules, art. 3(1).
726 AAA-ICDR International Arbitration Rules, art. 3(1).
justified under the circumstances.”728 Likewise, the ICC’s rules state that “[a]ny counterclaims made by the Respondent shall be submitted with the Answer . . . ”729

However, respondents can choose to bring their counterclaims in a separate cause of action. In other words, there is nothing to suggest that a respondent waives any counterclaims by failing to bring them in response to the claimant’s suit.730 Moreover, it is more efficient for the panel to decide any counterclaims, rather than dealing with the expense of filing a notice of arbitration and re-starting the process.

Counterclaims are subject to the same pleading standards as those required for the original claim.731 Similarly, responses to counterclaims are subject to the same standards outlined in the first section of this chapter.732

C. Failure to Reply

In the event the respondent, without sufficient cause, fails to respond to a notice of arbitration, communicate a statement of defense, or appear, most institutions allow for the proceedings to continue in the absence of that party.733 However, UNCITRAL makes it clear that the respondent’s absence and/or silence does not amount to an admission of the claimant’s allegations.734 In other words, the arbitration panel is still obligated to critically examine the claimant’s case, consider all arguments respondents would make if they were present, and render a judgment accordingly. The panel cannot simply render a default judgment against an absent party.735 Nonetheless, the panel can only consider the evidence before it, which can materially affect its understanding of the underlying issues.736

It should be noted that if the respondent fails to respond, and a judgment is entered against it, the claimant will likely have considerable difficulty enforcing the judgment.

728 UNCITRAL Arbitration Rules, art. 21(3).
729 ICC Rules of Arbitration, art. 5(5).
730 Both UNCITRAL and the AAA-ICDR are clear that a respondent “may” make certain counterclaims, rather than requiring the respondent to do so. See, e.g., AAA-ICDR International Arbitration Rules, art. 3(2) (“At the time a respondent submits its statement of defense, a respondent may make counterclaims.”) (emphasis added); 730 UNCITRAL Arbitration Rules, art. 21(3) (“the respondent may make a counterclaim.”) (emphasis added).
731 UNCITRAL Arbitration Rules, art. 21(4); ICC Rules of Arbitration, art. 5(5).
732 ICC Rules of Arbitration, art. 5(6).
733 UNCITRAL Arbitration Rules, art. 30(1)(b)-(30)(2); AAA-ICDR International Arbitration Rules, art. 23(1)-23(2).
734 UNCITRAL Arbitration Rules, art. 30(1)(b).
736 See UNCITRAL Arbitration Rules, art. 30(3); AAA-ICDR International Arbitration Rules, art. 23(3).
D. Anti-Suit Injunctions

One tool either party can use to help strengthen their position is an anti-suit injunction. An anti-suit injunction is an order from a court to a party (over which the court has personal jurisdiction) forbidding that party from either filing a claim in a foreign forum, or taking part in a proceeding that has already started. That is, an anti-suit injunction reflects the power of the court to compel action or inaction on the part of those subject to its jurisdiction.

Anti-suit injunctions can be useful tools in scenarios such as:

1) Where an arbitration is already pending, and the claimant seeks to prevent the respondent from escaping the immediate proceeding by attempting to litigate or arbitrate the same or related claims in a foreign forum.

2) Where an arbitration is complete and a decision was rendered in favor of the respondent, and the respondent seeks to prevent the unsuccessful claimant from re-arbitrating or re-litigating any claims in a foreign forum.

3) Where a claimant brings a lawsuit against the respondent, even though the parties agreed to arbitrate any disputes arising between them.

The main purposes for an anti-suit injunction are to avoid duplicative proceedings that would frustrate results in the original proceeding, encourage efficient use of time and resources, and curb bad faith or other dilatory tactics.

The main concern with anti-suit injunctions is that they can undermine the jurisdiction of the foreign forum, be it a foreign court or an arbitration panel. These concerns are not as great when the injunction relates to an arbitration panel rather than a judicial proceeding, as an injunction regarding the former only relates to private parties, whereas an injunction relating to a judicial proceeding implicates the power of the foreign state.

There is currently a circuit split in the United States over the standard courts should apply when considering an anti-suit injunction. The Second, Third, Sixth, and District of Columbia Circuits adopt a more conservative view, granting anti-suit injunctions only where the foreign proceeding threatens the court’s jurisdiction, or where a party seeks to evade strong public policies. The Fifth and Ninth Circuits, on the other hand, adopt a more liberal approach, granting anti-suit injunctions where the parties and issues are the same.

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738 See Born & Rutledge, supra note 737, at 540.
739 See id. at 541.
740 See Moses, supra note 735, at 94.
741 See id. at 92.
742 See id.
743 See Lafi x Sprl v. Axtel, SA de CV, 390 F.3d 194, 199 (2d Cir. 2004); Stonington Partners, Inc. v. Lernout & Hauspie Speech Prods., 310 F.3d 118, 126 (3d Cir. 2002); Gau Shan Co. v. Bankers
The European Union does not permit anti-suit injunctions to be issued by one Member State against a proceeding in another Member State, even if the proceeding was initiated in bad faith and solely for the purpose of frustrating the existing proceedings.\textsuperscript{745}

If a party decides to pursue an anti-suit injunction, it is crucial that the party seek the injunction through a court that has personal jurisdiction over the opposing party. The injunction is of no value if it was not obtained from the proper court. The party seeking the injunction is encouraged to pursue it from the opposing party’s home country, or from a country with which the party has considerable contacts.

E. Challenges to Jurisdiction\textsuperscript{746}

1. Challenges Before the Arbitration Panel

As a threshold matter, it is important to note that under some rules, parties are required to make any objections to the panel’s jurisdiction at the outset of the proceedings.\textsuperscript{747} Challenges to jurisdiction will only be considered later in the proceedings if the delay was justified.\textsuperscript{748}

As referenced in Chapter 8, the seminal framework for dealing with jurisdictional challenges before the arbitration panel is the competence-competence doctrine, commonly referred to in its German form: kompetenz-kompetenz.\textsuperscript{749} The doctrine holds that a panel is competent to determine its own competence. In other words, the panel has the jurisdiction to


\textsuperscript{745} Turner v. Grovit, Case C-159/02 (ECJ 27 April 2004).

\textsuperscript{746} For a discussion of personal and subject-matter jurisdiction in international disputes, see infra Chapter 22.

\textsuperscript{747} English Arbitration Act of 1996, §§ 31(1), 73(1); see also UNCITRAL Arbitration Rules, art. 4(2)(a) (“The response to the notice of arbitration may also include . . . Any please that an arbitral tribunal be constituted under these Rules lacks jurisdiction.”); AAA-ICDR International Arbitration Rules, art. 15(3) (“A party must object to the jurisdiction of the tribunal or to the arbitrability of a claim or counterclaim no later than the filing of the statement of defense, as provided in Article 3, to the claim or counterclaim that gives rise to the objection. The tribunal may rule on such objections as a preliminary matter or as part of the final award.”).

\textsuperscript{748} English Arbitration Act of 1996. §§ 31(2), 73(1).

\textsuperscript{749} See Moses, supra note 735, at 88.
decide if it can hear the dispute and all the claims brought before it. Along these lines, most model rules clearly state that the panel has the power to rule on its own jurisdiction.

In deciding its jurisdiction, the panel can make one of three determinations: (1) decide at the outset that it has no jurisdiction; (2) render an interim ruling accepting jurisdiction; or (3) rule on jurisdiction along with the merits of the case. In the first instance, if the panel decides it has no jurisdiction, the panel is absolved and the claimant will need to pursue its claims in another forum. In the second scenario, the party challenging jurisdiction (undoubtedly the respondent), can immediately seek review of this interim ruling before a court. Assuming the panel stays proceedings pending the court’s ruling, this option allows for a potentially dispositive determination to be made before addressing the case on its merits, which can save considerable time and expense. In the third instance, the panel purportedly has no choice but to join the jurisdictional issue with the merits of the case because the two are difficult to bifurcate. This can obviously be more time-consuming and expensive, especially because the respondent could challenge jurisdiction in court, and the entire award could be nullified for lack of jurisdiction.

The above discussion refers to a complete challenge to the panel’s jurisdiction. Increasingly common, however, are partial challenges to the panel’s jurisdiction such as challenges to the panel’s jurisdiction over certain claims or counterclaims. For example, it is possible that a claim or counterclaim falls outside the realm of the underlying agreement, or that it is was submitted in violation of contractual procedures or agreements. In such cases, the parties can agree to bring the new claims within the jurisdiction of the panel, but need to ensure that they do so as soon as practicable.

If either party refuses to consent to the panel’s jurisdiction over certain claims or counterclaims, the panel should ensure that it stays within the bounds of its authority when making an award. The New York Convention provides that awards may not be recognized or enforced if the “award deals with a difference not contemplated by or not falling within the terms

750 See id.
751 See, e.g., UNCITRAL Arbitration Rules, art. 23(1) (“The arbitral tribunal shall have the power to rule on its own jurisdiction”); ICDR Arbitration Rules, art. 15(1) (same); see Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration, 252 (4th ed. 2004) (“An arbitral tribunal must be able to look at the arbitration agreement, the terms of its appointment and any relevant evidence in order to decide whether or not a particular claim or series of claims comes within its jurisdiction.”).
752 See Redfern & Hunter, supra note 751, at 257.
753 Id.
754 Id.
755 Id.
756 Id. at 249.
757 Id.
758 Id.; see also ICC Rules of Arbitration, art. 23(4) (“After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal.”).
of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.\textsuperscript{759}

2. Challenges in National Courts

Respondents may also seek to challenge the panel’s jurisdiction in court: indeed, as referenced in Chapter 8, national courts have the “final word” on the panel’s jurisdiction.\textsuperscript{760} As with challenges before the panel, respondents are encouraged to make any such objections as early as possible. Any delay may be construed as an abuse of process.

The respondent may seek judicial review of the panel’s ruling on its jurisdiction after first challenging the ruling before the panel itself.\textsuperscript{761} Or, the respondent may choose to ignore the panel altogether and challenge its jurisdiction in court only.\textsuperscript{762} Under both options, it can pursue an injunction restraining the panel from proceeding, or simply a declaration that the panel lacks jurisdiction.\textsuperscript{763} Parties should consider the costs and benefits related to each option, but it is preferable to file a jurisdictional objection with the panel. Simply ignoring the panel may appear to be in bad faith, and may serve to alienate both the court and the panel.

The respondent can also choose between challenging jurisdiction in the courts at the seat of the arbitration, or in another national court, provided the latter court itself has jurisdiction to hear the challenge.\textsuperscript{764} National courts in the seat of the arbitration almost always have the authority to rule on the panel’s jurisdiction, but may be more accommodating to a panel in its country.\textsuperscript{765} Challenging jurisdiction in another court may prove to be more time-consuming and expensive, and the court may well balk at the dispute, preferring to honor basic principles of international comity by allowing courts in the seat of the arbitration to rule on the panel’s jurisdiction.

Courts will engage in various levels of review, depending on the extent to which the state respects the competence-competence doctrine and the authority of arbitration panels. In light of the competence-competence doctrine and clear language in many model rules outlining the panel’s authority to rule on its own jurisdiction, many courts defer considerably to the panel’s ruling when asked to review the validity of the arbitration agreement and the jurisdiction of the panel.\textsuperscript{766} That is, many courts will engage in a more limited \textit{prima facie} review of the panel’s decision, rather than a full \textit{de novo} review.\textsuperscript{767}

\textsuperscript{760} See Redfern & Hunter, supra note 751, at 256.
\textsuperscript{761} See id. at 261.
\textsuperscript{762} See id. at 260.
\textsuperscript{763} See id.
\textsuperscript{764} See id.
\textsuperscript{765} See id.
\textsuperscript{766} See Moses, supra note 735, at 88.
\textsuperscript{767} See id.
However, the extent of the court’s deference in assessing the panel’s jurisdiction depends on whether the forum country adheres to the competence-competence doctrine. For example, the French Code of Civil Procedure makes it clear that where an arbitrator’s jurisdiction is challenged, the arbitrator can “rule upon the validity and limits of his nomination.”\footnote{French Code of Civil Procedure, art. 1466.} The law of the People’s Republic of China (the “PRC”) is known to be less favorable;\footnote{See generally, Jingzhou & Clarisse Von Wunschheim, Articles 16 and 18 of the PRC Arbitration Law: The Great Wall of China for Foreign Arbitration Institutions, 23 Arb. Int’l 309, 312 (2007).} there is no competence-competence doctrine, and the arbitration institution does not have the exclusive authority to determine its own jurisdiction.\footnote{PRC Arbitration Law, art. 20.} Parties are entitled to have a PRC court rule on the jurisdiction of the panel.\footnote{Id. at art. 16, 18; see also Ulrike Gluck and Falk Lichtenstein, Arbitration in the People’s Republic of China, CMS, http://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_CHINA.pdf (last visited Nov. 15, 2012).} Moreover, it is unclear in the PRC whether a court will enforce an arbitration agreement (or any later award made by the panel) in the absence of a specific agreement between the parties conferring jurisdiction on the arbitration institution, rather than simply including an arbitration clause in an agreement that references an institution’s rules.\footnote{First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 947 (1995).}

In the United States and England, the key question in a jurisdictional challenge is whether the parties agreed to submit their dispute to arbitration. In \textit{First Options of Chicago, Inc. v. Kaplan}, the U.S. Supreme Court held that because one party “did not clearly agree to submit the question of arbitrability to arbitration” (i.e., that party did not consent to the panel’s jurisdiction), the arbitrability of the dispute between the parties was “subject to independent \textit{i.e., de novo} review by the courts.”\footnote{Id. at 941.} In \textit{First Options of Chicago}, however, the party objectsing to the arbitration panel’s jurisdiction never signed an arbitration agreement.\footnote{Id.} In England, in \textit{Harbour Assurance Co. (UK) Ltd. v. Kansa General International Insurance}, the Court of Appeal held that an arbitration agreement could be invalidated where, \textit{inter alia}, a party denies that an agreement was concluded.\footnote{Harbour Assurance Co. (UK) Ltd. v. Kansa Gen. Int’l Ins., 3 All E.R. 897 (1993).} It would appear that, under both U.S. and English jurisprudence, where the parties agreed to be bound by a set of institutional rules, and where those rules clearly state that the panel has the power to rule on its own jurisdiction, the arbitrator is competent to determine its own jurisdiction. In such cases, judicial review may be limited.\footnote{See Moses, supra note 735, at 90-91; Redfern & Hunter, supra note 751, at 262.}

Given how multiple countries place great importance on whether parties have in fact consented to submit a dispute to arbitrability, parties are advised to draft arbitration clauses in such a way as to unequivocally confer jurisdiction on a given arbitral body. This can help address jurisdictional challenges.

As a final consideration, it is worth noting that although many rules do not explicitly provide for a stay of arbitration proceedings, parties are entitled to request one. Many model
rules contain a provision similar to Article 17(1) of UNCITRAL, which affords the panel the discretion to conduct the arbitration as it sees fit: “the arbitral tribunal may conduct the arbitration in such a manner as it considers appropriate . . . The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties’ dispute.”

Certainly, where a good-faith jurisdictional challenge is pending in court, it would be appropriate for the respondent to seek (and for the panel to grant) stay of the arbitral proceedings.

F. Sovereign Immunity

Often, when arbitration is sought against a state or state entity, it will claim sovereign immunity (i.e., it will claim that it is a government body beyond the reach of courts or other adjudicatory institutions). The FSIA governs jurisdiction over a sovereign in U.S. courts. Under the FSIA, a state or state entity may be subject to the jurisdiction of U.S. courts where it has waived its immunity. This is consistent with the general principle in international law that if a state or state entity agreed to an arbitration clause in the underlying agreement, the entity is deemed to have waived its immunity. However, this may not be the case in all jurisdictions.

Perhaps the greater risk is that the state or related entity will resist enforcement of a judgment, particularly one that involves the state’s assets. In this respect, courts may draw a distinction between private/commercial and public/governmental acts, permitting an award arising out of the former but not of the latter. The chief distinction between the two types of acts is that public acts are those undertaken in furtherance of governmental duties (e.g., national defense, public safety, infrastructure maintenance and development, etc.), whereas private acts are those undertaken in furtherance of non-governmental or commercial initiatives (e.g., acts of state-sponsored industries, such as airlines or oil companies). Accordingly, experts suggest that when contracting with a state or related entity, the other party is strongly encouraged to include a separate provision noting that: (1) the obligations of the state or related entity under the contract constitute commercial rather than public acts; and (2) the state or related entity will not

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777 See, e.g., AAA-ICDR International Arbitration Rules (effective June 1, 2009), art. 16(1)-(2), http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_002008&_afrLoop=1643571573608240&_afrWindowMode=0&_afrWindowId=hokre8fsz_6#%40%3F_afrWindowId%3Dhokre8fsz_6%26_afrLoop%3D1643571573608240%26doc%3DADRSTG_002008%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dhokre8fsz_58 (last visited Nov. 19, 2012); ICC Rules of Arbitration, art. 28.
779 See Moses, supra at note 735, at 51.
780 See id.
781 See id. at 51-52. Indeed, the FSIA stipulates that foreign states are not immune from U.S. jurisdiction where the state is engaged in an action “based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” 28 U.S.C. § 1605(a)(2).
782 See Harold Honju Koh, Transnational Litigation in United States Courts, 113 (Foundation Press, 2008).
claim any right of immunity from arbitration, suit, jurisdiction, judgment, attachment, set-off, enforcement or execution of any award relating to its assets, or any other remedy afforded by an appropriate body. 783

X. CHAPTER 10: DISCOVERY IN ARBITRATION

A. Discovery in Litigation vs. Arbitration

“International practitioners have in particular gone to great lengths to avoid the import of U.S.-style discovery into international arbitration . . . . [T]he controversy over discovery is not one pitting the common law against the civil law, but rather one pitting the United States of America against the rest of the world.” 784

A practitioner managing discovery in international arbitration should be aware that the differing juristic traditions of the parties will color their respective expectations of discovery. A practitioner may avoid misunderstandings and confusion by remaining cognizant of these differences, some of which are discussed in greater detail below.

International commercial arbitration discovery practices differ substantially from litigation, particularly with respect to the probative value of documents versus oral testimony, disclosure of documents and scope of discovery, the development of proof through sequential written submissions rather than at oral hearings, and the relevance of rules of evidence. 785

As arbitration is an alternative to litigation, the litigation practices of national courts do not have to be followed in international arbitration (unless discovery is sought from third parties). Court rules of procedure do not apply to arbitration unless the parties so provide in their arbitration agreement.

The scope of discovery in arbitration is typically determined by agreement of the parties or by the arbitral tribunal based upon submissions made by the parties. 786 In their arbitration agreements, parties frequently designate as governing arbitration rules the rules of one of the major international arbitral authorities, but the many of these do not provide specific guidance on the scope of permissible discovery. 787 Unless an arbitration agreement expressly provides for discovery, the arbitration rules the parties select generally will be the basis for the arbitral tribunal’s power to require and enforce discovery.

783 See Moses, supra note 735, at 52.
785 Bernardo M. Cremades, Managing Discovery in International Arbitration, 57 DISP. RESOL. J. 72, 73 (2003).
One factor to consider when determining the scope of discovery in arbitration is that, generally speaking, each party does not bear its own costs in discovery in international arbitration. International arbitral tribunals generally will allocate the costs of discovery at the end of an arbitration proceeding, and the losing party may be stuck with the entire cost of the arbitration, including discovery.

1. Civil Law Systems

In civil law juristic systems, the judge decides a case according to the truth of the matter; the judge identifies the legal and factual issues involved and determines what evidence is relevant to decide them correctly. Under civil law juristic systems, each party has the burden of proving its own case, and the opposing party is not required to assist in developing the case against it. Document discovery does not exist in civil law countries. Because there is no trial, as such, in a civil law system, there is no pre-trial disclosure. As a result, attorneys from civil law systems do not have the expectation that they may have to share adverse documents with adverse parties and do not have the same duties as their American counterparts to preserve documents. Lawyers in civil law jurisdictions prove their cases through written submissions supported by documentary evidence voluntarily submitted by the parties – there is no distinction between pleadings, discovery, and proof. As the issues develop or change through the litigation process, parties may address these changes by making further submissions to the judges, who take active roles and may request specific information. Furthermore, civil law systems are not bound by strictures of evidentiary rules.

2. Common Law Systems

Common law juristic systems are adversarial and emphasize adherence to rules of evidence and full disclosure of all relevant information unless the information is privileged. A guiding principle is equality of information between the parties. Litigation in common law systems is unique in the broad range of permissible discovery. There are, however, differences in the scope of permissible discovery among the various common law systems. For example, discovery in the United States – which contemplates disclosure of all information that is reasonably calculated to lead to the discovery of admissible evidence – is more robust than in Britain or Canada. For this reason, practitioners from common law jurisdictions frequently distance themselves from United States-style discovery. United States practitioners involved

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788 Id.
790 Cremades, supra note 785, at 74.
791 Frank & Bédard, supra note 786, at 68.
in international commercial arbitration should be aware, therefore, that non-American lawyers likely will not have experience with American-style discovery (including the time and costs involved). From the perspective of a civil law legal practitioner, American-style discovery may be perceived as philosophically and morally offensive, and directed at obtaining irrelevant information.  

B. Rules of Leading Arbitral Authorities Relevant to Document Production

As noted above, the scope of discovery in arbitration is typically determined by agreement of the parties or by the arbitral tribunal based upon submissions made by the parties. Because parties frequently designate the rules of one of the major international arbitral authorities as governing rules, it is important that practitioners are aware of the differences in the rules of the major arbitral authorities, even though many of the rules do not provide specific guidance on the scope of permissible discovery. Of course, most of the major arbitral authorities and most arbitral tribunals permit the parties to modify the rules by agreement, and thus parties should consider specifying in their arbitration agreement the pre-hearing discovery rules that they would like to govern their dispute.

1. International Chamber of Commerce Rules of Arbitration:
   
   a. No specific rules on discovery.
   
   b. “The Arbitral Tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.”

2. UNCITRAL Arbitration Rules:
   
   a. No specific rules on discovery.
   
   b. “At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents exhibits or other evidence within such a period of time as the arbitral tribunal shall determine.”

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796 *Id.* at art. 27(3).
3. **London Court of International Arbitration Arbitration Rules**\(^{797}\):  

a. “Unless the parties at any time agree otherwise in writing, the Arbitral Tribunal shall have the power, on the application of any party or of its own motion, but in either case only after giving the parties a reasonable opportunity to state their views: . . . (e) to order an party to produce to the Arbitral Tribunal, and to the other parties for inspection, and to supply copies of, any documents or classes of documents in their possession, custody or power which the Arbitral Tribunal determines to be relevant.”\(^{798}\)


a. “(a) At the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct (i) the production of documents and other information . . . . (c) The arbitrator is authorized to resolve any disputes concerning the exchange of information.”\(^{800}\)

b. Procedures for Large, Complex Commercial Disputes, L-4 Management of Proceedings:

i. Parties shall cooperate in the exchange of documents and information within each party’s control “if the arbitrator(s) consider such production to be consistent with the goal of achieving a just, speedy and cost-effective resolution of a Large, Complex Commercial Case.”\(^{801}\)

ii. “The parties may conduct such discovery as may be agreed to by all the parties provided, however, that the arbitrator(s) may place such limitations on the


\(^{798}\) Id. at 22.1(e).  

\(^{799}\) See AAA-ICDR International Arbitration Rules, http://www.adr.org/aaa/faces/aoe/commercial/c_search/c_rule/c_rule_detail?doc=ADRSTG_004130&_afrLoop=1299465166055021&_afrWindowMode=0&_afrWindowId=kq78jj5fu_1#%40%3F_afrWindowId%3Dkq78jj5fu_1%26_afrWindowMode%3D1299465166055021%26doc%3DADRSTG_004130%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dkq78jj5fu_57 (last visited Nov. 15, 2012).  

\(^{800}\) Id. at art. 21.  

\(^{801}\) Id. at art. L-4(b).
conducted by such discovery as the arbitrator(s) shall deem appropriate. If the parties cannot agree on production of documents and other information, the arbitrator(s), consistent with the expedited nature of arbitration, may establish the extent of the discovery.”

5. **China International Economic & Trade Arbitration Commission Rules**

   a. “The arbitral tribunal may specify a time period for the parties to produce evidence and the parties shall produce evidence within the specified time period. . . . If a party has difficulties to produce evidence within the specified time period, it may apply for an extension before the expiration of the period. The arbitral tribunal shall decide whether or not to extend the time period.”

   b. “If a party having the burden of proof fails to produce evidence within the specified time period, or the produced evidence is not sufficient to support its claim or counterclaim, it shall bear the consequences thereof.”

6. **Japan Commercial Arbitration Association Rules**:

   a. “A party may request the arbitral tribunal to order the other party to produce documents which it possesses.”

   b. If a request for production is made, “the arbitral tribunal may, after hearing the other party’s opinion, order the production . . . if it considers it necessary to the examination proceedings, unless it determines there are legally justified reasons for the party to refuse the production.”

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802 *Id.* at art. L-4(c).
804 *Id.* at art. 36(2).
805 “Each party shall have the burden of proving the facts relied on to support its claim, defense or counterclaim.” *Id.* at art. 36(1).
806 *Id.* at art. 36(3).
808 *Id.* at 37(4).
809 *Id.* at 37(5).
7. **World Intellectual Property Organization Arbitration Rules**\(^{810}\):

a. “At any time during the arbitration, the Tribunal may, at the request of a party or on its own motion, order a party to produce such documents or other evidence as it considers necessary or appropriate and may order a party to make available to the Tribunal or to an expert appointed by it or to the other party any property in its possession or control for inspection or testing.”\(^{811}\)

8. **ICDR – Guidelines for Arbitrators Concerning Exchanges of Information** \(^{812}\):

a. The standard for the exchange of information: The tribunal shall manage the exchange of information with a view to maintaining efficiency and economy, avoiding unnecessary delay and expense, while balancing goals of avoiding surprise, promoting equality of treatment, and safeguarding each party’s opportunity to fairly present its claims and defenses.

b. The parties may give their views on the appropriate level of discovery on each case, but the tribunal retains final authority on how to best implement the standard. If parties wish to depart from the standard, they may only do so by express written agreement and in consultation with the tribunal.

c. Parties shall exchange, in advance of the hearing, all documents upon which each intends to rely.

d. The tribunal may, upon application, require one party to produce to another party documents in the party’s possession, “not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.”

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\(^{811}\) Id. at art. 48(b).

e. The tribunal may condition any exchange of documents on appropriate measures to protect commercial or technical confidentiality.

f. The tribunal may, on application and for good cause, require a party to permit inspection on reasonable notice of relevant premises or objects.

9. **AAA-ICDR International Arbitration Rules**

a. “The tribunal may order a party to deliver to the tribunal and to the other parties a summary of the documents and other evidence which that party intends to present in support of its claim, counterclaim or defense.”

b. “At any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate.”

10. **International Bar Association Rules on the Taking of Evidence in International Arbitration**:

a. On May 29, 2010, the IBA revised its Rules on the Taking of Evidence in International Arbitration – first published in 1999 and which contemplate pre-hearing document discovery – to require document requests to be narrowly tailored to issues that are relevant to the determination of the merits of a case. The guidelines for drafting discovery requests under the IBA Rules of Evidence are discussed in greater detail below.

b. “Within the time ordered by the Arbitral Tribunal, each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it on which it relies, including Public Documents and those in the public

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814 Id. at art. 19(2).
815 Id. at art. 19(3).
c. “Within the time ordered by the Arbitral Tribunal, any Party may submit to the Arbitral Tribunal and to the other Parties a Request to Produce.”

d. The new IBA Rules of Evidence provide further guidance on the production of documents. For example:

i. Copies of documents must conform to the originals and, at the request of the Arbitral Tribunal, an original shall be presented for inspections.

ii. Documents maintained in electronic form shall be produced in the form most convenient or economical that is reasonably usable by the recipients, unless the parties agree otherwise or, in the absence of such agreement, the Arbitral Tribunal decides otherwise.

iii. Parties are not required to produce multiple copies of documents that are essentially identical unless otherwise instructed by the Arbitral Tribunal.

iv. Translations of documents shall be submitted with the originals and marked as translations with the original language identified.

11. **International Institute for Conflict Prevention & Resolution Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration**:  
   
a. This protocol provides guidelines for dealing with discovery, including electronic discovery. The interests of speed, efficiency, fundamental fairness, and cost-control should be protected. Disclosure of documents or testimony should be granted “only as to items that are relevant and
material and for which a party has a substantial, demonstrable need in order to present its position.”

b. “The arbitrators should ensure that they are sufficiently informed as to the issues to be determined, the burden and costs of preserving and producing requested documents and other information, and the relative value of the requested information to the issues to be determined, so as to enable the arbitrators to make a fair decision as to the requested disclosure.”

c. Proportionality is key. “Arbitrators should carefully balance the likely value of documents requested against the cost and burdens, both financial and temporal, involved in producing the documents or information requested. Where the costs and burdens of disclosure requested are likely to be substantial in comparison to the amount in dispute or the need for the information to aid in resolving the dispute, the tribunal should ordinarily deny such requests. If extraordinary circumstances justify production of the information, the tribunal should condition disclosure on the requesting party’s paying to the requested party the reasonable costs of a disclosure.”

12. Singapore International Arbitration Centre Arbitration Rules:

a. Under Rule 24, the arbitral tribunal is empowered to:

i. conduct any enquiries the tribunal finds necessary or expedient;

ii. order the parties to make any property or item available for inspection; and

iii. order any party to produce copies of any document in its possession or control which the tribunal considers relevant to the case and material to its outcome.

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821 Id. at § 1(a).
822 Id. at § 1(e).
823 Id. at § 1(c)(2).
825 Id. at art. 24.
C. Drafting Discovery Requests

1. IBA Rules on the Taking of Evidence in International Arbitration:

   On May 29, 2010, the IBA revised its Rules on the Taking of Evidence in International Arbitration – first published in 1999 and which contemplate pre-hearing document discovery – to require document requests to be narrowly tailored to issues that are relevant to the determination of the merits of a case.

   Under IBA Rule of Evidence Article 3(3), a discovery request should be drafted consistent with the following principles:

   a. Specificity. A request to produce must contain a description of each requested document sufficient to identify it or a description in sufficient detail (including subject matter) or a narrow and specific requested category of documents that are reasonably believed to exist.

   b. Materiality. A request to produce must contain a statement as to how the documents requested are relevant to the case and material to its outcome.

   c. Lack of Availability to the Requesting Party and Relative Financial Burden of the Parties. A request to produce must contain a statement that the documents requested are not in the possession, custody, or control of the requesting party, or, a statement of the reasons why it would be unreasonably burdensome for the requesting party to produce such documents.

   d. Basis for Belief that the Responding Party Has the Requested Information. A request to produce must contain a statement of the reasons why the requesting party assumes the documents requested are in the possession, custody, or control of another party.

D. Electronic Discovery

1. A Developing Issue

   Electronic discovery is a developing issue in international arbitration, which has only recently begun to garner attention. Few, if any, rules exist on electronic discovery, or electronic disclosure as it is sometimes called, though guidelines loosely modeled on the IBA Rules of Evidence for document requests have emerged.
2. **Sample Guidelines:**

a. The Chartered Institute of Arbitrators (the “CIArb”) Protocol for E-Disclosure in Arbitration826:

i. The parties should confer at the earliest opportunity regarding the preservation and disclosure of ESI and seek to agree the scope of production.

ii. The parties should also consider whether any steps are appropriate for the retention and preservation of ESI; what tools or techniques (e.g., data sampling and use of agreed search terms) may be useful for reducing the burden of electronic disclosure; and whether the tribunal or any party could benefit from professional IT guidance.

b. A request for the disclosure of electronic documents must contain:

i. A description of the document or a narrow and specific category of documents;

ii. description of how the documents requested are relevant and material to the outcome of the case;

iii. a statement that the documents are not in the possession or control of the party requesting the documents; and

iv. a statement of the reason why the documents are assumed to be in the possession or control of the other party.

c. ICDR Guidelines for Arbitrators Concerning Exchanges of Information 827:

i. With regards to electronic discovery, the party producing electronic information may produce it in the form (which may be paper copies) most convenient and economical to it unless the Tribunal determines, on application and for good cause, that

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there is a compelling need to access the information in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search.

E. Discovery Disputes

In contrast to litigation in the United States, an Arbitral Tribunal generally will encourage parties to resolve discovery disputes among themselves. The tribunal will intervene only if the parties are unable to reach an agreement. Whatever decision-making process the tribunal uses, the principles of relevance, materiality, and proportionality will likely guide its decision. If parties fail to comply with peremptory orders by the tribunal, adverse inferences may be drawn.

1. ICDR Guidelines for Arbitrators Concerning Exchanges of Information\textsuperscript{828}:

   a. “In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve, and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.”\textsuperscript{829}

   b. “In the event any party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.”\textsuperscript{830}

2. IBA Rules on the Taking of Evidence in International Arbitration\textsuperscript{831}:

   a. “If the Party to whom the Request to Produce is addressed has an objection to some or all of the Documents requested, it shall state the objection in writing to the Arbitral Tribunal

\textsuperscript{828} See id.
\textsuperscript{829} Id. at 8(a).
\textsuperscript{830} Id. at 8(b).
and the other Parties within the time ordered by the Arbitral Tribunal.”

b. The grounds for objections include:

i. Lack of sufficient relevance to the case or materiality to its outcome;

ii. Legal impediment or privilege under applicable legal or ethical rules;

iii. Unreasonably burdensome to produce;

iv. Loss or destruction of the document that has been shown with reasonable likelihood to have occurred;

v. Compelling grounds for commercial or technical confidentiality;

vi. Compelling grounds of special political or institutional sensitivity (including classified governmental evidence);

vii. Compelling considerations of procedural economy, proportionality, fairness or equality; and

viii. Failure to narrowly tailor the discovery request as required by the Rules.

c. Consequences of failing to comply with discovery orders:

i. The Arbitral Tribunal may infer that the unproduced evidence, including documents and testimony, would be adverse to the interests of the non-producing party.

ii. “If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may . . . take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.”

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832 See e.g., id. at art. 9(2)(a)-(g).
833 Id. at arts. 9(5)-(6).
834 Id. at art. 9(7).
F. Compelling 3rd Party Evidence or Witnesses

1. Lack of Enforcement Power by the Panel

Third-party discovery presents a challenge in the context of arbitration, which derives from an agreement between parties to submit their dispute to an arbitration panel. Since third parties are not parties to the arbitration agreement, the authority to compel them to submit to discovery must derive from a source other than the arbitration agreement.

a. The IBA Rules of Evidence contemplates third party discovery and may be used in conjunction with other rules or laws, such as 28 U.S.C. § 1782 (discussed in detail below), to obtain evidence from third parties:

i. “If a party wishes to obtain the production of Documents from a person or organization who is not a Party to the arbitration and from whom the Party cannot obtain the Documents on its own, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the requested Documents, or seek leave from the Arbitral Tribunal to take such steps itself.”

(a) The request must be submitted in writing to the tribunal and other parties.

(b) The request must be narrowly tailored and contain the particular statements required by the rules.

(c) The tribunal shall decide on this request and shall take, authorize the requesting party to take, or order any other party to take, such steps as the tribunal considers appropriate if, in its discretion, it determines the documents would be relevant to the case and material to its outcome, the requirements of the rules have been satisfied, and there are no grounds for objections.

ii. At any time before the arbitration is concluded, a party may ask the tribunal to take whatever steps are available to obtain the appearance for testimony at an evidentiary hearing of any person. The tribunal can order a party to use

835 Id. at art. 3(9).
836 Id. at art. 3(3).
837 Id.
838 See supra Chapter 10.E.2.
its best efforts to provide a witness for testimony. A party to whom such a request is addressed may object for any of the grounds discussed above.\textsuperscript{839}

2. **Assistance of National Courts**

   a. **United States**

      1) **28 U.S.C. § 1782**

      28 U.S.C. § 1782 empowers United States district courts to provide assistance to foreign and international tribunals by ordering a person residing in the territorial jurisdiction of the court “to give his testimony or statement or to produce a document for use in a proceeding in a foreign or international tribunal.”\textsuperscript{840} A district court is authorized, but not required, to grant an application for discovery or testimony when the application under § 1782 shows that: (1) the discovery is sought from a person who resides or is found in the same district as the court to which the application is made, (2) the discovery is for use in a proceeding before a foreign tribunal, and (3) the applicant is a foreign or international tribunal or “interested person.”\textsuperscript{841}

      As discussed below, the availability of § 1782 judicial assistance has turned on the definition of “tribunal,” which has not been viewed uniformly over time or among courts. Currently, district courts are split over whether an international private tribunal is entitled to judicial assistance under 28 U.S.C. § 1782.\textsuperscript{842}

   2) **Relevant Case Law**

      The Second Circuit Court of Appeals and the Fifth Circuit Court of Appeals, the first appellate courts to address the scope of 28 U.S.C. § 1782, held that private commercial arbitral bodies – as opposed to arbitral tribunals established by governmental entities – were not “tribunals” under § 1782.\textsuperscript{843} The courts did not view § 1782 as authorizing United States federal courts to assist with discovery in private international arbitration.

      \textit{Intel Corp. v. Advanced Micro Devices, Inc.},\textsuperscript{844} marked a watershed moment in the judicial interpretation of 28 U.S.C. § 1782. \textit{Intel} did not involve an arbitration, and instead dealt with the investigative stage of an antitrust complaint filed with the Directorate-General for

\textsuperscript{839} Id.
\textsuperscript{841} See Schmitz v. Bernstein Liebhard & Fidshitz, LLP, 376 F.3d 79, 83 (2d Cir. 2004).
\textsuperscript{844} 542 U.S. 241 (2004).
Competition of the Commission of the European Communities (the “DG”), the European Union’s primary antitrust law enforcer. The United States Supreme Court concluded that the DG was a “tribunal” within the meaning of § 1782 because it acted as a first-instance decision-maker subject to judicial review.845

Following Intel, numerous district – but no appellate – courts have been presented with the issue of whether 28 U.S.C. § 1782 can be invoked for private international arbitrations. Most courts have relied upon Intel – which included a reference to a law review article that provided “[t]he term ‘tribunal’ . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts”846 – to conclude that private international arbitral bodies qualify as “tribunals” for purposes of 28 U.S.C. § 1782.847

One post-Inel district court decision held that an UNCITRAL arbitration proceeding between the Kyrgyz Republic and Oxus, a United Kingdom mining company, constituted a § 1782 “foreign or international tribunal” because the arbitration was authorized by the sovereign states of the United Kingdom and the Kyrgyz Republic for purposes of adjudicating disputes under a bilateral treaty.848 The Oxus court concluded, on the basis of Intel and the Second Circuit’s National Broadcasting decision, that § 1782 is available to assist an international arbitral tribunal so long as the “arbitration is not the result of a contract or agreement between private parties.”849

The U.S. District Court for the Southern District of Texas has attacked the decisions by other district courts holding that 28 U.S.C. § 1782 applies to private international arbitration in Comisión Ejecutiva Hidroeléctrica del Río Lempa v. El Paso Corp.850 According to this district court, Republic of Kazakhstan v. Biedermann Int’l851 continues to be controlling authority and the Intel decision sheds no light on the issue. The El Paso court drew a sharp distinction between the nature of an arbitral tribunal and the DG-Competition: “An arbitral tribunal exists as

845 See id. at 255 (holding that § 1782 “authorizes, but does not require, a federal district court to provide assistance to a complainant in a European Commission proceeding that leads to a dispositive ruling, i.e., a final administrative action both responsive to the complaint and reviewable in court”).
846 Id. at 258 (quoting Hans Smit, International Litigation under the United States Code, 65 COLUM. L. REV. 1015, 1026-27 and nn. 71, 73 (1965)).
847 See, e.g., In Re Roz Trading Ltd., 469 F. Supp.2d 1221 (N.D. Ga. 2006) (International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna was a “tribunal” within the meaning of § 1782); In re Hallmark Capital Corp., 534 F. Supp. 2d 951 (D. Minn. 2007) (private Israeli arbitral body was a “tribunal” within the meaning of § 1782); In re Application of Babcock Borsig AG, 583 F. Supp. 2d 233 (D. Mass. 2008) (International Chamber of Commerce Court of Arbitration was a “tribunal” within the meaning of § 1782, but exercising discretion to deny motion to compel discovery).
849 Id. (emphasis added).
851 168 F.3d 880 (5th Cir. 1999).
a parallel source of decision-making to, and is entirely separate from, the judiciary, which was not the case with the D-G Competition as the Court was at pains to point out in Intel.”852

Intel’s analytic framework for evaluating whether to grant § 1782 assistance consists of two inquiries: (1) whether the statutory threshold requirements have been satisfied and (2) whether the court should exercise its discretion in order to order discovery.853

Statutory requirements: The person from whom discovery is sought must reside or be found in the district of the district court to which the application is made.854 There is no requirement that presence in the district be permanent or continuous.855

Even if the statutory requirements are met, the court has discretion whether to order discovery under § 1782. The Supreme Court noted in Intel that courts should be guided by the overriding purpose of § 1782 – to provide “efficient assistance to participants in international litigation and encourag[e] foreign countries by example to provide similar assistance to our courts.”856 Factors to consider include:

1. Whether the person from whom discovery is sought is a participant in the foreign proceeding since a foreign tribunal “has jurisdiction over those appearing before it, and can itself order them to produce evidence.”857

2. The foreign tribunal’s need for § 1782 assistance.858 One purpose of § 1782 is “to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws.”859

3. Whether the foreign tribunal would be receptive to United States federal court judicial assistance.860 Section 1782 relief is not appropriate where the party opposing discovery presents authoritative and affirmative proof that the foreign tribunal would reject evidence obtained with the aid of § 1782.861

853 Cf. In Re Application of Caratube Int’l Oil Co. LLP, 2010 WL 3155822 (D.D.C. Aug. 11, 2010) (assuming, without deciding, that the ICSID tribunal was a “tribunal” under 28 U.S.C. § 1782, but holding that discovery should be denied based upon the evaluation of Intel factors).
855 See Edelman v. Taittinger, 295 F.3d 171, 180 (2d Cir. 2002).
856 Intel, 542 U.S. at 252 (internal quotation omitted).
857 Id. at 264.
858 Id.
859 Id. at 262.
860 Id. at 264.
4. The nature of the foreign tribunal and the character of the foreign proceeding underway.862

5. Whether the request for discovery conceals an attempt to circumvent proof-gathering restrictions or other policies.863

b. Europe

1) England

The English Arbitration Act of 1996864 provides that an arbitral tribunal sitting in England has the power to decide “whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage.”865

2) Switzerland

Chapter 12 of Switzerland’s Federal Code on Private International Law deals with international arbitration. Article 184 on the taking of evidence provides that “[i]f the assistance of the judicial or administrative authorities of the State is needed to take evidence, the arbitral tribunal or, with the consent of the arbitral tribunal, a party may request the assistance of the judge at the seat of the arbitral tribunal who shall apply his own law.”866 In other words, an arbitral tribunal seated in Switzerland may seek the assistance of a competent court to seek evidence.867

The Swiss Federal Code on Private International Law makes no mention of the production of documents, but it can be used in conjunction with the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, discussed elsewhere in this Outline, to request documents from a third party.868

G. Depositions

Oral depositions are not a normal or accepted part of international commercial arbitration.869 Contrast this view with the AAA-ICDR International Arbitration Rules, 870 which

862 Intel, 542 U.S. at 264.
863 Id. at 264-65.
865 Id. at § 34(2)(d).
867 PETER ASHFORD, HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 160 (2009).
868 Id.
869 Cremades, supra note 785, at 75.
870 See http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004130&_afrLoop=1302382455205405&_afrWindowMode=0&_afrWindowId=3iy2b46u_138%40%3F_afrWindowId%3D3liy
provide: “At the discretion of the arbitrator(s), upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator(s) may order depositions of, or the propounding of interrogatories to, such persons who may possess information determined by the arbitrator(s) to be necessary to determination of the matter.”

1. ICDR Guidelines for Arbitrators Concerning Exchanges of Information:

“Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.”

XI. CHAPTER 11: PRE-HEARING CONFERENCES

The arbitral panel may conduct a pre-hearing conference (or a preliminary hearing) with the parties for the purpose of organizing, scheduling, and agreeing to procedures with a view towards expediting the resolution of the dispute. The pre-hearing conference is often the first opportunity for the arbitral panel, the parties, and the parties’ counsel to meet in person. It is also an opportunity for the arbitral panel to set the procedures of the arbitration, particularly where the parties are from different countries and have different expectations of the process.

The Chairman of the arbitral panel will usually circulate an agenda before the pre-hearing conference.

A. Timing of Pre-Hearing Conferences

Pre-hearing conferences are commonly held at an early stage in the proceedings. Some arbitral institutions require the pre-hearing conference to be held promptly after the arbitral panel is appointed, unless the panel decides that it needs more information from the parties regarding the dispute. The parties may also be required to complete administrative tasks before the pre-

2b46u_138%26_afrLoop%3D1302382455205405%26doc%3DADRRSTG_004130%26_afrWindowTitle%3D0%26_afrWindowMode%3D0%26_adf.ctrl-state%3D3liy2b46u_155 (last visited Nov. 15, 2012).
871 ICDR International Arbitration Rules, at L-4(d).
872 See ICDR Guidelines for Arbitrators Concerning Exchanges of Information.
873 See id.
874 AAA-ICDR International Arbitration Rules (effective June 1, 2009), art. 16(2), http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_002579&_afrLoop=1643571573608240&_afrWindowMode=0&_afrWindowId=hokre8f8sz_6%26_f_adf.ctrl-state%3Dhokre8f8sz_58 (last visited Nov. 19, 2012).
875 PETER ASHFORD, HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 47 (2009).
876 See id.
877 See id.
hearing conference (e.g., administrative fees must be paid or the impartiality of the arbitrators must first be checked). In complex arbitrations, additional pre-hearing conferences may be held to take account of changing circumstances or to deal with new information.

B. Preparing for the Pre-Hearing Conference

The parties and the arbitral panel must prepare for the pre-hearing conference by making arrangements for the conference itself (e.g., the time and venue) and by thinking about the issues that need to be addressed at the conference. An arbitration will run more smoothly if the parties work together to discuss procedures and to notify the arbitral panel of any disagreements before the pre-hearing conference.

C. Attendance of Senior Representatives of the Parties

The arbitral panel may invite senior representatives of the parties to attend the pre-hearing conference. Although the arbitral panel does not expect to resolve any substantive issues at the conference, attendance by senior representatives may result in each party gaining a better understanding of the issues, as well as the time and cost of the process. This may, in turn, promote settlement.

D. Matters for Discussion

1. Determination of Procedural Matters, including Subsequent Hearings and Discovery.

There are no specific rules regarding the issues that must be discussed at a pre-hearing conference. All issues relevant to conducting a smooth and efficient arbitration should be considered. The parties and the arbitral panel may discuss preliminary issues such as procedure (e.g., jurisdiction) or substantive issues (e.g., a legal issue that could eliminate the need for later pleadings). The arbitral panel may also encourage stipulations of fact and admissions by the parties. The following additional matters may be considered at the pre-hearing conference, but no one matter is required:

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880 See CAPPER, supra note 878, at 91.
881 See id.
882 See id. at 92.
883 See id.
884 See ASHFORD, supra note 875, at App. 6, 281.
885 See id.
886 See id.
887 See CAPPER, supra note 878, at 92.
888 See id.
889 See id. at 94.
890 See CPR Rules, at Rule 9.3(c).
Hearings: The arbitral panel will typically set firm dates for subsequent hearings. The arbitral panel may also set out the practical details of subsequent hearings, including any limit on the amount of time each party will have for oral argument and questioning witnesses, the exchange of witness evidence before the hearing, the number of witnesses, the order in which the parties will present their arguments and evidence, the length of the hearings, arrangements for transcribing the hearings, and how to proceed if a party requests an emergency hearing.

Discovery: The arbitral panel may consider issues regarding the time limits for and the manner of discovery, as well as issues regarding e-discovery.

Timing of Written Submissions: The arbitral panel may set deadlines for written submissions. The panel may also notify the parties of the number of submissions that will be allowed and the format of the submissions.

Evidence: The arbitral panel may consider the manner in which evidence is to be handled, including disclosure of documents, witness statements, and expert evidence. The arbitral panel may also consider time limits for the submission of evidence, consequences of a late submission, whether the panel will require a party to produce certain evidence, time limits for objections to the authenticity of evidence, whether the parties are willing to submit evidence jointly, and whether voluminous or complicated evidence should be presented through summaries or in other forms. The arbitral panel may also set a schedule for presenting physical evidence or for conducting an on-site inspection.

Witnesses: The arbitral panel may notify the parties at the pre-hearing conference that each party will be required to give advance notice of witnesses they intend to present. The arbitral panel may also clarify how witnesses will be heard, the order in which witnesses will be called, the order of questioning by the arbitral panel and each party, whether testimony will be given under oath or affirmation, whether witnesses will be allowed to testify in the hearing room when they are not testifying, and whether

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892 See CAPPERS, supra note 878, at 95.
893 See ASHFORD, supra note 875, at 48; see also CPR Rules, at Rule 9.3(a).
894 See CAPPERS, supra note 878, at 94; see also UNCITRAL Notes, supra note 891, at ¶¶ 9, 39, 42.
895 See CAPPERS, supra note 878, at 94.
896 See UNCITRAL Notes, supra note 891, at ¶¶ 13, 48-54.
897 See id. at ¶¶ 14, 56-57.
898 See id. at ¶¶ 15, 60.
witnesses can be interviewed by the parties prior to their appearance at a hearing.899

- **Experts:** The arbitral panel may notify the parties that it plans to appoint an expert. The panel may also consider the questions on which an expert is to provide clarification, the time period for the parties to present written comments on an expert’s report, and whether it will require a party to give advance notice of its intent to use its own expert.900

- **Identifying and narrowing the issues:** The arbitral panel may use the pre-hearing conference to identify and narrow the issues between the parties.901 The arbitral panel may require the parties to submit a “list of issues” that clarifies the dispute between the parties. The list can be amended as issues change with the consent of the parties and the arbitral panel.902

- **Seat of the arbitration:** If the parties have not already agreed to the seat of the arbitration, or the arbitral institution’s rules do not fix the seat of the arbitration, the arbitral panel should determine the seat at the pre-hearing conference, as well as the possibility of hearings in other places it considers to be convenient.903

- **Arbitration rules:** If the parties have not included in their arbitration agreement a stipulation regarding the set of arbitration rules that will govern their proceedings, or if the arbitration is non-institutional, the parties may agree on the arbitration rules at the pre-hearing conference. If the parties do not agree, the arbitral panel has the discretion to determine how the arbitration will proceed.904

- **Communications:** The arbitral panel may set up a system for the exchange of documents between the arbitral panel and the parties. The arbitral panel may also consider special arrangements for particular pieces of written evidence and an agreement to use email for some exchanges.905

- **Language:** The parties may agree upon the language of the proceedings, translation of documents, interpretation of oral presentations (whether

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899 See id. at ¶¶ 63-67.
900 See id. at ¶¶ 16, 69-73.
901 See CPR Rules, Rule 9.3(b).
902 See ASHFORD, supra note 875, at App. 6, 282.
903 See UNCITRAL Notes, supra note 891, at ¶¶ 3, 21, 23; see also CAPPER, supra note 878, at 93.
904 See UNCITRAL Notes, supra note 891, at ¶¶ 1, 14, 16; see also CAPPER, supra note 878, at 93.
905 See CAPPER, supra note 878, at 93; see also UNCITRAL Notes, supra note 891, at ¶¶ 7, 33, 35-36.
simultaneous or consecutive and whether the responsibility of a party or the arbitral panel), and who will bear the costs.906

- **Administrative services:** The parties and the arbitral panel may discuss services that the arbitral panel may need to carry out its function, such as hearing rooms or secretarial services. The panel may also consider which entity will arrange and pay for administrative services (the arbitral institution, an outside arbitral institution offering mutual assistance, the arbitral panel itself, or the parties).907

- **Costs:** The pre-hearing conference is a good time for the arbitral panel to determine the level of their fees, the amount and deadline for an advance from the parties, how the deposits should be managed, and the possibility of additional costs during the proceedings. If the arbitration falls under the rules of an arbitral institution, the arbitral panel should look to that institution’s rules to make the above determinations.908

- **Confidentiality:** The arbitral panel may consider the confidentiality of the proceedings, such as specific material or information that is to be kept confidential, measures for maintaining confidentiality, whether any special procedures should be employed for maintain confidentiality of electronic information, and when confidential information may be disclosed.909

- **Other issues:** The arbitral panel may also consider the following issues at the pre-hearing conference: the desirability of bifurcation or other separation of the issues in the arbitration; the desirability and practicability of consolidating the arbitration with any other proceeding; confirmation that there is no change of name of any party; confirmation of the address for service and communications; any issues as to the appointment of the arbitral panel; any issues as to the jurisdiction of the arbitral panel; expectations as to serving documents and retention of documents; whether the parties have conducted a meet and confer regarding documents; arrangements for an evidentiary hearing; the award; and logistical arrangements for subsequent meetings or hearings.910

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906 See UNCITRAL Notes, supra note 891, at ¶¶ 2, 17-20.
907 See id. at ¶¶ 4, 24-25.
908 See CAPPER, supra note 878, at 93.
909 See UNCITRAL Notes, supra note 891, at ¶¶ 6, 31-32.
910 See ASHFORD, supra note 875, at App. 6, 281-84; see also CPR Rules, Rule 9.3(a).
2. Role of Arbitral Panel in Facilitating Settlement

At the pre-hearing conference, the arbitral panel may generally suggest to the parties that they attempt to settle the dispute. However, the arbitral panel should not participate in the settlement negotiations unless the parties ask the panel to be present. If the parties begin to discuss settlement during the pre-hearing conference, the panel should excuse itself. If the parties reach a settlement agreement during the pre-hearing conference, the arbitral panel should place a signed stipulation into the record.

E. After the Pre-hearing Conference

After the pre-hearing conference, the arbitral panel may issue instructions setting out the procedures that will be followed during the arbitration.

XII. CHAPTER 12: RULES OF EVIDENCE

A. Rules of Leading Arbitral Authorities Relevant to the Taking of Evidence

Parties to international arbitration specify in advance the rules under which their arbitration will be conducted. Unfortunately, the rules of the leading arbitral authorities generally do not provide the parties (or the tribunal) with specific guidance regarding the admissibility of evidence. Rather, the rules merely provide the tribunal with discretion to determine what evidence may be considered in support of a party’s claims or defenses.

For example, the ICC Rules of Arbitration provide that the “tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means”; that the “tribunal may decide to hear witnesses, experts appointed by the parties or any other person”; and “[a]t any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.” However, the Rules do not provide the parties or the tribunal with specific guidance regarding the admissibility of evidence.

Other leading arbitral authorities similarly provide little to no guidance on what evidence may be considered in international arbitration:

911 See UNCITRAL Notes, supra note 891, at ¶¶ 12, 47; see also CPR Rules, Rule 9.3(e); see also THOMAS H. OEHMKE, 3 COMMERCIAL ARBITRATION § 87:1 (2011).
912 See OEHMKE, supra note 911, at § 87:1.
913 See id.
914 See id.
915 See CAPPER, supra note 878, at 95.
• UNCITRAL Arbitration Rules: “The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.”

• AAA Commercial Arbitration Rules: “The arbitrator shall determine the admissibility, relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.”

• LCIA Arbitration Rules: “[T]he Arbitral Tribunal shall have the power, on the application of any party or of its own motion … to decide whether or not to apply any strict rules of evidence (or any other rules) as to the admissibility, relevance or weight of any material tendered by a party on any matter of fact or expert opinion; and to determine the time, manner and form in which such material should be exchanged between the parties and presented to the Arbitral Tribunal[.]”

• Stockholm Chamber of Commerce Arbitration Rules: “The admissibility, relevance, materiality and weight of evidence shall be for the Arbitral Tribunal to determine.

• Hong Kong International Arbitration Center: “The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of any matter presented by a party, including whether or not to apply strict rules of evidence.”

918 AAA-ICDR International Arbitration Rules (effective June 1, 2009), Rule 31(b), http://www.adr.org/aaa/faces/aoc/icdr/i_search/i_rule/i_rule_detail?doc=ADRSTG_002008&_afrLoop=128884397201466&_afrWindowMode=0&_afrWindowId=18qyhhv2ib_1#%40%3F_afrWindowId%3D18qyhhv2ib_1%26_afrLoop%3D128884397201466%26doc%3DADRSTG_002008%26_afrWindowMode%3D0%26_adf.ctrl-state%3D18qyhhv2ib_57 (last visited Nov. 15, 2012).
World Intellectual Property Arbitration Rules: “The Tribunal shall
determine the admissibility, relevance, materiality and weight of
evidence.”

Because the rules of the leading arbitral authorities do not provide specific guidance on
the admissibility of evidence, evidentiary issues are generally left to the discretion of the
tribunal. While this approach may allow for flexibility, it does not promote consistency or
predictability of results. It also may result in the tribunal following the evidentiary rules that it is
most familiar with, even if the parties themselves are not familiar with those rules and did not
intend to be bound by them. With these concerns in mind, the International Bar Association has
attempted to create unified standards for evidence in international arbitration.

B. International Bar Association Rules on the Taking of Evidence

The International Bar Association drafted a unique set of rules for the taking of evidence
in international arbitrations to promote an “efficient, economical and fair process” for the
adjudication of international disputes. The Rules provide mechanisms for the presentation of
documents, fact and expert witnesses, inspections, as well as the conduct of evidentiary
hearings. The IBA Rules of Evidence also reflect procedures used in many different legal
systems and, therefore, may be particularly useful when the parties come from different legal
traditions.

1. Scope of the IBA Rules of Evidence

The IBA Rules of Evidence are intended to be used in conjunction with, and adopted
together with, institutional, ad hoc or other rules or procedures that govern international
arbitration. “Whenever the Parties have agreed or the Arbitral Tribunal has determined to
apply the IBA Rules of Evidence, the Rules shall govern the taking of evidence, except to the
extent that any specific provision of them may be found to be in conflict with any mandatory
 provision of law determined to be applicable to the case by the Parties or by the Arbitral
Tribunal.” If the IBA Rules of Evidence are silent on any matter concerning the taking of
evidence and the Parties have not agreed otherwise, “the Arbitral Tribunal shall conduct the
taking of evidence as it deems appropriate, in accordance with the general principles of the IBA
Rules of Evidence.”

Parties may agree that a current or future dispute shall be governed by the IBA Rules of
Evidence. If parties elect to do so at the time of contracting, the parties should add the

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923 IBA Rules on the Taking of Evidence in International Arbitration (2010), Forward, p. 2.
924 Id.
925 Id.
926 Id.
927 Id. at art. 1(1).
928 Id.
929 Id. at Foreword, p.2.
following language to their arbitration agreement (conforming the clause to their particular circumstances):

[In addition to the institutional, ad hoc or other rules chosen by the parties,] [t]he parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence as current on the date of [this agreement/the commencement of this arbitration.]930

2. Agreement of the Parties

While the IBA Rules of Evidence provide default rules for pre-hearing discovery and the taking of evidence, the parties are free to modify the rules by agreement to fit their particular circumstances. In particular, “parties and Arbitral Tribunals may adopt the IBA Rules of Evidence, in whole or in part. … They also may vary them or use them as guidelines in developing their own procedures.”931

The Rules also encourage the Arbitral Tribunal to consult the parties on the taking of evidence at the very beginning of the arbitration. Article 2 provides that “[t]he Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.”932 The consultation on evidentiary issues may address “the scope, timing and manner of the taking of evidence,” including “the promotion of efficiency, economy and conservation of resources in connection with the taking of evidence.”933 The Arbitration Tribunal is “encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues … that the Arbitral Tribunal may regard as relevant to the case and material to its outcome.”934

3. Inspection

The IBA Rules of Evidence also provide for the inspection of physical evidence. “[T]he Arbitral Tribunal may, at the request of a Party or on its own motion, inspect or require the inspection by a Tribunal-Appointed Expert or a Party-Appointed Expert of any site, property, machinery or any other goods, samples, systems, processes or Documents, as it deems appropriate.”935 In arranging for the inspection, “[t]he Arbitral Tribunal shall, in consultation with the Parties, determine the timing and arrangement for the inspection” and “[t]he Parties and their representatives shall have the right to attend any such inspection.”936

930 Id.
931 Id.
932 Id. at art. 2(1).
933 Id. at art. 2(2).
934 Id. at art. 2(3).
935 Id. at art. 7.
936 Id.
4. Relevance

The IBA Rules of Evidence broadly provide that the Arbitral Tribunal “may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome.”\textsuperscript{937} The Rules also allow the Arbitral Tribunal to exclude, upon its own motion or at the request of a party, any evidence that is irrelevant or immaterial to the outcome of the case.\textsuperscript{938} However, the rules do not define what constitutes “relevant” or “material” evidence and, thus, there are no strict limitations on the admissibility of irrelevant evidence; the determination of whether evidence is relevant or material is left to the discretion of the Tribunal.

5. Hearsay

Most common law jurisdictions do not permit the admission of fact evidence based on assertions or out of court declarations that do not allow for reasonable cross examination.\textsuperscript{939} However, many civil law nations accept \textit{ex parte} interrogatories and out of court declarations as evidence in judicial proceedings.\textsuperscript{940} In international arbitrations, hearsay is admissible at the discretion of the Arbitral Tribunal. Although the IBA Rules of Evidence list several items that may be excluded by the Tribunal such as privileged documents and communications, the Rules do not specifically enumerate hearsay for the exclusion of evidence.\textsuperscript{941} Neither do other model rules for the adjudication of international disputes such as UNCITRAL or the ICC Rules of Arbitration.\textsuperscript{942}

Further, numerous courts have recognized the Arbitral Tribunal’s authority to admit and rely upon hearsay evidence. For example, in \textit{Ireland v. United Kingdom}, the European Court of Human Rights sanctioned the Arbitral Tribunal’s reliance upon hearsay evidence to adjudicate the merits of the claims.\textsuperscript{943}

In \textit{Sunshine Mining Co. v. United Steelworkers}, the United States Court of Appeals for the Ninth Circuit held that an arbitrator may admit and rely upon any evidence that would otherwise be inadmissible under the Federal Rules of Evidence.\textsuperscript{944} Similarly,

\textsuperscript{937} Id. at art. 8(5).

\textsuperscript{938} Id. at art. 9(2)(a).

\textsuperscript{939} Klaus Oblin, \textit{Hearsay and International Arbitration}, in AUSTRIAN ARBITRATION YEARBOOK 2009 201, 207 (2009).

\textsuperscript{940} Id.

\textsuperscript{941} Id.

\textsuperscript{942} Id. at 205-206.

\textsuperscript{943} Id. at 210. \textit{See also} \textit{Sunshine Mining Co. v. United Steelworkers}, 823 F.2d 1289, 1295 (9th Cir. 1987) (“Arbitrators may admit and rely on evidence inadmissible under the Federal Rules of Evidence.”)

\textsuperscript{944} Id. at 209.
6. Attorney Client Privilege

a. Overview of the Attorney Client Privilege

Although the rules relating to the attorney-client privilege vary from country to country, virtually every common law jurisdiction recognizes that confidential communications between a lawyer and a client that are made for the purposes of giving or receiving legal advice are protected from disclosure.\textsuperscript{945} In civil law countries, the principle of “professional secrecy” protects confidential communications between an attorney and his or her client, but the principle is comparatively limited because of the absence of pre-trial discovery.\textsuperscript{946} As recognized by most common law jurisdictions, the purpose of the attorney client privilege is to foster “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.”\textsuperscript{947} Almost all jurisdictions require that the privilege be confined to communications with a qualified lawyer and some jurisdictions further limit the privilege to legal rather than business advice.\textsuperscript{948} In the United States, however, the privilege attaches to communications with the attorney’s agents such as accountants, experts, interpreters and doctors, so long as the communications are made with a view towards seeking legal advice.\textsuperscript{949}

With respect to the attorney-client privilege within organizations, there is a distinction between common law and civil law jurisdictions. In most common law jurisdictions, the privilege extends to both in-house and outside counsel.\textsuperscript{950} However, in most civil law jurisdictions, communications between an in house lawyer and employees of the corporation are usually not protected by the attorney client privilege, even when made for the purpose of obtaining legal advice.\textsuperscript{951}

b. Attorney Client Privilege in International Arbitration

In the context of international arbitration, the Tribunal generally has discretion to protect privileged information, but the Rules do not define the nature and contours of the privilege. For example, Article 9.2(b) of the IBA Rules of Evidence specifically allows the Arbitral Tribunal to exclude any evidence, at the request of a party or upon its own motion, that is subject to “privilege” “under the legal or ethical rules determined by the Tribunal to be applicable.”\textsuperscript{952}

\begin{footnotesize}
\textsuperscript{945} PETER ASHFORD, HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 137 (2009).
\textsuperscript{947} ASHFORD, supra note 945, at 138.
\textsuperscript{948} Id. at 139.
\textsuperscript{949} Id. at 141.
\textsuperscript{950} Id. at 143.
\textsuperscript{951} Id.
\textsuperscript{952} IBA Rules of Evidence, art 9.2.
\end{footnotesize}
Although the Tribunal is vested with discretion to determine the scope of the privilege, there is authority that suggests that the Tribunal should adopt rules that provide the most protection to the parties. For example, the IBA Rules of Evidence allow the Arbitral Tribunal to exclude (a) evidence that the parties reasonably expected to be encompassed by the privilege and (b) evidence that based on fairness and equality should be considered as privileged because the opposing parties are subject to different legal and ethical rules. Likewise, the International Centre for Dispute Resolution urges the Arbitral Tribunal to apply rules that would be fair to both sides when the parties are subject to different legal and ethical requirements, giving preference to the choice of law that provides the most protection for attorney client communications.

In sum, while the rules of the various arbitral authorities and the IBA Rules of Evidence recognize that some protection must be afforded to “privileged” communications, the nature and extent of the “privilege” is generally left to the discretion of the Arbitral Tribunal. Accordingly, counsel must be mindful of the risks of disclosure in international arbitration.

7. Confidentiality

Article 3.13 of the IBA Rules of Evidence provides that

[any document submitted or produced by a Party or non-Party in the arbitration and not otherwise in the public domain shall be kept confidential by the Arbitral Tribunal and the other Parties, and shall be used only in connection with the arbitration. This requirement shall apply except and to the extent that disclosure may be required of a Party to fulfill a legal duty, protect or pursue a legal right, or enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. The Arbitral Tribunal may issue orders to set forth the terms of this confidentiality. This requirement shall be without prejudice to all other obligations of confidentiality in the arbitration.]

In addition, Article 9.2(f) allows the Arbitral Tribunal to exclude evidence on grounds of commercial or technical confidentiality.

8. Oral Testimony at the Evidentiary Hearing

Although issues relating to witnesses are discussed in detail in a subsequent chapter, it is important to note that the IBA Rules of Evidence also address issues relating to the taking of oral evidence at the evidentiary hearing. In particular, the Rules provide that the “Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing” and “may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise

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953 Id. at art 9.3(c); 9.3(e).
954 ICDR Guidelines for Arbitrators Concerning Exchanges of Information, Section 7.
955 IBA Rules of Evidence, art. 3(13).
956 Id. at art. 9(2)(f).
covered by a reason for objection [set forth in these Rules].”957 The Rules also provide that “[q]uestions to a witness during direct and re-direct testimony may not be unreasonably leading.”958

9. Discretion of Panel

The foregoing discussion demonstrates that evidence is generally admissible at the Arbitral Tribunal’s discretion in International Arbitration cases. In our experience, the Tribunal is generally willing to receive all evidence provided that the admission of such evidence does not prejudice the other party. The Tribunal may not give all evidence the same weight in considering the merits of the dispute, but the Tribunal is likely to receive the evidence in the first instance. This in part results from the fact that the refusal to admit evidence may lead to judicial review and provides a possible ground for vacating an arbitration award.959

XIII. CHAPTER 13: WITNESSES

A. Introduction

The presentation of witnesses is important to establishing entitlement to an award in international arbitration. Parties rely upon the testimony of fact witnesses to establish the essential facts in support of the party’s claims or defenses, and the testimony of expert witnesses to assist the Arbitral Tribunal in understanding certain aspects of the case. Parties also use cross-examination as a tool to undermine the credibility and the substance of the testimony of the other side’s witnesses.

As with virtually all other aspects of arbitration, the rules governing fact and expert witnesses in international arbitration are typically determined by agreement of the parties or, in the absence of agreement, by the Arbitral Tribunal. In particular, parties designate as governing rules in their arbitration agreements the rules of one of the major international arbitral authorities. The problem, however, is that the rules often do not provide sufficient guidance on witness issues, including pre-hearing disclosures and form of testimony, thus leaving those issues to the discretion of the Arbitral Tribunal. Nevertheless, there are certain common procedural and substantive rules concerning the presentation of witnesses in international arbitration that are worth exploring.

B. Direct Testimony

To establish the essential facts in support of their claims and defenses, parties present the direct testimony of fact witnesses. Under most international rules, parties are entitled to introduce evidence from any person having relevant information. For example, the IBA Rules of Evidence provide that “[a]ny person may present evidence as a witness, including a Party or a

957 Id. at art. 8(2).
958 Id.
Party’s officer, employee, or other representative.” These same rules provide guidance on witness disclosures and the methods for introducing fact witness testimony.

1. Witness Disclosures

Generally, parties must provide notice of the witnesses they intend to call at the evidentiary hearing. For example, the IBA Rules of Evidence provide that “[w]ithin the time ordered by the Arbitral Tribunal, each party shall identify the witnesses on whose testimony it intends to rely and the subject matter of that testimony.” Likewise, the International Center for Dispute Resolution Rules provide that a party must give the tribunal and the other parties at least 15 days notice regarding the “the names and addresses of any witnesses it intends to present, the subject of their testimony and the languages in which such witnesses will give their testimony.” Other rules, however, do not specify a particular time and manner for the making of witness disclosures. For example, the Commercial Arbitration Rules of the American Arbitration Association provide that “[a]t the request of any party or at the discretion of the arbitrator, consistent with the expedited nature of arbitration, the arbitrator may direct . . . (ii) the identification of any witnesses to be called.” Counsel should be aware of the witness disclosure rules provided for in the arbitration agreement.

2. Witness Statements

International arbitration is somewhat unique in that direct testimony may be presented by a written witness statement in addition to, or in lieu of, live testimony. For example, the IBA Rules of Evidence provide that the Tribunal “may order each Party to submit within a specified time to the Arbitral Tribunal and to the other Parties Witness Statements by each witness on whose testimony it intends to rely.” Additionally, the “Parties may agree or the Arbitral Tribunal may order that the Witness Statement or Expert Report shall serve as that witness’s direct testimony.” The witness statements may be directed at particular claims or issues, including jurisdiction, preliminary determinations, liability or damages. If testimony is introduced by witness statement alone, however, the party must make the witness available for cross-examination at the evidentiary hearing, or “the Arbitral Tribunal shall disregard [the] Witness Statement” from that particular witness.

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960 IBA Rules on the Taking of Evidence in International Arbitration (2010), art. 4(2).
961 Id. at art. 4(1).
962 AAA-ICDR International Arbitration Rules, art. 20(2), http://www.adr.org/aaa/faces/aoe/icdr/i_search/i_rule/i_rule_detail?doc=ADRSTG_002008&_afrLoop=1288884397201466&_afrWindowMode=0&_afrWindowId=18qyhhv2ib_1%40%3F_afrWindowId%318qyhhv2ib_1%26_afrLoop%3D1288884397201466%26doc%3DADRSTG_002008%26_afrWindowMode%3D0%26_adf.ctrl-state%3D18qyhhv2ib_57 (last visited Nov. 15, 2012).
963 AAA-ICDR International Arbitration Rules, art. (a)(ii).
964 IBA Rules of Evidence, art. 4(4).
965 Id. at art. 8(4).
966 Id. at art. 4(4).
967 Id. at art. 4(7). Article 4(7) provides exceptions to this rule where a witness fails to appear for a valid reason, or “exceptional circumstances” warrant the inclusion of such evidence.
Generally, the witness statements are drafted with the assistance of counsel and include relevant background information on the witness, the substance of the witnesses’ direct testimony, and an affirmation that the testimony is true and accurate to the best of the witnesses’ knowledge. For example, the IBA Rules of Evidence provide that each witness statement shall contain:

I. the full name and address of the witness, a statement regarding his or her present and past relationship (if any) with any of the Parties, and a description of his or her background, qualifications, training and experience, if such a description may be relevant to the dispute or to the contents of the statement;

II. a full and detailed description of the facts, and the source of the witness’s information as to those facts, sufficient to serve as that witness’s evidence in the matter in dispute. Documents on which the witness relies that have not already been submitted shall be provided;

III. a statement as to the language in which the Witness Statement was originally prepared and the language in which the witness anticipates giving testimony at the Evidentiary Hearing;

IV. an affirmation of the truth of the Witness Statement; and

V. the signature of the witness and its date and place.\textsuperscript{968}

The IBA Rules of Evidence also contemplate the submission of responsive witness statements. However, such “revisions or additions [must] respond only to matters contained in another Party’s Witness Statements, Expert Reports or other submissions that have not been previously presented in the arbitration.”\textsuperscript{969} This is an important provision because it allows the parties to respond to new legal theories and additional facts raised in the parties’ “submissions,” including witness statements.

There are a number of advantages to the use of witness statements in international arbitration. Many arbitrators and practitioners prefer written witness statements because it allows for a more efficient hearing by eliminating lengthy (and often rehearsed) direct examinations. In addition, the use of witness statements allows counsel to introduce precise testimony without the witness forgetting critical aspects of his or her testimony. On the other hand, some practitioners prefer live direct testimony because it allows the witness to get comfortable testifying before the witness is subject to cross-examination. It also allows counsel more flexibility in focusing on those aspects of the case that have developed during opening statements and prior testimony. Finally, the use of witness statements allows counsel to better prepare for cross-examination. In sum, there are important considerations that counsel must take into account when evaluating whether to proceed by way of written witness statements.

\textsuperscript{968} Id. at art. 4(5)(a-e).
\textsuperscript{969} Id. at art. 4(6).
3. Compelling Testimony of Witnesses

The IBA Rules of Evidence provide that if a party wishes to present “evidence from a person who will not appear voluntarily at its request, the Party may, within the time ordered by the Arbitral Tribunal, ask it to take whatever steps are legally available to obtain the testimony of that person, or seek leave from the Arbitral Tribunal to take such steps itself.”970 The party seeking to obtain the testimony of the witness should:

1) identify the witness;
2) describe the subjects of the witnesses’ testimony;
3) state why such “subjects are relevant to the case and material to its outcome.”971

The panel retains the discretion to determine which steps should taken regarding the absent witness.972

The panel also retains the discretion to “order any Party to provide for, or to use its best efforts to provide for, the appearance for testimony at an Evidentiary Hearing of any person, including one whose testimony has not yet been offered.”973 The party who receives such a request can object for any of the reasons stated in Article 9.2 of the IBA Rules of Evidence, including relevance or privilege.974

The ability of the tribunal to compel testimony or evidence will depend, in part, on the tribunal’s ability to issue subpoenas. The panel may have to rely on the national court system of the jurisdiction where the arbitration is being conducted to enforce a subpoena on third parties.975 Chapter 10 contains a detailed examination of the panel’s ability to compel the production of third party witnesses or evidence.

C. Cross Examination

Cross-examination is the practice whereby counsel questions witnesses presented by the opposing party. Cross-examination, however, differs between common law and civil law systems.976 In common law systems, cross-examination is conducted by counsel and it is an important method to rebut the opposing side’s case.977 However, in civil law jurisdictions, the judge or the court asks questions directly of the witness.978 This approach is less adversarial; the

970 Id. at art. 4(9).
971 Id.
972 Id.
973 Id. at art 4(10).
974 Id.
977 Id.
978 See MOSES, supra note 975, at 172 (noting that the U.S. Federal Arbitration Act grants arbitrators subpoena power).
goal is to gather information, not damage the witnesses’ credibility. Cross-examination is an important part of international arbitration, but it has customarily been less adversarial than in common law systems.

In most circumstances, the Arbitral Tribunal also may ask questions of the witness. For example, the IBA Rules of Evidence provide that “the Arbitral Tribunal may ask questions to a witness at any time.” Likewise, Rule 30 of the Commercial Arbitration Rules of the American Arbitration Association provides that “[w]itnesses for each party shall also submit to questions from the arbitrator and the adverse party.” Further, if the Arbitral Tribunal remains unsatisfied, it retains discretion under certain rules to call additional witnesses.

Finally, most arbitrators will permit the party presenting the witness to conduct redirect examination. The availability and scope of that examination, however, is dependent on the rules of the arbitral authority and/or the discretion of the Tribunal.

D. Expert Witnesses

Expert witnesses can provide important assistance to the arbitration panel in complex commercial disputes. Experts have unique experience or training that allows them to testify regarding issues where such expertise is required. Such expertise is often necessary in disputes involving complex scientific or technological issues, complex business valuations or other financial calculations, or in which the customs of a particular industry are at issue. In common law systems, a party can select an expert witness to testify on its behalf. However, in civil law systems, the court or the judge selects the expert to provide assistance to the court. The IBA Rules of Evidence incorporate the practices of both civil and common law systems, with both the parties and the Arbitral Tribunal retaining the right to present expert testimony to aid the tribunal’s decision-making process.

Expert witnesses generally submit a witness statement in the form of an expert report. The report should include the expert’s curriculum vitae, his or her testimony in previous

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979 See id. (quoting Arbitrator Nicholas Simon, “Arbitrators do not like cross-examination where witnesses are badgered. In the continental tradition, arbitrators see cross-examination as a method for eliciting information, not for destruction of a witness.”).
980 Id.
981 IBA Rules of Evidence, art. 8(3)(g).
982 See id. at art. 8(5) (“Subject to the provisions of Article 9.2, the Arbitral Tribunal may request any person to give oral or written evidence on any issue that the Arbitral Tribunal considers to be relevant to the case and material to its outcome. Any witness called and questioned by the Arbitral Tribunal may also be questioned by the Parties.”).
983 See id. at art. 8(3)(b) (“[F]ollowing direct testimony, any other Party may question such witness, in an order to be determined by the Arbitral Tribunal. The Party who initially presented the witness shall subsequently have the opportunity to ask additional questions on the matters raised in the other Parties’ questioning [.]”).
984 Laeuchli, supra note 976, at 83.
985 Id.
986 IBA Rules of Evidence, art. 5(1), 6(1).
987 Id. at art. 5(2).
arbitrations or trials, a list of the materials the expert reviewed in preparing the report, the methodology the expert used, and his or her opinions.\textsuperscript{988} The report should not include legal conclusions, as they provide little assistance to the arbitral panel, and undermine the credibility of the expert as an impartial analyst of the facts underlying the dispute.

The Arbitral Tribunal should consult with each party early in the proceedings regarding expert witnesses\textsuperscript{989} in order to give the parties sufficient time to retain an expert and provide him or her with the relevant documents and/or information. The panel, however, retains the discretion to exclude the expert’s testimony if it is not relevant or unnecessarily prejudicial.\textsuperscript{990} However, in practice, the panel is likely to allow the expert to testify, but will give less weight to evidence that it deems irrelevant.

**Party-Appointed Experts:** Under the IBA Rules of Evidence, each party is entitled to retain an expert witness to testify on its behalf.\textsuperscript{991} Each party that intends to introduce testimony from an expert must identify the expert, the subject matter of the expert’s testimony, and submit an expert report.\textsuperscript{992}

Under Article 5(2), the report must contain:

(a) the full name and address of the Party-Appointed Expert, a statement regarding his or her present and past relationship (if any) with any of the Parties, their legal advisors and the Arbitral Tribunal, and a description of his or her background, qualifications, training, and experience;

(b) a description of the instructions pursuant to which he or she is providing his or her opinions and conclusions;

(c) a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal;

(d) a statement of the facts on which he or she is basing his or her expert opinions and conclusions;

(e) his or her expert opinions and conclusions, including a description of the methods, evidence and information used in arriving at the conclusions. Documents on which the Party-Appointed Expert relies that have not already been submitted shall be provided;

(f) if the Expert Report has been translated, a statement as to the language in which it was originally prepared, and the language in which the Party-Appointed Expert anticipates giving testimony at the Evidentiary Hearing;

(g) an affirmation of his or her genuine belief in the opinions expressed in the Expert Report;

(h) the signature of the Party-Appointed Expert and its date and place; and

\textsuperscript{988} See id. at art. 5(2)(a-e) (listing what the expert report should include).

\textsuperscript{989} Id. at art. 2(2)(a).

\textsuperscript{990} See id. at art. 2(2)(a); 9(2) (listing the factors the panel can consider in exclude certain evidence).

\textsuperscript{991} Id. at art. 5(1).

\textsuperscript{992} Id.
(i) if the Expert Report has been signed by more than one person, an attribution of the entirety or specific parts of the Expert Report to each author.993

International arbitration is also somewhat unique in that the panel may order that party-appointed experts meet and confer on disputed issues.994 At this meeting, the party-appointed experts attempt to reach common ground or agreement on issues within the scope of their reports.995 The experts must record the results of this meeting.996

Finally, if an expert is requested to appear before the tribunal and fails to appear in person at the evidentiary hearing, the arbitral panel “shall” disregard the expert report.997 Therefore, a party that intends to present an expert witness should ensure that the expert can attend the hearing.

**Tribunal-Appointed Experts:** Under the IBA Rules of Evidence, the tribunal also retains the right to appoint one or more experts.998 Any potential expert must submit to the tribunal and the parties, a “description of his or her qualifications and a statement of his or her independence from the Parties, their legal advisors and the Arbitral Tribunal.”999 The parties can object to the expert based on his or her qualifications or independence.1000 If additional evidence arises after the appointment has been made, the parties can make an additional objection, but such objection must be based on the newly discovered evidence.1001 The tribunal-appointed expert must create a report in a manner that is substantially similar to a party-appointed expert.1002 The cost of the tribunal-appointed expert is part of the costs of the overall arbitration, and is thus borne by the parties.1003

A tribunal-appointed expert has the ability to request documents or other evidence from each party.1004 The authority of the expert to obtain such information is the same as the tribunal itself.1005 A party that attempts to prevent such evidence from being turned over must petition the panel to prevent such disclosure.1006

If the tribunal-appointed expert report is adverse to one of the parties, the party should select its own expert to rebut the tribunal-appointed expert. Under IBA Rule of Evidence 6(5),

993 *Id.* at art. 5(2).
994 *Id.* at art. 5(4).
995 *Id.*
996 *See id.* (“At such meeting, the Party-Appointed Experts shall attempt to reach agreement on the issues within the scope of their Expert Reports, and they shall record in writing any such issues on which they reach agreement, any remaining areas of disagreement and the reasons therefore.”).
997 *See id.* at art. 5(5). The Rule, however, provides for an exception in “exceptional circumstances”.
998 *Id.* at art. 6(1).
999 *Id.* at art. 6(2).
1000 *Id.*
1001 *Id.*
1002 *Id.* at art. 6(4).
1003 *Id.* at art. 6(8).
1004 *Id.* at art. 6(3).
1005 *Id.*
1006 *Id.*
each party retains the right to provide rebuttal witnesses or experts in response to the tribunal-appointed expert.\footnote{1007} The parties and the tribunal also retain the ability to request and question the tribunal-appointed expert at the evidentiary hearing.\footnote{1008}

E. Objections

Parties in international arbitration have the ability to object to evidence that is not relevant to the proceeding, or otherwise objectionable under IBA Rule of Evidence 9(2). However, the panel is likely to admit all the evidence presented by the parties and, therefore, objections should be used sparingly.\footnote{1009} Most leading arbitral authorities have rules that provide the Arbitral Tribunal with discretion over what evidence, including fact and expert testimony, is admissible. For example, Article 8(2) of the IBA Rule of Evidence states, in part:

The Arbitral Tribunal shall at all times have complete control over the Evidentiary Hearing. The Arbitral Tribunal may limit or exclude any question to, answer by or appearance of a witness, if it considers such question, answer or appearance to be irrelevant, immaterial, unreasonably burdensome, duplicative or otherwise covered by a reason for objection set forth in Article 9.\footnote{1010}

However, as the panel frequently consists of judges and attorneys who are unlikely to consider themselves unduly influenced by irrelevant evidence, the parties should avoid making unnecessary objections that disrupt the proceeding.\footnote{1011}

F. Order of Witnesses

In international arbitration, the order of testimony is generally:

1. Claimant’s Fact Witnesses
2. Respondent’s Fact Witnesses
3. Claimant’s Party Appointed Expert
4. Respondent’s Party Appointed Expert
5. Any Tribunal-Appointed Expert.\footnote{1012}

\footnote{1007}{Id. at art. 6(5).}
\footnote{1008}{Id. at art. 6(6); LCIA Arbitration Rules (effective Jan. 1, 1998), art. 20.3, http://www.lcia.org/Dispute_Resolution_Services/LCIA_Arbitration_Rules.aspx (last visited Nov. 17, 2012).}
\footnote{1009}{See L. Tyrone Holt, Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation’s Ill Effects, 7 DePaul Bus. & Comm. L. J. 455, 470 (Spring 2009). Holt noted that “[b]ecause arbitration is an informal process, arbitrators need not (and usually do not) strictly apply the rules of evidence. Objections can be made on significant issues, but counsel should avoid repeated interruptions that break the pace of the hearings. Because evidence is presumptively admissible, arbitration spares lawyers from authenticating and arguing about every document. Arbitrators who are also attorneys have training and experience that allows them to recognize hearsay and other dubious proof. This allows counsel to concentrate on the case without constantly objecting, seeking sidebars, and making proffers as they must in litigation.”}
\footnote{1010}{IBA Rules of Evidence, art. 8(3)(b), (c).}
\footnote{1011}{See Holt, supra note 1009, at 470.}
However, this order may be altered the tribunal or by motion of a party.1013

XIV. CHAPTER 14: POST-ARBITRATION MATTERS

A. Introduction

Most international arbitration institutions allow for the correction in the award of any errors of a clerical, computational or typographical nature, or for an interpretation of the award.1014 Moreover, the UNCITRAL rules go further and permit either party to ask the arbitral tribunal to render an additional award with respect to claims that were presented in the arbitration proceedings but omitted from the award.1015 The UNCITRAL rule also allows the arbitral tribunal to render an additional award when the request is justified and “the omissions can be rectified without any further hearings or evidence.”1016 The international arbitration institutions uniformly require that applications for the correction or interpretation of an award must be filed 30 days from the receipt of the award.1017

The ability of a party to request the tribunal to “interpret” an award is only meant to allow the tribunal to clarify any ambiguity or internal inconsistency in the award.1018 As a practical matter, there are a very small number of cases where international tribunals have granted a request for an interpretation of an award.1019

A few arbitration rules contemplate a built-in process for appeals. For example, the ICSID arbitration rules allow an award to be annulled, an enforcement proceeding to be stayed or for a resubmission of an annulled award to another tribunal.1020 However, the ICSID rules are an exception to the norm. Widely used rules such as the UNCITRAL rules or the ICC rules do not

1012 IBA Rules of Evidence, art. 8(3)(b), (c).
1013 Id. at art. 8(3)(f).
1015 UNCITRAL Arbitration Rules, art. 35, 36.
1016 Id. at art. 37.
1017 ICC Rules of Arbitration, art. 35; AAA-ICDR International Arbitration Rules, art. 30; LCIA Arbitration Rules, art. 27; UNCITRAL Arbitration Rules, art. 36.
1019 Id.
1020 Id.
provide for any kind of internal level of review for awards rendered by an international arbitral tribunal. Rather, most international arbitration rules explicitly state that an award is binding on the parties.1021

Because almost all international arbitration rules narrowly restrict the tribunal’s review of an award to correction or interpretation, most of the challenges to an award are brought in local courts of competent jurisdiction. Unless an arbitration is conducted in reference to some other law, local courts have the power to hear and rule upon the propriety of an award under the arbitration law of the country where the tribunal sits.1022

B. Recourse to the Courts

With a few minor exceptions such as England and Belgium, the grounds for challenging an arbitration award in the national courts may only be brought as set out in the Model Law On International Commercial Arbitration.1023 These grounds are taken from Article V of the New York Convention. Generally, the grounds for contesting an arbitration award in the context of international disputes can be broadly organized into the following four categories: (1) adjudicability; (2) procedural irregularity; (3) mistakes of law or fact; and (4) public policy.

1. Adjudicability

Challenges concerning the adjudicability of the claim in question typically include an objection to the tribunal’s jurisdiction, issues of incapacity, invalid agreements to arbitrate, a claim that the tribunal exceeded its powers or that the subject matter of the dispute cannot be subject to arbitration in the first instance. Issues of incapacity and invalidity of the agreements to arbitrate usually depend upon the substantive law in the arbitration agreement agreed to by the parties. Where the arbitration agreement does not provide the controlling law, the courts generally apply the law of the State where the arbitration takes place.1024 When an arbitral award is challenged on the basis that the tribunal has exceeded its powers, the ground pertains to instances where the tribunal has proper jurisdiction to deal with the dispute, but the tribunal ruled upon matters that were not submitted to it. For example, the Cour d’Appel de Paris held that a tribunal exceeded its powers by awarding a party damages by an amount that disproportionately exceeded the damages claimed.1025

While an arbitration panel has the capacity to rule upon a challenge to its own jurisdiction during the course of the proceedings, the Model Law recognizes that the panel’s decision is not necessarily the final word on the subject. Thus, the Model Law states that a panel’s decision on

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1022 Hanessian & Newman, supra note 1018, at 185.
1023 Alan Redfern & Martin Hunter, Redfern and Hunter on International Arbitration 595 (2009).
1024 Id. at 597.
issues related to jurisdiction or adjudicability may be appealed within thirty days of the panel’s
decision to a competent court that sits where the arbitration takes place.\footnote{1026} Of course, the
arbitration statutes of any given state have not adopted the Model Law with exactitude and the
time limits for challenging issues related to the adjudicability of claims vary from country to
country.\footnote{1027}

2. Procedural Irregularity

Arbitral awards can also be successfully challenged if the tribunal does not observe
minimum procedural standards to ensure that the proceedings are conducted properly and fairly.
The minimum procedural standards are meant to ensure that the tribunal is properly constituted;
that the procedures applied conform to the agreement of the parties; that the parties are given
proper notice of the proceedings; and that the parties are treated equally and given an opportunity
to fully and fairly present their case.\footnote{1028}

The sufficiency of the procedural safeguards in any given proceeding is heavily
dependent on the substantive laws of the country where the award is challenged. By way of
example, in the United States, the failure to give the parties an oral hearing is a violation of due
process and constitutes a ground for setting aside an award or holding it as unenforceable under
the New York Convention.\footnote{1029} In the same vein, most civil law systems recognize that a party’s
right to fully and fairly present its case includes the principle that evidence or argument cannot
serve as a basis for any decision unless the party has an opportunity to confront the evidence or
argument.\footnote{1030} Nevertheless, the Federal Tribunal in Switzerland has held that a party does not
have an absolute right to hear a witness orally or to ask any questions when an arbitrator has
excluded the witness from the proceedings.\footnote{1031}

\footnote{1026} UNCITRAL Model Law, art. 16(3).
\footnote{1027} Hanessian & Newman, \textit{supra} note 1018, at 189.
\footnote{1028} Redfern & Hunter, \textit{supra} note 1023, at 601.
\footnote{1029} \textit{Parsons Whittemore Overseas Co. Inc. v. Societe Generale de l’Industrie du Papier (RAKTA)},
508 F.2d 969 (2d. Cir. 1974).
\footnote{1030} Redfern & Hunter, \textit{supra} note 1023, at 601.
\footnote{1031} \textit{Id. See also VII Ybk Comm Arb} 345, at 346 (vacating an award because a party was not given
proper notice of the appointment of the arbitrators when the party was not told the names of all the
members of the arbitral tribunal); \textit{Iran Aircraft Indus. v. Avco Corp.}, 980 F.2d 141 (2d. Cir. 1992)
(holding that a U.S. corporation was denied an opportunity to be heard when the tribunal did not allow
the corporation to present all the invoices but directed it to submit a certified accountant’s report in
their place); \textit{Corporacion Transnacional de Inversiones SA de CV v. STET International SpA and
STET International Netherlands NV} (1999) 45 OR (3d) 183 (Ont SCJ) (holding that the “due process”
guarantee does not apply to a party’s own failures or strategic choices when the party intentionally
boycotts the proceeding and then later complains that it was denied the opportunity to be heard); \textit{OAO
Northern Shipping Co. v. Remolcadores De Marin SL ‘Remnar’} [2007] EWHC 1821 (setting aside an
award where the tribunal decided the case on an issue that was not argued by either of the parties
during the arbitration, and that should have been raised by the tribunal for the parties’ consideration).
3. **Mistakes Of Fact Or Law**

Courts universally take a restrictive view of challenging an arbitral award based on errors of law. In the United States, the Federal Arbitration Act does not provide for any judicial scrutiny of an award on the basis of a mistake of law. Consequently, in *Hall Streets Associates v. Mattel*, 1032 the Supreme Court held that the provisions laid out in the FAA for challenging an arbitration award are exclusive, and that the parties are not free to contractually expand the scope of judicial review. 1033 Although federal courts have historically allowed appeals premised on the fact that a tribunal’s decision was “in manifest disregard of the law,” a federal court in Minnesota applied *Hall Streets Associates* to rule that sections 10 and 11 of the FAA provide the exclusive grounds for challenging and modifying an award. 1034

Consistent with a restrictive approach, courts in England allow appeals by leave of court only when the decision of the tribunal on the question of law is “obviously wrong” or the question is one of “general public importance” and the decision is at least “open to serious doubt.” 1035 Perhaps the most restrictive approach is found in French legislation, which distinguishes between domestic and international arbitrations. France does not allow appeals based on mistakes of law to its courts from an international award. Instead, awards can only be challenged on the basis of adjudicability, procedural irregularities and important questions of public policy. 1036

Almost all states that maintain a developed body of law on arbitration do not allow appeals from arbitral tribunals on issues of fact. In the United States, the Circuits were split for some time on whether parties could contractually expand the scope of judicial review to include factual issues, but the Supreme Court’s holding in *Hall Streets Associates v. Mattel* has probably foreclosed the possibility of expanding judicial review to encompass factual issues. 1037

4. **Public Policy**

An arbitral award can be set aside if the national court that sits in the place of arbitration decides that the award runs afoul of the public policy of its own country. Different states have different concepts of what constitutes as public policy. In Germany, courts hold that an award violates public policy when it is contrary to “fundamental notions of justice” or economic values. 1038 In the same vein, Canadian courts set aside awards that “fundamentally offend the most basic and explicit principles of justice and fairness . . . or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal.” 1039 The New French Code of Civil Procedure has carved out a special exception for international commercial arbitration and allows an award to be

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1033 Id.
1035 *See* English Arbitration Act 1996, §§ 69(2), (3).
1037 *Hall Street*, 552 U.S. at 612.
1038 Id. at 614.
1039 Id.
set aside when recognizing the award would be contrary to “international public policy.” The French approach is presumably more restrictive, and it should intuitively apply only to awards that offend international notions of fair play and justice.

C. New Evidence Discovered After the Conclusion of Arbitration

An application to reopen the case or to reconsider an award can be a means of setting aside an award when a party discovers evidence that was unavailable when the award was rendered. Again, the contours of whether an award can be revoked largely depend on the substantive law of the state where the arbitration takes place unless the parties agree otherwise. In Belgium, an award can be set aside upon the discovery of crucial evidence that was not disclosed by the other party. The Dutch code is even more restrictive and allows a party to reopen the proceedings only upon the discovery of a decisive document. Thus, newly discovered witness testimony, no matter how probative or powerful, does not allow a party to reopen proceedings. Similarly, Swiss courts allow an arbitration proceeding to be reopened when newly discovered facts were previously unknown and could not be diligently presented by the petitioner, and the newly discovered facts would substantially affect the outcome of the proceedings.

D. Settlement Negotiations

Usually, either before or after an award is obtained, a party uses the likelihood of enforcement as a negotiating tool in order to reach a settlement. A 2008 School of International Arbitration Survey found that 40% of the participating companies negotiated a settlement after obtaining an award. Fifty-six percent of the companies settled the case after obtaining an award because they wanted to avoid the time and money involved in enforcing the award in a foreign jurisdiction. This shows that prevailing parties rely on settlement negotiations as a risk management tool. The survey showed that companies were particularly concerned about their ability to enforce awards in Russia, India, China and Turkey which are all perceived to have lax enforcement tools or otherwise saddled with corruption in judicial administration. Further, nearly 20% of the respondents settled the case because of a business relationship with the adverse party.

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1040 Id.
1041 Id.
1043 Id. at 787.
1044 Id. at 798.
1046 Id.
1047 Id.
1048 Id.
A settlement negotiated after an award is rendered often changes the terms of performance required of the non-prevailing party.\textsuperscript{1049} For example, the non-prevailing party might agree to pay in installments or exchange damages for a promise to specifically perform certain obligations.\textsuperscript{1050}

Prevailing parties also employ the threat of enforcement or seizing assets in arbitration friendly countries to gain leverage in settlement negotiations. This tactic is particularly beneficial because the threat of seizing an asset in one jurisdiction may encourage the debtor to pay a substantial part of the award in order to avoid harm to its reputation, credit rating and business relations.\textsuperscript{1051}

Parties to a post-award settlement also often agree on the prevailing party receiving immediate payment with an “enforcement discount.”\textsuperscript{1052} Under such an agreement, the non-prevailing party complies immediately with the award, so long as the prevailing party reduces the amount of money to be paid. An “enforcement discount” allows the prevailing party to quickly collect the award while reducing the cost, effort and uncertainty associated with an enforcement proceeding.\textsuperscript{1053}

\textbf{XV. CHAPTER 15: THE AWARD}

Parties may protect their interests in international commercial arbitration by obtaining an award from the arbitral panel. International arbitration panels may issue various types of awards, and each type may serve to protect a different interest in a different way. As discussed in prior chapters, the arbitration agreement between the parties, the substantive law the parties have agreed to apply to their dispute, and the rules of the relevant arbitral organization determine the scope of the panel’s power, along with the substantive law of the situs of the arbitration. Most organizations’ rules provide that an award is to be rendered according to the decision of a majority of the arbitrators.\textsuperscript{1054} This chapter discusses the types of awards available in international commercial arbitration, requirements for the different types of awards, and issues with respect to awards of which counsel should be aware.

\textsuperscript{1049} Id.
\textsuperscript{1050} Id.
\textsuperscript{1052} Id.
\textsuperscript{1053} Id.
A. Types of Awards

Arbitral panels can issue various types of awards depending on the context of the arbitration and the needs of the parties. Each type of award raises issues of which counsel should be aware in drafting arbitration agreements, conducting arbitration proceedings, and enforcing (or resisting the enforcement of) awards.

1. Provisional or Interim Awards

The ability of the panel to take provisional measures before the disposition of the entire case may be one of the most controversial parts of the arbitration process. In addition to the applicable arbitral rules, the law of the situs of the arbitration and the parties’ arbitration agreement govern the availability of provisional measures. Therefore, the parties should pay attention to the arbitral situs. Since provisional measures are not well established principles of law, the parties are better served by stating in expressis verbis whether they want provisional measures and, if so, which provisional measures they desire. Provisional measures may include: sequestration of property, injunctive relief, [and attachment], as well as security measures, such as payments into an escrow account.

Under UNCITRAL rules, the parties can “agree that the arbitral panel should have the power to order on a provisional basis any relief which it would have power to grant in a final award.” This type of relief may be useful, for example, “where it is necessary to protect or

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1055 See William Wang, International Arbitration: The Need for Uniform Interim Measures of Relief, 28 BROOK. J. INT’L L. 1059, 1074-75 (2002) (“Interim measures are incredibly controversial in international arbitration because of the inherent risks involved in granting such orders. First, there is a risk that the issuance of an interim order will represent factual victory in the main proceeding for the petitioner. Even though the decision is only interlocutory, its consequences can often be irreparable.”). Other reasons for controversy include:

...the risk that the petitioner is being abusive in its use of the request for an interim order. Parties often do not use proceedings for provisional remedies solely to secure later enforcement of an award, but in reality use a petition for an interim order as an offensive weapon. The interim order can be used to exert pressure on the opponent by threatening the seizure of its assets abroad. Moreover, interim proceedings may also be used as dilatory tactics to stay the general progress of the arbitration. Thus, the proper determination of the issue of interim measures of relief is critical to any successful international arbitration.

Id. (citations omitted).


1057 PHILLIP CAPPER, INTERNATIONAL ARBITRATION: A HANDBOOK 112 (3d ed. 2004). See also UNCITRAL Arbitration Rules, art. 32(1) (“In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.”); ICC Rules of Arbitration, art. 28(1) (“Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the Arbitral Tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The Arbitral Tribunal may make the granting of any such measure subject to appropriate
preserve property, to order provisional payments in industries where cash flow is important[,] or to provide security for costs.”\textsuperscript{1058} While courts have recognized that “provisional remedies such as attachment promote the arbitral process by ensuring the enforceability of arbitral awards,”\textsuperscript{1059} there is a split of authority as to whether judicial attachment of a party’s assets is available as a provisional award in international arbitration.\textsuperscript{1060} “In the arbitral context, attachment serves to preserve assets in the jurisdiction where enforcement of the arbitral award will be sought.”\textsuperscript{1061} Courts in the United Kingdom\textsuperscript{1062} and Italy\textsuperscript{1063} have determined that pre-award is permissible under their domestic laws.

Other types of provisional awards include preliminary injunctions and temporary restraining orders. “In contrast to attachment, which preserves assets in money damage claims, the preliminary injunction protects the rights of a party pending resolution of a dispute over non-money damages.”\textsuperscript{1064} Preliminary injunctions provide “compulsory measures directed at one of the parties. For example, the preliminary injunction may be used to direct the preservation of evidence.”\textsuperscript{1065} Temporary restraining orders have “been used to preserve a situation pending the formation of an arbitral panel in order to seek an interim award.”\textsuperscript{1066}

security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.”\textsuperscript{1058}

\textsuperscript{1058} CAPPERS, supra note 1057, at 112

\textsuperscript{1059} Kevin J. Brody, Note, An Argument for Pre-Award Attachment in International Arbitration Under the New York Convention, 18 CORNELL INT’L L.J. 99, 102 (1985) (citing Murray Oil Prod. Co. v. Mitsu & Co., 146 F.2d 381, 384 (2d Cir. 1944) (L. Hand, J.) and comparing Metropolitan World Tanker Corp. v. P.N. Pertambangan Minjakdangas Bumi Nasional, 427 F. Supp. 2 (S.D.N.Y. 1975) (denying attachment because it would have placed the defendant under undue pressure to settle in order to release his attached assets)).

\textsuperscript{1060} See id.; compare Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044 (N.D. Cal. 1977) with McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1038 (3d Cir. 1974). In Carolina Power & Light, the court held that while it could not adjudicate the merits of the dispute, it could maintain jurisdiction limited to ordering attachment prior to arbitration. 451 F. Supp. at 1048-49. In McCreary Tire & Rubber, “[a]lthough the contract provided for arbitration of disputes in Brussles under Italian law, the plaintiff brought suit in Pennsylvania state court and attached [the defendant’s] assets pursuant to state law.” Brody, supra note 1059, at 107 (footnote omitted). The case was removed to federal court. “The Third Circuit held that the [New York] Convention’s provision that courts ‘shall . . . refer the parties to arbitration’ compels courts to send the entire controversy to the arbitral body designated by the parties and to refrain from ordering pre-award attachment.” Id. (citations omitted).


\textsuperscript{1062} The Rena K., [1979] 1 ALL E.R., Q.B. 397, 417.

\textsuperscript{1063} SEV Scherk Enter. A.G., Corte cass., Italy, Foro It. I.

\textsuperscript{1064} Reichert, supra note 1061, at 373.

\textsuperscript{1065} Id.

\textsuperscript{1066} Id. (citing Sperry International Trade, Inc. v. Government of Israel, 532 F. Supp. 901, 903 (S.D.N.Y. 1982), aff’d, 689 F.2d 301 (2d Cir. 1982)).
Provisional awards, unlike final awards, are reversible and do not dispose of the matter before the panel.\textsuperscript{1067} “Since the parties are not compelled to respect an interim protection order imposed by the arbitrators, any order may be meaningless without coercive judicial assistance.”\textsuperscript{1068} As with other potential difficulties, one way to deal with this problem is by determining in the arbitration agreement how such disputes will be handled. “The parties might specify that they recognize the authority of courts to order provisional remedies in support of arbitration, notwithstanding the arbitration agreement.”\textsuperscript{1069}

Interim awards are not awards in the traditional sense, but are final decisions on procedural matters that are necessary to the disposition of substantive issues.\textsuperscript{1070} These awards may resolve jurisdictional challenges, define the scope of matters to be decided, or determine which substantive law applies.\textsuperscript{1071} The availability \textit{vel non} of interim measures presents particular difficulties for parties to international arbitrations:

First, a common difficulty in arbitration occurs when resolution of the dispute involves a third party. Issues often arise when interim measures are needed in the form of orders that have an effect on those who are not party to the agreement to arbitrate. Moreover, when a third party witness’ testimony is needed, there are few legal or practical means for the arbitrators to compel such testimony. Secondly, when interim measures of protection are needed against one of the parties to the arbitration, issues arise as to the availability of such remedies when they are sought at early stages in an arbitral proceeding.\textsuperscript{1072}

In some instances, including when interim relief is needed before the parties select an arbitral panel, parties may apply to judicial authorities for interim relief.\textsuperscript{1073} But “there is

\textsuperscript{1067} Reichert, \textit{supra} note 1061, at 373.
\textsuperscript{1068} Id. at 395.
\textsuperscript{1069} Id.
\textsuperscript{1070} Id.
\textsuperscript{1071} See id. at 112. See also UNCITRAL Arbitration Rules, art. 32(1).
\textsuperscript{1072} Wang, \textit{supra} note 1055, at 1079. The latter difficulty arises because the arbitral panel, unlike a permanent judicial court, has no authority until it is constituted:

Parties to arbitration also face difficulties when one party seeks interim relief at an early stage of the proceeding. In arbitration, it is typically difficult to obtain such relief expeditiously, because the arbitral tribunal has not yet been constituted. As a result, a party in need of provisional relief can obtain it only in the regular courts. If a party seeks to delay the opposing party’s request for an injunction or attachment, that party can slow the process considerably by taking a long time to select an arbitrator. There are times when parties need immediate recourse, \textit{i.e.}, to enjoin an immediate action, and the arbitration procedure simply does not accommodate this need. Thus, most parties in need of this immediate assistance seek the aid of national courts for this emergency relief.

\textit{Id.}

\textsuperscript{1073} See ICC Rules of Arbitration, art. 28(2):
continued and justified judicial reluctance to grant interim relief in the context of arbitration. 1074

This is particularly true when relief is sought against non-parties to the arbitration. For example, in Lance Paul Larsen v. Kingdom of Hawaii, the respondent requested interim measures against the United States. 1075 “The tribunal explicitly stated that it lacked jurisdiction to award interim measures against non-parties.” 1076

Counsel can prevent problems with interim awards, particularly when it is apparent that non-parties will be essential to the proceedings, by stipulating in the initial agreement the types of interim measures that will be available:

Parties may tailor freely the language of their agreement to broaden, narrow, or even specify the types of interim relief available from the arbitrator. Interim protective measures often may be included in contracts. Parties should address as

Before the file is transmitted to the Arbitral Tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an Arbitral Tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the Arbitral Tribunal. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the Arbitral Tribunal thereof.

Id. See also AAA-ICDR Rules art. 21(1) (“At the request of any party, the tribunal may take whatever interim measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.”). Cf. UNCITRAL Rules art. 17 J (“A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of [state having ratified the treaty] as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.”)

But see Reichert, supra note 1061, at 394:

There are problems with relying on an arbitral tribunal for interim protection. One problem involves the delay that occurs in establishing the tribunal itself. Another difficulty is the limited number of jurisdictions where the arbitration could result in compulsory attachment enforceable against third parties, such as a bank. The principal difficulty with such orders is that they are not mandatory. As with an arbitral award, compliance by the parties is voluntary. One solution to this difficulty is for the tribunal to issue the protective order in the form of an interim award, as provided in UNCITRAL Rule 26(2). An interim award is enforceable in the United States under the Arbitration Act.

Id. (citing Sperry, 689 F.2d 301).

1074 Michael F. Hoellering, Interim Relief in Aid of International Commercial Arbitration, 1984 Wis. INT’L L.J. 1, 5 (1984). “Reluctance may exist because grants of relief may ultimately influence the arbitrators’ decision on the merits, cause unnecessary expense, delay the arbitration process, and in the case of international arbitration, subject a foreign party to laws and procedures with which it is unfamiliar.” Id.


1076 Hoellering, supra note 1074, at 1080.
many aspects of arbitration as possible in their contract clause, because international cases frequently involve large amounts of money and complex issues.\footnote{1077}

Sperry International Trade, Inc. v. Government of Israel presents a good example of the effect of such forward thinking.\footnote{1078} There, the Government of Israel (the “GOI”) challenged the arbitrators’ authority to render a partial final award which would have enjoined Israel from drawing down on a letter of credit. The court confirmed the award, partly because of a contract provision” that addressed the subject matter.\footnote{1079}

Both the UNCITRAL and the ICC rules discuss whether and when an arbitral panel may award interim measures of protection. The relevant provisions are set forth in the table below.

| UNCITRAL Rules Art. 26 | 1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter of the dispute, including measures for the conservations of the goods forming the subject matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.  
2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.  
3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement. |

\textsuperscript{1077} Id. at 3-4.  
\textsuperscript{1078} 532 F. Supp. 901 (S.D.N.Y. 1982), aff’d, 689 F.2d 301 (2d Cir. 1982).  
\textsuperscript{1079} Hollering, supra note 1074, at 3-4. The provision read as follows:

Buyer hereby waives any and all rights to claim sovereign immunity in any court of competent jurisdiction within the United States with respect to any suit in equity, action at law, or arbitration proceeding instituted by Seller. Buyer further waives any right to sovereign immunity with respect to any attachment, levy or execution resulting from a decree or judgment of any of the aforementioned courts on its commercial or quasi-governmental property or any funds, liquidated or unliquidated, or securities, negotiable or non-negotiable, deposited in or handled by any banking institution or other entity within the United States.

532 F. Supp. at 909.
| ICC Rules Art. 28(2) | Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal. |

2. **Partial Awards**

When the arbitration proceedings are conducted in stages, the tribunal may grant a party final relief as to part of the matters to be decided. A partial award does not exhaust the panel’s duties, nor the parties’ potential liabilities, since the panel must render a decision on all matters covered by the arbitration agreement.

Partial awards may bring unintended consequences. For example:

If the award is deemed to be final in nature, it might be subject to immediate confirmation or vacatur proceedings. . . . Moreover, and regardless of whether either party clearly realizes the implications of the finality of such an award, the issuance of an interim or partial award might actually commence the running of the time limits . . . within which a party may seek confirmation or vacatur of the award. Similarly, and due to the application of *functus officio* principles, by issuing an interim or partial award the tribunal not only might be rendering itself powerless to alter its determination on the merits of the issues covered by the award but also might trigger the deadlines within which the parties may request the tribunal to correct clerical or similar errors in the issued interim or partial award.

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1080 See Capper, supra note 1057, at 112.
1081 James M. Gaitis, *The Federal Arbitration Act: Risks and Incongruities Relating to the Issuance of Interim and Partial Awards in Domestic and International Arbitrations*, 16 AM. REV. INT’L ARB. 1, 5-6 (2005) (footnotes omitted). Gaitis’s article discusses problems raised by the Federal Arbitration Act, which, among other things, provides time limits within which certain challenges to arbitral awards must be brought. Because the Act is not entirely clear with respect to what constitutes a partial award for finality purposes, and because different states and federal judicial circuits interpret the Act’s provisions differently, parties should carefully navigate the potential procedural minefield.
Accordingly, counsel must “exercise caution in electing to utilize otherwise effective procedural innovations, such as the early determination of certain threshold issues, bifurcated proceedings, and separate hearings on issues relating to costs and fees.” 1082

Failure to consider these issues can result in the waiver of the right to challenge an arbitral award. For example, in Banco de Seguros del Estado v. Mutual Marine Offices, Inc., 1083 a party was ordered to post security prior to the arbitral hearing. The court held that this order disposed of “a claim ‘separate’ and ‘independent’ from the other claims submitted in the arbitration,” and thus was reviewable as a final order. 1084 Cases like this serve as a reminder that “when an arbitral tribunal enters an interim or partial award in a nondomestic arbitration, U.S. courts will entertain applications to confirm or vacate those awards when the court perceives that the award is sufficiently final.” 1085 Since there is no universal standard to determine when a partial or interim award is sufficiently final, parties “to international arbitrations conducted in the United States therefore must be cautious in agreeing to the bifurcation of proceedings or the issuance of such awards and must anticipate that the issuance of such awards might precipitate immediate district court proceedings and related appeals.” 1086

3. Final Awards

Final awards dispose of all matters (or all remaining matters, if the panel has granted partial awards) in the arbitration. These awards may be subject to further review, according to the rules agreed upon by the parties and to the applicable substantive law. 1087

a. Consent awards

As with litigation, parties to an arbitration may settle their dispute before the arbitration ends. If the dispute is settled prior to a final award by the panel, the parties may agree to a consent award on terms consistent with their settlement agreement. Depending on the terms of the agreement, this award may dispose of some or all of the matters remaining in the arbitration. The consent award can then be enforced to the same extent as a final award. 1088

b. Default Awards

If one of the parties fails to participate in the proceedings, the panel may award a default judgment. “In the absence of the respondent, the arbitral tribunal must examine the merits of the arguments of law and fact put to it by the participating party, so as to satisfy itself that these are

1082 Id.
1084 Id. at 370 (citing Metallgesellschaft A.G. v. M/V Capitan Constante, 790 F.2d 280, 283 (2d Cir. 1986) (“[A]n award which finally and definitely disposes of a separate independent claim may be confirmed although it does not dispose of all the claims that were submitted to arbitration.”)).
1085 Gaitis, supra note 1081, at 58.
1086 Id. at 59.
1087 See id. at 113.
1088 See Capper, supra note 1057, at 113. See also ICC Rules of Arbitration, art. 32.
Though the panel does not act as the defaulting party’s counsel, it does have a duty to assess the facts and evidence brought by the appearing party. It must assure itself that the facts and evidence are sufficient to justify an award in the appearing party’s favor. So long as the defaulting party was given full opportunity to participate in the proceedings, a default award is valid and may be enforced to the same extent as a regular final award. For arbitrations conducted under ICC Rules, if the claimant has notified the ICC Secretariat, arbitral proceedings have commenced and the responding party must participate or risk defaulting. The Secretariat will notify both the claimant and the respondent of the receipt of the request and the date of the receipt. The rules of the various arbitral organizations differ with respect to what constitutes “default.” Counsel for parties to international arbitrations must, therefore, consult the rules that govern their particular arbitration agreements.

### B. Requirements for a Proper Award

#### 1. Content of the Award

Certain considerations pertain to all awards, regardless of their substance:

The award should recite the facts, the claims and defenses, the applicable arbitration law and rules, the applicable governing law, as well as a brief account of the major phases of the arbitral proceedings from commencement of the arbitration and naming of arbitrators through the hearings and their close . . . More technical, but no less important, is the recitation of the date and place of award – the former implicating the timeliness of the award and the latter indicating the court competent to entertain challenges to the award and, more generally, the “nationality” of the award, which may be important for various purposes (such as whether the award is an award of a Contracting State within the meaning of the New York Convention). All arbitrators should sign the award.

Beyond these requirements, enforceable awards typically meet the following criteria: the panel has jurisdiction to render the award; the award complies with the arbitration agreement; the award complies with applicable time limits and substantive law; the award has received the approval of the arbitral organization if necessary; and the award has been communicated to the parties. Those criteria are discussed below.

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1090 Id.
1091 Id.
1092 See CAPPER, supra note 1057, at 113.
1094 See Tunik, supra note 1089 (discussing default generally, and the ICC provisions specifically).
2. Jurisdiction

The most obvious requirement for an effective award is that the arbitral panel must have jurisdiction over the dispute. In addition to any state jurisdiction requirements, this means that there must be an effective arbitration clause in the contract giving rise to the dispute. Alternatively, the parties may have entered into a separate arbitration agreement. In either case, the clause or agreement will specify the arbitral organization (i.e., the ICC, AAA, or a similar organization) the parties want to arbitrate the dispute.

3. Compliance with Arbitral Agreement

An award rendered by the arbitral panel must deal only with those matters the parties have agreed to refer to arbitration. If the arbitral agreement includes a time limit within which awards must be rendered, a valid award must comply with that limit. “If the panel fails to make the award within a prescribed time limit, its authority is terminated and it cannot make a valid award.”

4. Completeness

The parties have contracted for a resolution to their dispute. Therefore, at the close of the arbitration, the arbitral panel should not leave unresolved any of the issues submitted to it. In order for an award to be “final and definite,” it must “resolve all the issues submitted to

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1096 See supra Chapter 9.
1097 See UNCITRAL Arbitration Rules, art. 21(1); see also supra Chapters 3 & 4.
1098 Id. See also Hanessian & Newman, supra note 1095, at 175 (“The applicable arbitration law and arbitration rules are obviously to be closely consulted to ensure the award’s adequacy in all these respects.”).
1099 See Capper, supra note 1057, at 118 (“For example, if a submission to arbitration is expressly limited to the issue of whether or not a buyer was entitled to reject allegedly defective goods, the award should not include an award of damages. If it did, it would take the award beyond the scope of the submission to arbitration.”). Indeed, as the arbitral panel only has power over the parties’ affairs to the extent granted by the parties themselves, an award that goes beyond the matters referred to arbitration would be ultra vires.
1100 Id. at 118.
1101 See id. at 118. But cf. Hanessian & Newman, supra note 1095, at 173 (“From an arbitrator’s perspective, partial awards are particularly useful when they permit the tribunal (and thereby the parties, too) to postpone holding hearings or taking evidence on issues that may be rendered moot if other issues in the case are decided in a particular way.”). The danger in the case of a bifurcated or partial award is that [a] partial award, if final, is presumably subject to a set aside action upon issuance. (Indeed, the limitations period for such an attack will in principle start running). The award also is presumably a candidate for recognition and enforcement, both where rendered and elsewhere. This can lead to a proliferation of judicial proceedings and further fragmentation of the case.

Id.
arbitration, and determine each issue fully so that no further litigation is necessary to finalize the obligations of the parties under the award.**1102

5. Time limits

Under ICC rules, an award generally must be rendered and delivered to the parties within six months of the signing of the Terms of Reference for the arbitration.1103 The rules of most organizations, however, provide that the panel may order extensions as necessary. Timing is important because limitations periods for appealing an award commence from the delivery of the award to the parties. Additionally, the parties may set a time limit for the rendering of their award in the arbitration agreement.

6. Substantive Law

For all practical purposes, the laws relevant to an arbitral award are those of the situs of the arbitration, the law chosen to govern the dispute, and the law of the place of enforcement. The arbitral award must comply with each body of law. For the prevailing party, the most important of these is the law of the place of enforcement. “The law which is applicable to the recognition or enforcement of an award is that of the state in which enforcement is sought (e.g. where the debtor’s assets are located).”1104 Differences among these laws can affect, among other issues, collection of a monetary award and interest on that award.

7. Approval of Arbitral Organization (if necessary)

Some arbitral organizations, including most notably the International Chamber of Commerce, require a superior court within the organization to review any draft award issued by a panel before the award is rendered.1105 Though the court’s scope of review is largely confined to

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1103 ICC Rules of Arbitration, art. 30(1) (“The time limit within which the Arbitral Tribunal must render its final Award is six months. Such time limit shall start to run from the date of the last signature by the Arbitral Tribunal or by the parties of the Terms of Reference or, in the case of application of Article 18(3), the date of the notification to the Arbitral Tribunal by the Secretariat of the approval of the Terms of Reference by the Court.”). The Terms of Reference is a document defining, inter alia, the scope of arbitration and procedures by which the arbitration will be conducted. See ICC Rules of Arbitration, art. 23. See also Hanessian & Newman, supra note 1095, at 166.
1104 CAPPER, supra note 1057, at 17. See also New York Convention, art. III (“Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”) (emphasis added).
1105 See ICC Rules of Arbitration, art. 33 (“Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal’s liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form.”).
the form of the award, the court may also “draw [the panel’s] attention to points of substance.”\textsuperscript{1106} The tribunal may not render the award until it has received the court’s approval.\textsuperscript{1107}

8. Communication

The award must be communicated to the parties. “Communication is usually regarded as taking place when the [parties receive copies] of the award, not when [they are] notified that it is available for collection.”\textsuperscript{1108} Limitations periods for appeals begin on the date of communication.\textsuperscript{1109}

C. Available Remedies

Remedies available in arbitration proceedings largely mirror those available in traditional litigation. The parties may agree to limit any award according to their respective needs.\textsuperscript{1110} This is done either in the arbitration agreement, or in a separate agreement entered into during the arbitration and approved by the panel.\textsuperscript{1111} The types of relief are described briefly below.

1. Declaratory Relief

Parties generally may use arbitration in order to clarify or define their respective legal rights or obligations. “An arbitral tribunal may include a declaration as to the parties’ rights and obligations or the meaning of a contract or part of one in its award. A declaratory award is capable of recognition in proceedings commenced in the same state as the arbitration, or elsewhere.”\textsuperscript{1112} For example, the new Austrian arbitration law allows parties to obtain declaratory relief stating that they have obtained a previous arbitral award.\textsuperscript{1113} “This covers situations in which it is doubtful whether an arbitral award has been rendered or whether there is an arbitral award at all.”\textsuperscript{1114}

2. Injunctive Relief

An arbitral tribunal generally may award injunctive relief, but this power can “be illusory because any injunction can (in most states) only be enforced with assistance of the state courts

\[\textsuperscript{1106} \textit{Id.}\]
\[\textsuperscript{1107} \textit{Id.}\]
\[\textsuperscript{1108} \text{Capper, supra note 1057, at 119.}\]
\[\textsuperscript{1109} \textit{Id.}\]
\[\textsuperscript{1110} \textit{Id. at 114.}\]
\[\textsuperscript{1111} \textit{Id.}\]
\[\textsuperscript{1112} \textit{Id. at 114. See also, e.g., Electra Air Cond. BV v. Seeley Int’l Pty Ltd., [2008] F.C.A.F.C. 169 (Fed. Ct. Aust.), available at 2008 WL 4516345 (2008) (“It may be assumed that an arbitrator can make an award which contains injunctive or declaratory relief provided that the arbitration agreement signed by the parties gives the arbitrator that power . . . .”) (citations omitted).}\]
\[\textsuperscript{1113} \text{Erhard Bohm, \textit{Outlook on a New Austrian Arbitration Law}, INT. A.L.R. 2003, 6(4), 105-109 (“Any applicant who can show a “legal interest” may apply to the court for a declaration regarding the existence or non-existence of an arbitral award.”).}\]
\[\textsuperscript{1114} \textit{Id.}\]
which can take time even in urgent cases.” Thus, it may be preferable to apply directly to a court for injunctive relief:

The courts of most states will accept jurisdiction in respect of such applications. The UNCITRAL Arbitration Rules and the rules of most arbitration institutions permit such applications to state courts, before or during the arbitration, by providing that they are not to be deemed incompatible with the agreement to arbitrate, and are not a waiver of that agreement.1116

Bypassing the panel by applying directly to a court for injunctive relief, then, may save both time and attorneys’ fees.

3. Compensatory Damages

Compensatory damages are the most common type of award in international arbitration. Money awards can include compensatory and punitive damages as well as incidental payments such as an award directing the losing party to pay a disputed debt. Some arbitral agreements have limited the ability of the panel to issue awards other than compensatory damages in breach of contract cases.1119

4. Punitive Damages

Punitive damages are damages awarded above and beyond actual or compensatory damages; they are used to “mark conduct of which the tribunal wishes to mark its disapproval.” Insofar as the aim of punitive damages is to “publicise the award of punitive damages so as to deter others,” their propriety in the arbitration context is debatable. This is because “the Award in arbitration is a private document that is not published.”

Notwithstanding the conceptual difficulties associated with awarding exemplary damages in a nonpublic award, punitive damages may be available in international arbitration. In the judicial context, the purpose of punitive or compensatory damages is to punish or deter “particularly aggravated misconduct on the part of the defendant.” While “[m]any jurisdictions simply do not recognise the jurisdiction to award exemplary damages,” “[t]he

1115 CAPPER, supra note 1057, at 115.
1116 Id. See also Electra Air Cond., 2008 WL 4516345, at *1.
1117 See, e.g., O’Loan v. Risinger, (2009) 183 L.A.C. 4th 306 (Ont. Superior Court of Justice), aff’d (2009) 188 L.A.C. 4th 385, available on Westlaw at 2009 CarswellOnt 2964 (“While there is debate about whether arbitrators have jurisdiction to award punitive damages, there seems little dispute [that] arbitrators can award compensatory damages.”).
1118 See CAPPER, supra note 1057, at 114.
1120 PETER ASHFORD, HANDBOOK ON INTERNATIONAL COMMERCIAL ARBITRATION 204 (2009).
1121 Id.
1122 Id.
1124 ASHFORD, supra note 1120, at 204.
most widespread use of punitive damages is in the United States.” Canada is another country that allows the award of punitive damages in international commercial arbitrations. Civil law legal systems generally limit recovery of damages in private actions to an amount that restores a party to its pre-injury condition” and so do not allow the award of punitive damages. Countries that do not allow punitive damages include France, Germany, Switzerland, Japan, Korea, and Taiwan.

In the United States, it appears that unless the arbitration agreement specifically denies to the Panel the power to award punitive damages, that power is available to it. Accordingly, an “arbitrator sitting in the United States would have the authority to award such relief, even if the governing law prohibits awards of punitive damages.”

Practitioners should be aware that some countries prohibit punitive damage awards, even if they are permitted by the law governing the arbitration. For example, when a distribution agreement between a French wine merchant and an American buyer was breached, punitive damages were unavailable even though the arbitration agreement contained a New York choice-of-law clause. “The arbitrator found that the seller had improperly terminated the agreement, and issued an award of lost profits in favor of the buyer.” The buyer’s claim for punitive damages, however, was denied: “Damages that go beyond compensatory damages to constitute a punishment of the wrongdoer . . . are considered contrary to Swiss public policy, which must be

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1125 Id.
1126 Id. (citing Royal Bank of Canada v. Got, 178 DLR (4th) 385 (2000)).
1128 ASHFORD, supra note 1120, at 204.
1129 See Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995). In Mastrobuono, the Supreme Court held that an arbitration agreement with a choice-of-law clause requiring the application of New York law did not preclude an award of punitive damages, even though under New York law, the “power to award punitive damages is limited to judicial tribunals and may not be exercised by arbitrators.” Id. at 55 (citing Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354 (1976)). This is because the Federal Arbitration Act, which Congress passed “to overcome courts’ refusals to enforce agreements to arbitrate,” Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995), “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.” Southland Corp. v. Keating, 465 U.S. 1, 10 (1984). “[I]f contracting parties agree to include claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration.” Mastrobuono, 514 U.S. at 58. And, “if the parties leave it unclear, the right to make [a punitive] award will be assumed.” ASHFORD, supra note 1120, at 205.
1130 Gotanda, supra note 1127, at 65.
1131 ASHFORD, supra note 1120, at 204 (“Several civil law countries also prohibit arbitrators from awarding punitive damages even if the substantive law is that of a different country.”). Sweden, Germany, and Switzerland are countries that do not allow arbitrators to award punitive damages or fines. Id.
respected by an arbitral tribunal sitting in Switzerland even if the arbitral tribunal must decide a
dispute according to a law that may allow punitive or exemplary damages as such.”

This may prove to be an effective issue on appeal for parties against whom punitive
damages have been awarded. As with other forms of the damage calculus, liability for punitive
damages factors into settlement negotiations. Whether a party faces punitive damages, therefore,
must be determined at the outset of the arbitration. Accordingly, counsel should determine which
law will be applied and where the award will be enforced, as these determinations will impact
the availability of punitive damages.

5. Costs and Interest

a. Costs

Although the parties may contract with respect to payment of costs, some arbitral
organizations require the parties to follow their rules regarding costs. The ICC, for example,
requires that “[t]he final Award shall fix the costs of the arbitration and decide which of the
parties shall bear them or in what proportion they shall be borne by the parties.”
The result is similar for arbitrations conducted under UNCITRAL auspices. The UNCITRAL
Rules “provide that the tribunal may fix and apportion between the parties the costs of arbitration
in the final award.” An award for costs may comprise “the fees and expenses of the
arbitrators; any administrative expenses of the applicable arbitration institution; fees and
expenses of experts; and reasonable legal costs incurred by the parties.” Different countries
and arbitral organizations may require costs to be allocated in a certain manner. Ireland, for
example, has legislated that “an agreement of the parties to arbitrate subject to the rules of an
arbitral institution shall be deemed to be an agreement to abide by the rules of that institution as
to how costs are to be allocated and as to the costs that are recoverable.”

Though U.S. courts do not generally follow England’s “loser pays” system of taxing
costs against the losing party, some U.S. courts will uphold arbitral agreements and foreign
judicial decisions apportioning costs in that manner. In In re Hashim, for example, the Ninth
Circuit held that a British court’s unliquidated award of costs and attorneys’ fees must be
afforded comity and enforced.

1134 Case No. 5946, XVI Y.B. Com. Arb. 97.
1136 Hanessian & Newman, supra note 1095, at 168.
1137 Id.
202-205.
1139 213 F.3d 1169, 1172 (9th Cir. 2000).
b. Interest

“International arbitration tribunals generally award simple interest in commercial disputes.”1140 However, it is important to consult both the substantive law of the place of arbitration, as well as the substantive law of the place of enforcement, as these bodies may cabin the ability of the arbitrator to award certain types or amounts of interest.1141

One caveat of which counsel should be aware is the availability vel non of interest in Middle Eastern countries applying Shari’a law. In particular, these issues may arise in Saudi Arabia, which, pursuant to Shari’a law, prohibits usury:

Saudi Arabia has not adopted regulations governing interest in commercial matters. As a consequence, and unlike other Middle Eastern countries that have distinguished between commercial and other civil cases, Saudi Arabia has a prohibition on usury in accordance with the general principles of Shari’a law. Any award that might need to be enforced in Saudi Arabia needs to take this into account as an award that includes interest could be annulled.1142

Arbitration clauses and awards that will apply Shari’a law or be enforced in countries that follow (or use) Shari’a law must be “valid.” There are several factors that determine whether a clause is valid or invalid:

Arbitration clauses generally found to be invalid are treated as one of two types. “In the first category, only the clauses in question themselves are void, but the contracts remain valid.” “These are clauses which, in fact, have no interest for the parties and their performance cannot be requested.” In the second category, not only will the clauses be invalid, but the whole contract in which the agreement to arbitrate is embedded will also be found to be invalid. The latter category of invalid clauses are those which contain riba (interest), clauses creating a double contract hiding interest, and clauses resulting in gharar (risk). One example of gharar would be a clause that includes a waiver of the right to produce evidence through witnesses.1143

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1140 Id. at 169. But see id. at 170 (“The LCIA Arbitration Rules by comparison do provide that a tribunal may award compound interest limited to the period up to the date of the award.”).
1141 For a complete discussion of the considerations surrounding awards of interest in international arbitrations, see id. at 169-170.
1142 ASHFORD, supra note 1120, at 211. Other Middle Eastern countries, however, have dealt legislatively with the problem of interest. For example, “Iran prohibits interest but has an exception in the case of transactions between Iranian nationals and foreigners whose laws permit the payment of interest. Egypt and Iraq have moved away from strict Shari’a and permit interest.” Id.
D. Finality of the Award

1. Challenging an Award

Counsel must distinguish between challenging the validity of an award and resisting its enforcement. A validity “challenge is normally made either to the arbitral tribunal or to the courts of the place where the arbitration took place.”[1144] In contrast, “[e]nforcement of an award [under the New York Convention] . . . usually takes place in courts other than [those in] the place where the arbitration took place.”[1145] In a powerful reminder of the import of this distinction, the United States District Court for the District of Columbia recently affirmed an award that had purportedly been set aside, because the court that set the award aside had no jurisdiction to do so under the New York Convention.[1146]

Arbitral tribunals have no independent power to enforce their awards; the prevailing party must sue to enforce its award if the other party does not comply with it voluntarily. When the prevailing party sues to enforce the award, the other party may, under certain circumstances, ask that the award be set aside. Under the UNCITRAL Rules, an arbitral award may be set aside by a court only if 1) one of the parties was incapacitated or the agreement is invalid under the law selected by the parties to govern the agreement or of the forum state; 2) there was a lack of notice; 3) the award decides matters not submitted by the parties for arbitration;[1147] 4) the arbitral panel itself was not composed according to the agreement or was illegal; or if the court finds that a) under the state’s laws an arbitral panel does not have subject matter jurisdiction over the dispute; or b) the award conflicts with the state’s public policy.[1148] The form of the award (including whether it is reasoned or unreasoned) also can provide grounds for a challenge.[1149]

The panel may, however, correct minor, nonsubstantive errors in its award.[1150] For example, errors in the award that are “clerical, computational[,] or typographical” are often handled by the panel.[1151]

The New York Convention “does not allow awards to be set aside on the basis of mistake of law or facts.”[1152] The Convention “reflects an international consensus in favour of enforcing

\[\text{References:}\]

[1145] Id.
[1146] See infra text accompanying note 1174.
[1148] UNCITRAL Arbitration Rules, art. 34(2). See also 9 U.S.C. § 207 (2009) (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”) (codifying the Convention’s limited grounds for challenging an award).
[1152] See id. at 186.
arbitration awards and limiting the scope for challenges.” When parties agree to submit to arbitration to resolve their disputes,

they effectively give up whatever rights they may have to challenge an award in the courts (to whatever extent such rights can be excluded). This amounts to a contractual waiver of rights which operates regardless of the decision of the arbitrators and, largely speaking, regardless of the quality of the award.

Parties should consider this waiver carefully before inserting an arbitration clause into a contract.

a. **Lack of Jurisdiction**

An arbitral panel’s jurisdiction over any given dispute is limited by the parties’ arbitration agreement. Accordingly, “anything that goes to the validity of that agreement . . . or to the scope of the subject matter referred to the arbitrators or to the implementation of the agreed arbitral process, potentially gives grounds to challenge the award on jurisdictional grounds.” Counsel should note, however, that the purported invalidity of the contract of which the arbitration clause is a part does not necessarily “deprive[] the arbitrators appointed under the clause of their authority to determine any dispute arising in a legally enforceable way.” This concept is called “separability”; i.e., parties may not prevent arbitration by claiming that the main contract is invalid.

The panel has competence to rule on its own jurisdiction. A panel’s finding that it has jurisdiction over a dispute “is subject to review by the relevant court, normally either the court of the place of arbitration or the court hearing an application to enforce the award,” i.e., a national court. Most arbitration rules contain a limitations period for bringing a jurisdictional challenge. It is important to note that appearing, even for the limited purpose of challenging a panel’s authority, may be construed as a waiver of the issue of arbitral jurisdiction, though a

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1153 Id.
1154 Id. *But see* id. (Under English law . . . the right to apply to the court in the event of a serious irregularity cannot be contracted out of.”) (citing English Arbitration Act § 68).
1155 Hanessian & Newman, *supra* note 1095, at 188.
1156 Id.
1157 Id. at 190. *See also* id. (“The practical effect of separability . . . is that it operates to prevent a party desiring to derail the arbitration by questioning in court the existence or validity of the arbitration agreement.”).
1159 *See, e.g.,* UNCITRAL Arbitration Rules, art. 16 (“The tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.”). This is known as the doctrine of Kompetenz-Kompetenz.
1161 Id. *See, e.g.,* UNCITRAL Arbitration Rules, art. 21(3)(“A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of [defense] or, with respect to a counter-claim, in the reply to the counter-claim.”).
recent United States Supreme Court decision counsels arbitral panels to allow such challenges to be taken “under protest” and without waiver.1162

b. **Procedural Due Process**

Challenges on the basis of procedural due process (or, rather, lack thereof) are fairly straightforward. For example, parties can seek relief if an arbitrator displayed bias or if they were not afforded notice of the proceedings and an opportunity to be heard. In the first instance, parties should petition the arbitral organization itself for relief. Under the ICC Rules, a challenge to the independence of an arbitrator generally must be sent to the Secretariat “within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based . . . .”1163 If the organization does not provide relief, the resulting award can be challenged under UNCITRAL and other rules.1164

Parties challenging the partiality of an arbitrator must show that a “reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration.”1165 “A finding of partiality or bias is generally confined to situations where an arbitrator has had a relationship or dealings with a party in the proceeding.”1166 “A party may show bias by inferences from objective facts inconsistent with partiality.”1167 “The alleged bias must be direct and definite; mere speculation is not enough.”1168 “Bias is not established by showing that an arbitrator consistently agrees with the arguments of one side and repeatedly finds in their favor.”1169

c. **Reasoned / Unreasoned Awards**

The parties may have a choice whether they want the award issued by the panel to state reasons for the award.1170 While an unreasoned award may protect confidentiality, unreasoned

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1162 See Rau, supra note 1158, at 97 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)).
1164 See UNCITRAL Arbitration Rules, art. 34(2)(a)(ii).
1167 Id. at *14 (internal quotation omitted).
1168 Id. (internal quotation omitted).
1169 Id. (internal quotation omitted). For an analysis of the strategy behind the decision whether to challenge an arbitrator on grounds of bias, see Yulia Andreeva, *How Challenging is the Challenge, or Can U.S. Courts Remove Arbitrators Before an Arbitration Has Come to an End?*, 19 AM. REV. INT’L ARB. 127, 127 (2009)(“If you shoot at the king, you’d better not miss.”).
1170 See Hanessian & Newman, supra note 1095, at 175:

Under some rules (particularly in certain domestic systems of arbitration), an arbitral award is to remain unreasoned, unless the parties have decided otherwise. Much more commonly, a reasoned award is either required or deemed to be required by the applicable arbitration law and/or rules (unless, once again, the parties have expressly
awards are vulnerable to reversal: “If called into question, an award that does not reflect an arbitration panel’s rationale and intent opens the door for a reviewing court to formulate its own, perhaps erroneous, assumptions and conclusions as to the motives of the arbitration panel and the basis of the award.” Accordingly, counsel for parties to an arbitration, especially counsel to the prevailing party, should weigh whether to request a reasoned award. Factors for this determination include the party’s desire for privacy and the likelihood that the other party will challenge enforcement of the award.

d. Consequences of a Successful Challenge to the Award

“If a challenge is successful[,] the court making the decision may refer the award back to the tribunal for re-consideration or it may vary the award or set the award aside in whole or in part.” Two important considerations are implicated by a successful challenge. First, “it is conceivable that a tribunal taking a second look could arrive at the same decision by different reasoning or even produce an even more unsatisfactory result.” Thus, a party must determine whether the level of its dissatisfaction with an award merits the risk that a different tribunal might render an even more unfavorable award.

Second, “a decision to vary or set aside an award made by a court in the place of arbitration does not necessarily operate to delay enforcement proceedings brought in the court of some other country.” For example, if in International Trading and Industry Investment Co.

agreed otherwise). While it would be unusual (though not unheard of) for an award to be set aside as unreasoned, at least where the tribunal purported to state its reasons, arbitrators should bear in mind that inadequate reasoning may impair the award’s subsequent recognition or enforcement. A good example is where an award, while apparently reasoned, contains contradictions or logical gaps.


Id. at 192.

Id.

the prevailing party had sought enforcement of the award in the proper jurisdiction before the
losing party challenged the award in an improper jurisdiction, the award could have been
enforced notwithstanding the pendency of the challenge.1175

2. Resisting Enforcement of an Award

Enforcement of an international arbitral award is like enforcement of a civil judgment:
“[t]he award will be enforced either in the home jurisdiction of the party against which
enforcement is sought, or in some other jurisdiction in which that party has assets.”1176 The
mechanisms by which an award is enforced are addressed in chapter 16. A few considerations,
however, merit brief mention here.

A successful challenge to the enforcement of an arbitral award is jurisdiction-specific. It
may still be possible to enforce the award elsewhere,1177 because the “decision of the court
refusing the application for recognition and/or enforcement is not binding on the courts of any
other jurisdiction in which such an application may be made.”1178 In a striking example, the
United States District Court for the District of Columbia recently affirmed a French award that
had purportedly been set aside by the Qatari Court of Cassation.1179 The court ruled in
International Trading and Industry Investment Co. v. DynCorp Aerospace Technology that the
Qatari court was incompetent to set aside the award, which had been rendered under the auspices
of the New York Convention, because the only authority competent to set aside an award under
the New York Convention is “one located within the country where the arbitration
commenced.”1180 The arbitration commenced in Paris, so only French courts would have been
competent to set aside the award.1181

Counsel on both sides of a successful challenge should pay special attention to the
relevant arbitral organization’s governing rules, since the challenge to enforcement might not
extinguish liability under the award.

3. Res Judicata Effect

While the ability to challenge an arbitral award in court is somewhat limited, an
interesting issue arises with respect to whether an award is binding on a subsequent arbitral
panel’s examination of the same issue or issues. The “overwhelming majority of federal
jurisdictions have held that arbitrators are not bound by the decisions of other arbitrators but . . .

1175 See infra text accompanying note 1177.
1176 Hanessian & Newman, supra note 1095, at 195.
1177 See CAPPER, supra note 1057, at 134 (“The award remains valid and, even though it may not be
recognised or enforced in the country in which the application has been refused, it remains possible
(subject to the defenses which may be established in the relevant court) that the award will be
recognised and/or enforced in another jurisdiction where assets may be located.”).
1178 Id.
1180 Id. at 21 (citing New York Convention, art. V(1)(e), codified at (9 U.S.C. §§ 1-208 (2011)).
this issue is very unsettled in state courts.”1182 In Connecticut, for example, whether the doctrines of res judicata and/or collateral estoppel apply is a function of the arbitration agreement:

It is [the] agreement that sets limits on the arbitrator’s authority. In negotiating the agreement, the parties are free to bargain for whatever terms they choose, including a provision establishing a system of arbitral precedent. If, however, the parties elect not to include such a provision, or if one party’s attempts to negotiate for the inclusion of such a provision are unsuccessful, arbitrators are free to attach to prior awards whatever precedential value they deem appropriate. Put simply, the parties bargain for the arbitrator’s independent judgment and sense of justice, unfettered by the opinions of other arbitrators.1183

But in Nevada, “[p]olicy considerations underlie [the] conclusion that the doctrine of collateral estoppel should apply to arbitration.”1184 England, too, applies the doctrine of res judicata to arbitrations.1185

The danger (or opportunity) of an award not being considered final by subsequent arbitral panels should prompt counsel to consider addressing the issue preemptively, i.e., when the arbitration agreement is drafted. Counsel should stipulate whether any award will be treated as final for purposes of review.

E. Confidentiality

The rules of nearly all arbitral organizations require both the parties and the panel to observe confidentiality with respect to the proceedings and to the award. For example, UNCITRAL Rules provide that the “award may be made public only with the consent of both parties.”1186 English law, as well, is inherently confidential.1187 The UNCITRAL Rules also

1182 Robert M. Hall, Res Judicata and Collateral Estoppel—Effect Of Prior Arbitration Orders: What Impact on Subsequent Arbitrations?, 17-17 MEALEY’S LITIG. REP. REINSURANCE 12 (2007) (discussing Stanford v. Int’l Assoc. of Firefighters, 728 A.2d 1063, 1070 (Conn. 1999)). See also Hotel Assn. of Wash., D.C., Inc. v. Hotel & Rest. Emp. Union, Local 25, 963 F.2d 388, 390-91 (D.C. Cir. 1992) (“[W]here the agreement is silent, the arbitrator may decline to follow arbitral precedent when his judgment is that earlier decisions are erroneous. . . . [T]he question whether a prior arbitral decision binds a subsequent arbitrator can be determined only by reference to the agreement itself. It falls to the second arbitrator, therefore, to answer that question in the first instance.”). But see Action Dist. Co. v. Int’l Bhd. of Teamsters Local 1038, 977 F.2d 1021, 1026 (6th Cir. 1992) (if the issue in the arbitration proceeding is identical to that in the prior award, collateral estoppel principles might apply).

1183 Stanford, 728 A.2d at 1071 (footnotes omitted).


1186 UNCITRAL Arbitration Rules, art. 32(5); but see Esso Australia Resources v. Plowman, [1995] 183 CLR 10 (rejecting implied confidentiality of the proceeding, but accepting the possibility of express confidentiality); United States v. Panhandle Eastern Corp., 118 FRD 346 (D. Del. 1988) (confidentiality does not necessarily attach to documents obtained in arbitration); see generally Peter
provide, however, that if “the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.”

This confidentiality is necessarily abrogated to some extent by the filing of an action to enforce or challenge the award in court, at least in jurisdictions, such as the United States, where court proceedings are presumptively public. “But the same may not be said of the arbitral record; that enters the public domain only to the extent referred to in the judicial proceedings.”

Additionally, ethical codes may restrict the ability of arbitrators disclose confidential information obtained in the course of an arbitration. The American Arbitration Association and the American Bar Association co-drafted a Code of Ethics for Arbitrators in Commercial Disputes that applies to all arbitrators in AAA arbitrations. The Code provides that “an arbitrator should keep confidential all matters relating to the arbitration proceedings and decision.” The code of Ethics thus generally proscribes an arbitrator from speaking with any third parties about the case. Arbitrators under the AAA Rules are therefore ethically obligated to keep proceedings confidential.

The parties can also control by contract the confidentiality of the arbitration proceedings.


See Dolling-Baker v. Merrett, [1990] 1 W.L.R. 1213. The court described arbitration confidentiality this way:

As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must . . . be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or used in the arbitration, or transcripts or notes of the evidence in the arbitration or the award—and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration—save with the consent of the other party, or pursuant to an order or leave of the court.

Id.

UNCITRAL Arbitration Rules, art. 32(7). See also AAA-ICDR International Arbitration Rules, 9, 10.

Hanessian & Newman, supra note 1095, at 180.


AAA, Code of Ethics for Arbitrators, at VI.B.


Baldwin, supra note 1190, at 456. The parties may agree either at the time the contract is formed, or at the time the arbitration begins, to keep the proceedings secret. Id. A sample confidentiality provision might read:
XVI. CHAPTER 16: ENFORCING THE AWARD

There are three primary sources of authority governing the recognition and enforcement of foreign arbitral awards: (1) the New York Convention\textsuperscript{1194}; (2) Panama Convention\textsuperscript{1195}; and (3) the domestic United States FAA.\textsuperscript{1196} In addition to these primary enforcement mechanisms, a party may also seek to enforce an arbitration award under various other mechanisms, including (a) multilateral treaties, such as the Arab Agreement on Judicial Cooperation; (b) bilateral treaties, such as the mutual agreement treaty between China and Hong Kong; and (c) traditional principles of comity among nations.

A. The New York Convention

1. Background and Purpose

The New York Convention is the primary vehicle for recognition and enforcement of foreign arbitral awards by the United States and numerous other nations, including the 145 countries that have adopted the Convention. The United States acceded to the New York Convention in 1970.\textsuperscript{1197} The New York Convention was implemented by Congress in Chapter II of the FAA.\textsuperscript{1198} Specifically, the FAA applies the New York Convention in the United States to

The parties hereby mutually agree that the existence, terms and content of any Arbitration or Dispute Resolution entered into pursuant to this Agreement, as well as all information or documents evidencing any Results, Final Order, Judgment, Settlement or the performance thereof, shall be maintained in confidence and not be given, shown, disclosed to, or discussed with any third person or party except: (a) by prior written agreement of both parties; (b) solely as contemplated by this Agreement and limited thereby, courts or other tribunals whose assistance is necessary to secure or protect a right of the parties relating to the performance of this Arbitration Agreement or the enforcement of an award rendered pursuant hereto, in which case the existence and content of such proceedings shall be disclosed only to the extent necessary and all efforts contemplated by this Agreement to maintain the confidentiality of documents and information shall be taken; (c) counsel and accountants who shall agree to maintain its confidentiality; (d) to the extent required by applicable reporting requirements; and (e) upon compulsory legal process.

\textit{Id.} at 456-57.


\textsuperscript{1195} \textit{Inter-American Convention on International Commercial Arbitration} (the “Panama Convention”), https://www.aaau.org/media/5043/inter-american%20convention%20on%20international%20commercial%20arbitration.pdf (last visited Nov. 17, 2012); \textit{see also} 9 U.S.C. §§ 301-07 (U.S. enabling legislation).

\textsuperscript{1196} 9 U.S.C. §§ 1-16.


\textsuperscript{1198} 9 U.S.C. §§ 201-208.
awards that relate to “commercial” disputes that are “not considered as domestic awards,”1199 and Section 207 provides that within three years of an award having been made, a court “shall confirm the award unless it finds one of the grounds for refusal or deferral or recognition or enforcement of the award specified in the [New York] Convention.”1200

The New York Convention was established in 1958 as a result of dissatisfaction with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927. The International Chamber of Commerce began an initiative to replace the Geneva treaties, which was taken over by the United Nations Economic and Social Council.1201 As a result, the New York Convention was established following a conference at the United Nations Headquarters in May-June 1958.1202

The purpose of the New York Convention is to ensure the recognition and enforcement of foreign arbitral awards by requiring adopting states to recognize such awards as binding and to enforce them in accordance with their rules of procedure.1203 Article III of the New York Convention provides that a contracting state cannot “impose[] substantially more onerous conditions or higher fees or charges on the recognition or enforcement of foreign arbitral awards to which the [New York] Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards” in that territory.1204 Accordingly, although the New York Convention establishes standards for enforcement of arbitral awards and grounds for refusal to enforce such an award, there remains some latitude in the ability of states to enforce awards “in accordance with their rules of procedure.” As stated by the U.S. Supreme Court in Scherk v. Alberto-Culver Co.,

[t]he goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreement in international contracts

1199 Id. at § 202; Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997) (citing Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983) (“awards ‘not considered as domestic’ denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdictions”); Jain v. de Mere, 51 F.3d 686, 689 (7th Cir. 1995) (interpreting § 202 to mean that “any commercial arbitral agreement, unless it is between two United States citizens, involves property located in the United States, and has no reasonable relationship with one or more foreign states, falls under the Convention”)).
1203 New York Convention, art. III; see also generally Bergesen, 710 F.2d at 932; Scherk v. Alberto-Culver Co., 417 U.S. 520 n.15 (1974).
1204 New York Convention, art. III.
and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.¹²⁰⁵

Due in part to the widespread success of the New York Convention in establishing a uniform framework for the enforcement and recognition of foreign arbitration agreements and awards, arbitration has become a preferred method for the resolution of a vast majority of international business disputes.

The New York Convention applies if the arbitral award is between parties of more than one contracting state and arises out of a legal relationship, whether contractual or not, that is commercial in nature.¹²⁰⁶ Article I of the Convention provides that it applies to awards made in the territory of a state other than that where recognition and enforcement is sought and that it also applies to arbitral awards not considered as domestic in the state where their recognition and enforcement are sought. Moreover, as detailed in the enabling legislation of the New York Convention, Chapter II of the FAA provides that if all of the parties to the agreement are U.S. citizens, the New York Convention will still apply if the agreement or transaction involves “property located abroad, envisages performance or enforcement abroad, or has some other reasonable relationship to one or more foreign states.”¹²⁰⁷

2. Procedure for Enforcement

When seeking to enforce a foreign award under the New York Convention, the party must provide the court with (a) a certified copy of the arbitral award, (b) the arbitration agreement that must be in writing; and (c) certified translations of the two documents, if necessary.¹²⁰⁸ Written arbitration agreements are defined in the New York Convention to include “an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”¹²⁰⁹

In the United States, the federal district courts have original jurisdiction over the actions or proceedings falling under the Convention regardless of the amount in controversy.¹²¹⁰ The party seeking to enforce the arbitral award may bring enforcement proceedings in any district court that would have proper venue absent the arbitration agreement, or in the district where the place of arbitration was designated in the agreement if such place is within the United States.¹²¹¹ In rare instances—and subject to much controversy—United States courts have refused to

¹²⁰⁵ 417 U.S. at 520 n. 15; see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (noting that the United States’ accession to the New York Convention supports the principle that federal policy favoring arbitral dispute resolution “applies with special force in the field of international commerce”).
¹²⁰⁷ Id.
¹²⁰⁸ New York Convention, art. IV; see also id. at art. II (noting that the agreement to arbitrate must be “in writing”).
¹²¹⁰ Id. at art. II(2).
¹²¹¹ 9 U.S.C. § 203; see also 9 U.S.C. § 205 (defendants may remove to federal district court any proceeding commenced in state court).
enforce an award on grounds of *forum non conveniens.* Moreover, some court have held that the court in which the party seeking enforcement brings the proceeding must have personal jurisdiction over the defendant or its property. On rare occasion United States courts have refused to enforce an arbitral award for lack of personal jurisdiction over the defendant.

If a party against whom the award is sought seeks to object to enforcement of the award, he must submit proof that enforcement of the award would fall within one of the grounds for refusal of enforcement as defined in Article V of the New York Convention and explained in further detail below. Moreover, parties should not that a few courts have held that a party may have waived an Article V defense if he did not make a timely objection before the arbitral panel, but instead waited until its defense to enforcement to raise the issue. There is a three year statute of limitations to enforce an award under the New York Convention.

3. **Limitations on the New York Convention**

Despite the widespread success of enforcement via the New York Convention, there remain situations in which the New York Convention may not apply and parties may need to look to alternative means of enforcement. These situations are discussed below:

*First,* there are still approximately 50 states that are not a party to the New York Convention, including Iraq, Palestine, Taiwan, and Tajikistan, among others. Thus when

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1212 *In re Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine,* 311 F.3d 488, 495-97 (2d Cir. 2002) (holding that dismissal pursuant to *forum non conveniens* was proper and relying on Article III of the Convention which states that each signatory must recognize arbitral awards “and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”).

1213 *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,”* 283 F.3d 208, 214-16 (4th Cir. 2002) (noting that a court must have personal jurisdiction over the defendant and holding that the district court lacked personal jurisdiction over the defendant); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarian Co.,* 284 F.2d 1114 (9th Cir. 2002) (same).

1214 See, e.g., *Bernstein Seawell & Kove v. W.E. Bosarge,* 813 F.2d 726, 732 (5th Cir. 1987) (affirming district court judgment that enforced arbitral award where defendant failed to make his Article V(1)(d) objection to the composition of the arbitration panel at the time of the arbitration); *La Societe Nationale Pour La Recherche, et al. v. Shaheen Natural Res., Co.,* 585 F. Supp. 57, 65 (S.D.N.Y. 1983) (holding the party challenging enforcement of the arbitral award "should have presented its objection [that it was acting only as an agent of its subsidiary] to the arbitration panel" and noting that to deny recognition and enforcement to the arbitration award at a later date “would be to violate the goal and the purpose of the Convention, that is, the summary procedure to expedite the recognition and enforcement of arbitration awards") (citing *Imperial Ethiopian Gov’t v. Baruch-Foster Corp.,* 535 F.2d 334, 335 (5th Cir. 1976)); *AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Services Inc.,* 139 F.3d 980, 982 (2d Cir. 1998) (challenging party waived it right to assert its public policy defense to enforcement of foreign arbitral award because challenging party had knowledge of facts indicating the tribunal was corrupt prior to the commencement of the arbitral hearings, but did not raise its argument during the arbitration).

1215 9 U.S.C. § 207.

1216 UNCITRAL, *Status, supra* note 1197.
seeking to enforce an award in such a state, a party will need to utilize one of the other means of enforcement.

Second, there may arise a situation in which, although the state in which enforcement is being sought is a party to the New York Convention, the state in which the award was made is not a party to the New York Convention. Many states such as the United States are subject to the “reciprocity reservation,” which means that the Convention only applies to awards made in foreign states that are also parties to the convention.\footnote{Id.} Given that approximately 145 states are currently parties to the New York Convention, the significance of this reservation is diminishing; however, this situation is important to consider when entering into an arbitration agreement.

Finally, as noted above, the majority of states, including the United States, has invoked the “commercial reservation” which limits the application of the New York Convention to disputes arising out of relationships that are considered “commercial” under United States law.\footnote{Id.} The scope of “commercial” is broadly construed by U.S. courts.\footnote{See, e.g., Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1, 13 (S.D.N.Y. 1973) (construction of a factory in a foreign country defined as commercial); Best Concrete Mix Corp. v. Lloyd’s of London Underwriters, 413 F. Supp. 2d 182, 188 (E.D.N.Y. 2006) (insurance policies are considered commercial); Meadows Indem. Co. Ltd. v. Baccala & Shoop Ins. Services, Inc., 760 F. Supp. 1036, 1040-41 (E.D.N.Y. 1991) (reinsurance contracts); Siderius, Inc. v. Compania de Acero del Pacifico, S. A., 453 F. Supp. 22, 24 (S.D.N.Y. 1978) (purchase of goods by a U.S. company from a foreign company).} The majority of states, including the United States, have invoked the “commercial reservation,” which limits the application of the New York Convention to disputes arising out of relationships that are considered “commercial” under United States law.

\section*{B. Alternative Means of Enforcement}

\subsection*{1. The Panama Convention}

The Panama Convention is a common alternative means of enforcement in the Americas which applies to commercial transactions between parties from signatory countries who have entered into agreements to arbitrate.\footnote{See generally The Inter-American Convention on International Commercial Arbitration, 1975 http://www.oas.org/juridico/english/treaties/b-35.html (last visited Nov. 16, 2012); Helena Tavares Erickson, et al., Looking Back, and Ahead: The Panama Convention After 30 Years, 23 Alternatives to High Cost Litig. 184 (December 2005).} The Panama Convention was promulgated in 1975 at the Inter-American Conference on Private International Law, as part of an initiative to combat the apprehension in Latin American courts about enforcing agreements to arbitrate future disputes and recognize arbitral awards.\footnote{Tavares Erickson, et al., supra note 1220, at 184.} Nineteen countries in North and South America, including the United States, are now signatories to the Panama Convention.\footnote{Ratification of the Inter-American Convention on International Commercial Arbitration, http://www.oas.org/juridico/english/sigs/b-35.html (last visited Nov. 16, 2012). The signatories to the Panama Convention include: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, USA, Uruguay, Venezuela.} The United States ratified the
Panama Convention in 1990, and Chapter III of the FAA implements the Panama Convention.\textsuperscript{1223} Under the Panama Convention, a non-appealable arbitral decision or award shall have the force of a final judicial judgment.\textsuperscript{1224} Arbitral decisions or awards are enforceable under the Panama Convention only if made in the territory of a foreign state that has ratified the Convention.\textsuperscript{1225} U.S. courts have also held that the Panama Convention applies retroactively to contracts signed before the U.S. ratified the Convention.

Standards for enforceability of arbitration agreements and arbitral awards under the New York Convention and the Panama Convention are applied similarly in U.S. courts. The Panama Convention was modeled on the New York Convention and the two Conventions’ grounds for refusing enforcement are essentially identical.\textsuperscript{1226} However, unlike the New York Convention, the Panama Convention does not distinguish between foreign and domestic arbitral awards. Under circumstances in which both the New York and Panama Conventions would apply, the Panama Convention applies if a majority of the parties to an arbitration agreement are from countries that have ratified the Panama Convention and are members of the Organization of American States.\textsuperscript{1227} In all other cases, the New York Convention applies.\textsuperscript{1228} Additionally, under U.S. law, the FAA’s provisions apply to the extent that the FAA is not in conflict with the Panama Convention; however, in practice such a situation rarely applies.\textsuperscript{1229} This includes the defenses to enforcement of domestic arbitration awards outlined in Chapter I of the FAA.\textsuperscript{1230}

2. Federal Arbitration Act

Finally, Chapter I of the Federal Arbitration Act applies to the enforcement of domestic U.S. awards or foreign awards not falling within the New York or Panama Conventions.\textsuperscript{1231} Section 1 of the FAA defines “commerce” in the Act to include commerce with foreign nations.\textsuperscript{1232} The enabling legislation of both the New York and Panama Conventions provide that Chapter I of the FAA will apply to the enforcement of foreign awards in the United States under each Convention to the extent that the FAA does not conflict with the enabling legislation or the Conventions as ratified by the United States.\textsuperscript{1233} However, in practice, Chapter I rarely applies in the enforcement of foreign arbitration awards governed by the New York or Panama Conventions. Accordingly, Chapter I of the FAA will apply to the enforcement of foreign awards in the United States if the award does not come within the New York or Panama

\textsuperscript{1224} See Panama Convention, art. IV.
\textsuperscript{1225} 9 U.S.C. § 304.
\textsuperscript{1226} See Panama Convention, art. V.
\textsuperscript{1227} 9 U.S.C. § 305(1); see also Progressive Casualty Ins. Co. v. C.A. Reaseguradora Nacional de Venezuela, 802 F. Supp. 1069, 1073-74 (S.D.N.Y. 1992), rev’d, 991 F.2d 42 (2d Cir. 1993); Tavares Erickson, et al., 23 Alternatives to High Cost Litig. 184.
\textsuperscript{1228} 9 U.S.C. § 305(2).
\textsuperscript{1229} See 9 U.S.C. § 307.
\textsuperscript{1231} 9 U.S.C. §§ 1-16.
\textsuperscript{1232} Id. at § 1.
\textsuperscript{1233} Id. at § 208, § 307.
Conventions because (a) one of the parties to the arbitration is from a country that is not a signatory to either the Conventions, or (b) the arbitral award arises out of an agreement that is not commercial in nature. Moreover, Chapter I of the FAA will also likely apply if the arbitration took place in the United States and U.S. or state procedural rules were used in the arbitration. However, as noted above, if all the parties to the arbitration are U.S. citizens, the New York Convention will still apply if the relationship “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”\textsuperscript{1234}

C. Defenses to Enforcement:

1. Defenses Under the FAA

Chapter I of the FAA outlines the defenses to enforcement of domestic arbitration awards. Those defenses include that: (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, refusing to hear material evidence, or any other misbehavior by which the rights of any party might have been prejudiced; and (4) 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.\textsuperscript{1235}

2. Defenses Under the New York Convention and the Panama Convention

The ability to review a foreign arbitral award is limited under the New York and Panama Conventions, and the party seeking to challenge the enforcement and recognition of the award has the burden of proving that an award should be overturned.\textsuperscript{1236} In the United States, a court may refuse to enforce a foreign arbitral award based on the enumerated grounds set out in Article V of the New York Convention or Article V of the Panama Convention. In addition to these grounds, a court may \textit{sua sponte} refuse enforcement, as provided by Article V(2) of the New York Convention, if either (a) the subject matter is not capable of settlement by arbitration under the laws, or (b) for reasons of public policy.

As noted above, the defenses to enforcement are almost identical under the New York and Panama Conventions. Article V of the New York Convention provides:

(1) Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the

\textsuperscript{1234} Id. at § 202.
\textsuperscript{1235} Id. at § 10.
\textsuperscript{1236} \textit{La Societe Nationale}, 585 F. Supp. at 61 (citing \textit{Imperial Ethiopian Government}, 535 F.2d at 336); \textit{Encyclopedia Universalis S.A. v. Encyclopedia Brittanica, Inc.}, 403 F.3d 85, 90 (2d Cir. 2005).
law of the country where the award was made; or (b) The 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; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

United States courts have acknowledged that the enumerated Article V grounds are the exclusive grounds upon which a party can oppose enforcement. Moreover, the enumerated defenses are construed narrowly “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts.” As courts have noted, “[a]bsent extraordinary circumstances, a confirming court is not to reconsider the arbitrator’s findings.”

Moreover, as noted above, the New York Convention presumes the validity of awards and a party challenging an award bears the burden of proving that the award should not be enforced. Accordingly, a party challenging an international arbitral award faces a challenging battle.

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1237 See, e.g., *Encyclopedia Universalis*, 403 F.3d at 90, 92; *M & C Corp. v. Erwin Behr GmbH & Co.*, KG, 87 F.3d 844, 851 (6th Cir. 1996); see also 9 U.S.C. § 207 (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”).


1239 *Europcar Italia, S.p.A v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998); *Encyclopedia Universalis*, 403 F.3d at 90; *Karaha*, 364 F.3d at 288.

1240 New York Convention, art. V; see also e.g., *First State Ins. v. Banco de Seguros Del Estado*, 254 F.3d 354, 357 (1st Cir. 2001) (review of arbitration decisions by the courts is “extremely narrow and exceedingly deferential”); *Czarina, LLC v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n.3 (11th Cir. 2004) (foreign arbitral awards are “presumed to be confirmable” and the burden of proof is on the party defending against enforcement); *Yusuf Ahmed Alghanim & Sons, W.L.L.*, 126 F.3d at 23, cert. denied, 522 U.S. 1111 (1998) (noting that review of arbitration awards is “very limited . . . in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and
Below we address the defenses to enforcement under the New York and Panama Conventions and the key cases in the United States examining each respective defense.

a. Invalidity of Arbitration Agreement

Article V(1)(a) of the New York Convention permits a court to refuse to recognize enforcement of an arbitral award where the parties to the arbitral agreement were “under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it to or, failing any indication thereon, under the law of the country where the award was made.”\(^{1241}\)

The arbitration agreement’s validity is to be judged under the law governing the contract, or absent a clear indication of the governing law, the law of the country where enforcement is sought.\(^{1242}\) This provision has very rarely been interpreted by the courts; however, the cases that have interpreted the defense have focused on a wide variety of arguments regarding the validity of a contract’s formation.\(^{1243}\) According to commentators, no reported U.S. judicial decision has vacated an arbitral award because of either lack of capacity of one or both of the contracting parties or invalidity of the agreement to arbitrate under the applicable law.\(^{1244}\) The reason for the lack of successful Article V(a)(1) challenges to arbitral awards may be due in part to the fact that invalidity of the arbitration agreement is a defense that parties typically raise in the arbitration proceeding itself, rather than for the first time during an enforcement proceeding.

\(^{1241}\) New York Convention, art. V(1)(a).


\(^{1243}\) See e.g., *Buques Centroamericanos, S.A. v. Refinadora Costarricense de Petroleos, S.A.*, 1989 U.S. Dist LEXIS 5429, at *1 (S.D.N.Y. May 18, 1989); *American Constr. Mach. & Equip. Corp. v. Mechanized Constr. Of Pakistan Ltd.*, 659 F. Supp. 426, 429-30 (S.D.N.Y.), aff’d, 828 F.2d 117 (2d Cir. 1987) (holding that party opposing award failed to meet burden of demonstrating the award should not be enforced in part by rejecting argument that the award could not be enforced because it was invalid under the laws of Pakistan because the parties failed to validly designate Pakistani law as applying to the agreement); *Guang Dong Light Headgear Factory Co. v. ACI Int’l, Inc.*, 521 F. Supp. 2d 1153, 1167-69 (D. Kan. 2007) (denying party’s argument that there was no arbitration agreement, but merely non-binding order confirmations, and finding objective evidence of intent in the parties’ actions, and thus rejecting Article V(1)(a) defense to enforcement); *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Sys., Inc.*, 29 F. Supp. 2d 1168, 1173-74 (S.D. Cal. 1998), aff’d in part and vacated in part, 665 F.3d 1091 (9th Cir. 2011) (rejecting party’s argument that the agreement was invalid because it had been subjected to improper “oral amendments” made by the arbitrators, where such “amendments” were deemed to be legal theories and conclusions); *China Minmetals Materials Import and Export Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 286 (3d Cir. 2003) (remanding to the district court for further fact inquiry as to whether the contracts providing for arbitration between the parties was forgery).

\(^{1244}\) Bishop & Martin, *supra* note 1242.
b. Lack of Due Process

Article V(1)(b) provides a defense to enforcement of an arbitral award if the “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.” This provision has been interpreted to permit challenges to enforcement based upon the alleged lack of due process in the arbitration proceedings, which includes “the opportunity to be heard at a meaningful time and in a meaningful manner.” Although courts have distinguished the due process requirements of the judicial system from those of an arbitration, due process in arbitration typically requires adequate notice, an opportunity to present the evidence, and a fundamentally fair hearing which includes an impartial decision by the arbitrator.

Like the other defenses, the defense of denial of due process has been successful in only limited cases. For example, in Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier, the court denied the Article V(1)(b) challenge based upon a violation of due process that the tribunal denied it an adequate opportunity to present its where the case arbitral tribunal refused to reschedule a hearing to accommodate a witness’s schedule. In distinguishing between arbitration and the judicial system, the court concluded that the tribunal acted within its discretion in deciding the reschedule the hearing and thus the petitioner’s due process rights were not infringed upon by the tribunal’s decision. However, in Iran Aircraft Indus. v. Avco Corp., the petitioner successfully challenged enforcement of the award based on due process grounds. In this case, the court concluded that the arbitral tribunal denied the petitioner “the opportunity to present its case in a meaningful manner,” where the one arbitrator on the panel instructed the party to present its case with a summary of the invoices supporting its claim, rather than the voluminous invoices themselves, and the tribunal ultimately denied the petitioner’s claim because it had not supplied the supporting invoices. For that reason, the court rendered the award unenforceable because the petitioner was affirmatively mislead and denied the right to present its case.

1245 New York Convention, art. V(1)(b).
1246 Parsons, 508 F.2d at 976.
1247 Iran Aircraft Indus. v. Avco Corp., 980 F.2d 141, 146 (2d Cir. 1992) (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)) (holding that enforcement of an arbitral award should be refused if a party was denied a due process hearing).
1248 Generica Ltd. v. Pharmaceutical Basics, 125 F.3d 1123, 1129-30 (7th Cir. 1997) (noting that among other requirements, under Article V(1)(b) of the Convention, “proof that a party was ‘unable to present his case’ constitutes a proper defense”).
1249 Id. (noting that “[parties] may seek redress from the courts for [only] the most exceptional errors at arbitration”) (internal citations omitted).
1250 508 F.2d 969 (2d Cir. 1974).
1251 Id. at 975-76.
1252 980 F.2d 141 (2d Cir. 1992).
1253 Id. at 143-44.
c. **Arbitration in Excess of Jurisdiction**

Under Article V(1)(c) of the New York Convention, a court may refuse to enforce an arbitral award where “[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.”1254 A party raising this defense essentially argues that the arbitrators have gone beyond the scope of their powers as defined by the arbitration agreement.1255 Examination of an Article V(1)(c) defense requires an analysis of the text of the arbitration agreement.1256 However, like other Article V defenses, courts have also interpreted Article (1)(c) narrowly and construed arbitration agreements broadly.1257

d. **Defects in Arbitral Composition and Procedure**

Article V(1)(d) provides for refusal of enforcement of an arbitral award where “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.”1258 Petitioners have used this defense to argue that the arbitrators were biased in violation of the arbitration agreement,1259 or as a means to raise a broad range of procedural challenges.1260 However, courts have limited the ability of petitioners to

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1254 New York Convention, art. V(1)(c).
1256 See e.g., M & C Corp., 87 F.3d at 848-50.
1257 See e.g., Parsons, 508 F.2d at 977 (noting that the Article (1)(c) defense “should be construed narrowly” and stating that “[a]lthough the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator’s jurisdiction, it does not sanction second-guessing the arbitrator’s construction of the parties’ agreement.”); Gas Natural Approvisionamiento, 2008 WL 4344525, at *2-6.
1258 New York Convention, art. V(1)(d).
1260 See e.g., Encyclopaedia Universalis, 403 F.3d at 91-92 (holding that the premature appointment of a third arbitrator – when the agreement expressly provided for two – rendered the award unenforceable because “the composition of the arbitral authority was not in accordance with the parties’ agreement”); Zeiler v. Deitsch, 500 F.3d 157, 160-61 (2d Cir. 2007) (challenge based on composition of arbitral panel rejected); Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1442 (11th Cir. 1998) (rejecting argument that the procedures were “not in accordance with the agreement of the parties” where the technical report that was filed late); LaPine v. Kyovera Corp., 2008 WL 2168914, at *7-8 (N.D. Cal. May 23, 2008) (arguing that panel incorrectly applied federal procedural law instead of state procedural law); Karaha Bodas Co. v. Perusahaan Pertambangan Minyak dan Gas Bumi Negara, 190 F. Supp. 2d 936, 945-49 (S.D. Tex. 2001) (challenge based upon alleged
successfully raise Article V(1)(d) challenges by requiring a showing of substantial prejudice from the alleged procedural defect.\textsuperscript{1261}

e. **Award Not Yet Binding or Has Been Set Aside or Suspended**

Under Article V(1)(e) of the New York Convention, a court may refuse to recognize an award when (a) “the award has not yet become binding on the parties,” or (b) “has been set aside or suspended by a competent authority of the country in which, under the law of which, that award was made.”\textsuperscript{1262} An arbitral award is “binding” under the Convention when the award is not open to arbitral or judicial review.\textsuperscript{1263} The primary line of cases focus on whether interim decisions made by the arbitral tribunal are “binding” and thus are sufficiently final to be enforced. Courts have held that an interim award cannot be enforced unless (a) it “finally and definitely dispose[d] of a separate, independent claim” and (b) there was “an immediate need for relief.”\textsuperscript{1264} In contrast, other courts have held orders to be sufficiently binding where they “finally and conclusively disposed of a separate and independent claim” absent a showing of immediate need to obtain enforcement of the interim award.\textsuperscript{1265}

Article V(1)(e) also permits challenges where an award has been set aside or vacated. For example, in *TermoRio S.A. E.S.P. v. Electranta S.P.*, the court affirmed the dismissal of an enforcement proceeding where Columbia, the country where the arbitration took place, had set aside the award, regardless of whether the grounds relied upon for nullification would have been valid in the United States.\textsuperscript{1266} The court concluded that nullified awards may not be enforced absent a showing that the nullification was contrary to the “basic notions of justice to which we subscribe.”\textsuperscript{1267} In contrast, in *In re Chromalloy Aeroservices v. The Arab Republic of Egypt*, the

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\textsuperscript{1262} New York Convention, art. V(1)(e).

\textsuperscript{1263} See e.g., *Fertilizer Corp. of India v. IDI Mgmt., Inc.*, 517 F. Supp. 948, 955-58 (S.D. Ohio 1981) (noting that the award is “considered ‘binding’ for purposes of the Convention if no further recourse may be had to another arbitral tribunal (that is, an appeals tribunal). The fact that recourse may be had to a court of law does not prevent the award from being ‘binding.’”).

\textsuperscript{1264} *Hall Steel Co. v. Metalloyd Ltd.*, 492 F. Supp. 2d 715, 720-21 (E.D. Mich. 2007) (noting that an arbitrator’s award need not conclusively resolve all matter in dispute in order to qualify as “final,” but denying enforcement of an interim award of legal costs because there was no immediate need for relief).

\textsuperscript{1265} See e.g., *Zeiler*, 500 F.3d at 169; *Publicis v. True North*, 206 F.3d 725, 730-31 (7th Cir. 2000).

\textsuperscript{1266} 487 F.3d 928 (D.C. Cir. May 25, 2007); see also *Continental Transfer Technique Ltd. v. Federal Government of Nigeria*, 2010 WL 1048827, at *7-8 (D.D.C. 2010) (refusing challenge to enforcement of arbitral award against Nigeria absent evidence that any court “has issued any ruling whatsoever on the substantive validity of the award”).

\textsuperscript{1267} 487 F.3d at 939.
court refused to recognize a decision of the Egyptian court to nullify an arbitration award where to do so would violate clear United States’ public policy in favor of final and binding arbitration of commercial disputes.  

f. Non-Arbitrability and Public Policy

The final two defenses in Article V – non-arbitrability and public policy – may be invoked by the court sua sponte. Article V(2)(a) provides that a court may refuse to recognize an award “if the competent authority of the country where recognition and enforcement is sought finds that . . . the subject matter of the difference is not capable of settlement by arbitration under the law of that country.” This argument has very rarely been successfully invoked as a defense to enforcement because to be successful on an Article V(2)(a) challenge, a party must prove that the domestic law of the enforcing nation determines that there is a special national interest such that the subject matter of the dispute makes it incapable of being settled by arbitration. Accordingly, in reality, there may be significant overlap between an Article V(2)(a) challenge and a challenge based upon public policy grounds. Courts have further held that certain disputes, such as antitrust claims, may not be subject to arbitration.

Article V(2)(b) permits a court to refuse to recognize or enforce an award where “recognition or enforcement of the award would be contrary to public policy of [the country where recognition and enforcement is sought].” As one court noted, defenses under Article V(2)(b) are narrowly construed and are successful “only when the award violates some explicit public policy that is well-defined and dominant . . . [and is] ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests.” As the court explained in MGM Productions Group, Inc. v. Aeroflot Russian Airlines, “[p]ublic policy arguments [under the New York Convention] should be accepted with caution, so as not to discourage enforcement of United States arbitration awards by courts of

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1269 New York Convention, art. V(2)(a).
1270 See Parsons, 508 F.2d at 975 (“The mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable. Rather, certain categories of claims may be non-arbitrable because of the special national interest vested in their resolution.”); see also Richard Garnett, et al., A Practical Guide to International Commercial Arbitration 108 (2000).
1272 New York Convention, art. V(2)(b).
1273 Industrial Risk Insurers, 141 F.3d at 1445 (internal citations omitted); see also Parsons, 508 F.2d at 974 (the public policy defense is only successful “where enforcement would violate the forum state’s most basic notions of morality and justice”); Karaha, 364 F.3d at 306 (“The general pro-enforcement bias informing the convention . . . points to a narrow reading of the public policy defense.”); La Societe Nationale, 585 F. Supp. at 63 (the public policy defense “is generally construed narrowly in order to promote the Convention’s goal of encouraging the prompt enforcement of awards”).
other countries.” 1274 “Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention.” 1275 Despite this standard, the petitioner in *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, 1276 brought a Article (2)(b) public policy defense where the award ordered a U.S. company to make certain communications equipment available to the government of Iran in violation of a federal statute barring the export of these goods to Iran, and the Ninth Circuit remanded the case to the district court for further proceedings on enforcement of the award in light of public policy concerns. 1277

**D. Miscellaneous Enforcement Topics**

**1. Attorney’s Fees**

A party may seek attorney’s fees in an arbitration enforcement action pursuant to two primary avenues: (1) attorney’s fees pursuant to the FAA and/or (2) attorney’s fees pursuant to the arbitration agreements. A district court may use its discretion to award attorney’s fees against a party making challenges to arbitration awards “that are not cognizable under the FAA, are frivolous, or are without legal justification.” 1278 For example, the court in *Western Tech. Servs. Int’l, Inc. v. Cauchos Industriales S.A.*, recently addressed the question of whether the party opposing the challenge to the arbitration enforcement action should be awarded attorneys fees based on its argument that the challenges were not cognizable under the FAA, were frivolous and were without legal justification. 1279 The court held that challenging party should not be sanctions nor should it be responsible for attorney’s fees because its position “was not objectionably unreasonable,” and although the challenging party was ultimately unsuccessful, its arguments did not meet the standard set forth in *International Ass’n of Machinists & Aerospace Workers, Dist. 776 v. Texas Steel Co.* for recovery of attorney’s fees under the FAA. 1280 The court also denied the request for attorney’s fees pursuant to the arbitration agreements. The court noted that the agreements contemplate an award of attorney’s fees as part of the arbitration award, the arbitration panel previously denied the request for attorney’s fees, and although there is a distinction between costs that are part of the arbitration versus costs of the enforcement action, the court already determined that the party opposing the enforcement challenge was not

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1275 *Karaha*, 364 F.3d at 306.

1276 969 F.2d 764 (9th Cir. 1992).

1277 *Id.* at 773.


1279 *Id.* at *3.

1280 *Id.* at *3-6.
entitled to recovery of fees in the action pursuant to the FAA, and thus, in light of the language of the agreements and the panel’s previous denial of fees, the court refused to award fees pursuant to the agreements.\textsuperscript{1281}

2. \textbf{Prejudgment Interest}

The “Convention is silent” on the issue of post-award, pre-judgment interest, but federal courts have held that they have the power to grant post-award, prejudgment interest when enforcement of foreign arbitral awards is sought in actions brought under the New York Convention.\textsuperscript{1282} Courts have held that “a discretionary award of pre-judgment interest is appropriate, notwithstanding a statute's silence on the subject of interest, when such an award is ‘“fair, equitable and necessary to compensate the wronged party fully.”’\textsuperscript{1283} As noted in \textit{Sarhank Group v. Oracle Corp.}, the goals of the New York Convention to further “federal policy favoring arbitration as a means to resolve expeditiously disputes by avoiding time-consuming and costly litigation” by promoting the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions” would be impeded if pre-judgment interests were not permitted in certain cases.\textsuperscript{1284}

\section*{XVII. CHAPTER 17. INVESTOR-STATE ARBITRATION}

Given the unique power dynamic that is implicated when a private investor sues a sovereign state, parties involved in such disputes could face difficulties in referring the disputes to arbitration and ensuring the enforcement of an arbitral award. Prior to the latter half of the twentieth century, there was no framework to properly address investment disputes between sovereign nations and private foreign investors. Without a system in place to adjudicate such conflicts, international investment may have been stifled due to trepidation on the part of investors. A would-be investor may have been unwilling to invest in a developing country out of fear that the developing country would nationalize or otherwise misuse the funds and then deny the investor recourse through its court system.\textsuperscript{1285} Because of the inherent problems with a nation’s courts hearing investment disputes to which that nation’s government is a party, independent arbitration and mediation were viewed as desirable. The World Bank, intending to stimulate international investment and economic activity, as well as to alleviate the burden that had previously been imposed upon it to arbitrate such disputes, decided that something needed to

\begin{footnotes}
\textsuperscript{1281} \textit{Id.} at *9-10.
\textsuperscript{1283} \textit{Sarhank}, 2004 WL 324881, at *2 (citing \textit{Wickham Contracting Co., Inc. v. Local Union No. 3, IBEW,} 955 F.2d 831, 835 (2d Cir. 1992))
\textsuperscript{1284} 2004 WL 324881, at *2 (internal citations omitted).
\end{footnotes}
be done to increase investor confidence. To accomplish this goal, it created an institution specifically intended to address such disputes. That institution is ICSID. ICSID attempts to engender confidence in investors because they will know that there is an impartial forum available to them and also addresses concerns that a sovereign defendant would merely assert sovereign immunity to avoid liability. ICSID addresses the problem that states could refuse to pay arbitral awards, hiding behind the doctrine of sovereign immunity by mandating that states give ICSID awards the same credit that they would afford to decisions by their own national courts. However, there remains a possibility that, as the number of ICSID arbitrations and the size of their awards increase, states will find novel ways to attempt to invoke sovereign immunity.

A. Convention on the Settlement of Investment Disputes between States and Nationals of Other States

ICSID is not a permanent arbitral body. Rather, is an organization that has established an “institutional and procedural framework” for those commissions and tribunals charged with hearing such disputes. Furthermore, it does not set forth the substantive law that will be used in any arbitrations or mediations conducted based upon its rules. Although it is an autonomous organization, it maintains close ties to the World Bank, to the point that the president of the World Bank is the ex officio chairman of the ICSID Administrative Counsel, its

1286 Id. at 49.
1287 See generally Convention on the Settlement of Investment, Disputes between States and National of Other Nations, Oct. 14, 1966, 575 U.N.T.S. 159 [hereinafter, “ICSID Convention”]. Prior to the World Bank, the United Nations attempted to pass a resolution supporting arbitration of disputes between private investors and sovereign states but its attempt was largely unsuccessful. Lowenfield, supra note 1285, at 49-50. Initially, the World Bank’s proposal was to set forth a series of rules to explicitly prohibit expropriation of foreign nationals’ investments but it was not passed and a compromise was eventually reached for a system of arbitration that would theoretically address claims of expropriation. Id.
1288 ICSID Convention, art. 1. ICSID arbitral panels have evolved substantially over the years. While they are still technically ad hoc tribunals, they now possess many of the trappings of formal international courts, such as the arbitrators being generally drawn from the same recurring list of experts and the opinions written by those arbitrators spanning hundreds of pages and building a common law on which other ICSID panels rely. Julian Davis Mortenson, The Meaning of “Investment”: ICSID’s Travaux and the Domain of International Investment Law, 51 HARV. INT’L L. J. 257, 265 (2010).
1289 This was largely the result of compromise. Developing countries in Latin America would not have signed off on a convention that they viewed as binding them and stifling their economic development and curtailed the authority of their judicial systems, just as they opposed any type of resolution prohibiting the expropriation of foreign investors’ money. Ultimately, all of the Latin American governments opposed its passage anyway. Lowenfield, supra note 1285, at 49-50. The substantive law has generally come from treaties and customary international law. Of late it has primarily come from bilateral investment treaties between the states, which often guarantee rights such as fairness and due process. Mortenson, supra note 1288, at 264.
annual meetings are timed to coincide with meetings of the World Bank and it is financed out of the World Bank’s budget.1290

ICSID proceedings are governed by the Convention on the settlement of Investment Disputes between States and National of Other States (the “ICSID Convention”), also known as the Washington Convention.1291 The ICSID Convention was drafted in 1966 with 20 signatory members.1292 It has subsequently expanded to 136 Contracting States.1293 Once a country has become an ICSID Contracting State, the procedures of the ICSID Convention become available in disputes involving either the nation or its nationals provided that the other jurisdictional requirements are met. However, simply because a country is a signatory to the ICSID Convention, that does not, in and of itself, mean that all investor-state disputes involving that country or its nationals that meet ICSID’s jurisdictional requirements will automatically be referred to ICSID. ICSID arbitration is a voluntary process and neither the investor nor the state may be mandated to consent to the dispute being arbitrated under the ICSID Convention.1294 However, once the parties have agreed to let ICSID hear their dispute, neither party may unilaterally withdraw that consent.1295

In order to become a signatory to the ICSID Convention, a state must agree to abide by any arbitral awards granted under the ICSID convention.1296 This requirement has two primary effects. First, a member state may not set aside such an award handed down against it. Thus, a court within a nation must give full faith and credit to an arbitral award against that state. Furthermore, the courts of ICSID signatory states are obligated to recognize and enforce arbitral awards against other ICSID signatory states. Thus, an investor does not necessarily have to rely on the courts of the adversary state to enforce the judgment. That is not to say that member states have not previously attempted to set aside or refuse to pay ICSID awards through various

1290 ICSID Convention, Arts. 2, 5. Some commentators have lobbied for greater autonomy for ICSID. See David Samuels & James Clasper, ICSID Deserves a Full-Time Leader, 1 GLOBAL ARB. REV. 12 (2006)
1291 ICSID Convention, Introduction.
1292 Id.
1293 Id.
1294 Id. at art. 25.
1295 Id. at art. 26.
1296 Id. at art. 27.
However, those attempts are in direct contradiction of ICSID regulations and have been largely unsuccessful. In order for a dispute to be heard under the ICSID convention, it must arise directly out of an investment dispute between an ICSID Contracting State and an individual or company that is a citizen or national of a different ICSID Contracting state. Initially, the requirement that a dispute arise out of an investment was approached very liberally, with any dispute with even the most attenuated connection to investment generally being regarded as appropriate for ICSID arbitration. Of late, however, many ICSID panels have begun looking more closely at whether a dispute is truly connected with an investment and, in many cases, they have refused to hear the case. Additionally, if the Secretary-General of ICSID concludes that a dispute is “manifestly” outside of ICSID’s jurisdiction, he has the power to refuse to allow the dispute to be registered under ICSID. However, the Secretary General’s power to refuse to allow cases to be heard under ICSID is limited to jurisdictional concerns and, even in those cases, the lack of jurisdiction must be obvious. Until recently, a lack of jurisdiction was the only grounds on which an ICSID claim could be summarily dismissed by either the Secretary-General or the

1297 See generally Edward Baldwin, Mark Kantor & Michael Nolan, Limits to Enforcement of ICSID Awards, 23 J. OF INT’L ARB. 1. There are several ways in which some commentators have posited that parties will attempt to get national courts to overturn or refuse to enforce ICSID arbitral decisions. Id. In the United States, for example, an ICSID arbitral decision need only be given the same recognition that decisions by courts of other states are given, which still leaves open the possibility that parties will challenge the ruling based on a lack of jurisdiction or other grounds. 22 U.S.C. §1650a (2006); Baldwin at 1. To date, four parties have attempted to challenge enforcement or execution of ICSID awards through the courts of multiple countries. While some of the courts have held in favor the challenges to execution against particular assets, none of them have granted the challenges to the enforcement of the awards in their entirety. Baldwin at 1.

1298 See infra Chapter 17.B.

1299 ICSID Convention, art. 25,

1300 See generally Mortenson, supra note 1288. Many ICSID panels have used a five part test to determine whether a dispute is truly investment related. Under this test, to conclude that a dispute actually involves an investment, the panel must conclude (1) that the enterprise in question last for a certain duration (2) that there is a regularity of profit and return, (3) that the investor has assumed a certain amount of risk, (4) that the investor has made a substantial commitment and (5) that the investment has contributed to development of the state. Id at 271. However, the use of this test as dispositive is in direct contradiction with the intent of the balancing test’s author who viewed it only as a tool that arbitrators could use to help them in using their discretion to decide whether or not to hear a case. Id. at 274.

1301 If an ICSID panel refuses to hear a case, that may put the investor in a very difficult position because, in many cases, based on the bilateral investment treaty governing the dispute, ICSID is the only type of adjudication available to the parties. Thus, if such a claim cannot be heard under ICSID, the aggrieved investor will be left without a forum in which to bring the claim. Id. at 265. Even if there is another forum available to the investor, it would presumably not afford the investor the same protections that ICSID does.

1302 ICSID Convention, art. 14.

However, given the recent spike in cases brought under ICSID, ICSID was forced to amend its rules to provide for the expedited dismissal of a case that is without merit upon request of the parties.\(^{1305}\)

There are certain situations in which ICSID has the power to administer proceedings not covered by the ICSID convention. These include fact-finding proceedings and those proceedings that do not qualify under the ICSID Convention because either the parties or the dispute do not meet the ICSID jurisdictional requirements. Claims heard under these circumstances are governed by a separate framework known as the ICSID “Additional Facility Rules.”\(^{1306}\) The Additional Facility Rules are similar to the ICSID Convention but differ in one key respect. It is national law, not the ICSID Convention that governs the enforcement of arbitral awards.\(^{1307}\)

Consequently, a nation is at greater liberty to refuse to enforce an award. There is one provision, though, in the ICSID Additional Facility Rules that theoretically provides some protection to the investor akin to the provided by the ICSID Convention. That provision is that, even under the Additional Facility Rules, arbitration may not take place in a nation that is not a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.\(^{1308}\)

Thus, an investor may still have some recourse if the state refuses to pay an ICSID award even if it is not as strong as the recourse available under the ICSID Convention.

The actual procedures for arbitration under ICSID are very similar to those of any other sort of arbitration. The arbitration will be heard by either a single arbitrator or a panel of any odd number of arbitrators.\(^{1309}\) If the parties cannot agree on the number of arbitrators, the default is a panel of three arbitrators with each party choosing one arbitrator and the third arbitrator, the chairman of the panel, being appointed jointly by the parties.\(^{1310}\) If the parties cannot agree on the third arbitrator, the Secretary-General of ICSID will select the third arbitrator. In no circumstance will the majority of the arbitrators be nationals of either the country that is a party or the home country of the investor.\(^{1311}\) Unless the parties have otherwise agreed on what law will govern the proceeding, under the ICSID Convention, disputes between investors and


\(^{1305}\) Id.

\(^{1306}\) The Additional Facility Rules were adopted in 1978 but were seldom used with no award being made under the rules until 1999. J. Anthony VanDuzer, Enhancing the Procedural Legitimacy of Investor-State Arbitration through Transparency and Amicus Curiae Participation, 52 MCGILL L. J. 681, 690 (2007).

\(^{1307}\) ICSID Additional Facility Rules, art. 4.

\(^{1308}\) ICSID Additional Facility Arbitration Rules, art. 19.

\(^{1309}\) ICSID Convention, art. 37.

\(^{1310}\) Id.

\(^{1311}\) Id. at art. 39. This provision is inapplicable to circumstances in which there is only one arbitrator or in which the parties have agreed on the selection of the arbitration panel.
sovereign states are governed by the law of the host state as well as those provisions of international law that are applicable.\textsuperscript{1312}

Once a case has been heard under ICSID, the parties have limited appeal options. First, the parties may submit a request for clarification to the Secretary-General if there is a dispute as to exactly what the arbitrator meant.\textsuperscript{1313} The parties may also request the revision of an award based on the discovery of new facts.\textsuperscript{1314} Finally, under certain, very limited circumstances, the parties may appeal the ruling itself. These circumstances include an improperly constituted panel, the panel exceeding its powers, corruption on the part of the panel, serious departures from the rules or a failure to explain the reasons for the decision.\textsuperscript{1315} Other than those three avenues, the parties do not have a right to appeal and they are precluded from bringing the case in any other forum.\textsuperscript{1316}

Since it came into effect, the ICSID Convention has met with varying levels of success but its usage has increased dramatically in recent years. In ICSID’s first fifteen years, only eleven disputes were brought under the Convention and only six resulted in a final award.\textsuperscript{1317} The turning point for ICSID was likely the Argentine financial crisis of the late 1990’s and early 2000’s.\textsuperscript{1318} In the first thirty years of ICSID’s existence, none of the cases filed under the Convention involved Latin American governments.\textsuperscript{1319} Since 1996 though, over 40 cases have been filed against Argentina alone.\textsuperscript{1320} Another factor that has lead to the increase in ICSID cases is the proliferation of bilateral investment treaties through which all cases between one state and nationals of another must be submitted to ICSID. Thus, ICSID has become a major player in the realm of investor-state disputes.

B. **Sovereign Immunity**

One key issue that must be considered when discussing arbitration between an individual and a state is that the state may assert that it is not liable for any award based on the doctrine of sovereign immunity. ICSID’s requirement that member states treat its arbitral decisions just as they would treat decisions of their own courts is one of its main advantages over alternative channels through which aggrieved investors may pursue claims against sovereign states. The ICSID convention specifically provides, however, that it should not be construed as limiting the states’ rights to sovereign immunity.\textsuperscript{1321} Consequently, just because a state is a party to the ICSID Convention, that does not mean that it is automatically subject to the jurisdiction of

\textsuperscript{1312} Id. at art 42. In many cases, though, the parties have agreed to the controlling law through the use of a bilateral investment treaty. \textit{See} Mortenson, \textit{supra} note 1288, at 264.

\textsuperscript{1313} ICSID Convention, art. 50.

\textsuperscript{1314} Id. at art. 51.

\textsuperscript{1315} Id. at art. 52.

\textsuperscript{1316} Id. at arts. 26-27.

\textsuperscript{1317} Lowenfield, \textit{supra} note 1285, at 55.

\textsuperscript{1318} Tuck, \textit{supra} note 1304, at 886.

\textsuperscript{1319} Id.

\textsuperscript{1320} Id. There are also more than twenty more that have been filed during the same time frame against other Latin American governments. \textit{Id}.

\textsuperscript{1321} ICSID Convention, art. 55.
ICSID and will be responsible for any arbitral awards. However, once a case has been submitted
to ICSID, it becomes binding on the parties unless the parties jointly withdraw their consent to it
being heard by an ICSID tribunal. 1322 A country may not submit a case to ICSID and then,
following an unsatisfactory judgment, declare sovereign immunity and refuse to pay the
judgment.1323 This is the facet of ICSID arbitration that makes it superior to other international
arbitral bodies for investor-state disputes, because the investor should be confident that the state
will not renege on its obligation to pay. If state parties were permitted to then assert sovereign
immunity following an unsatisfactory judgment under the ICSID Convention, that would render
arbitration meaningless and defeat the original purpose of the Convention itself. Consequently,
decisions based on the ICSID Convention must be binding on all parties and arbitration awards
rendered under ICSID must be recognized in all signatory countries.

Theoretically, based on this dynamic, one might expect few cases to be referred to ICSID
because, if one party had a decided advantage by referring the case to ICSID, the other party
would refuse to consent. Presumably, a state that would have a decided advantage if the case
proceeded through its own judicial system would be reluctant to consent to a case being heard by
an impartial arbitrator. One solution to that has been the increased use of bilateral investment
treaties that make specific reference to ICSID arbitration.1324 Over the past twenty years, there
has been a tremendous increase in the number of bilateral investment treaties and they are now
the primary source of law governing investor-state litigation.1325 Through these treaties, which
also provide for many other rights and responsibilities in the investor-state relationship, countries
may agree that if the nationals of one country become involved in investment-related litigation
against the other sovereign state, the parties will be deemed to have consented to ICSID hearing
the case. By the 1990s, procedures for how to settle investor-state disputes had become standard
in most bilateral investment treaties.1326 The negative aspect of this, according to some critics, is
that these treaties are generally reached based on unequal bargaining power.1327 When one
country is desirous of investments from nationals of another country, critics argue that the
investors’ home country often coerces the country desiring the investment into entry into the
treaty. Ultimately, though, the country is making the informed decision to submit to the treaty

1322 Id. at art. 25.
1323 Id.
1324 See, e.g., Joseph E. Stiglitz, Regulating Multinational Corporations: Towards Principles of
Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities, 23
1325 See United Nations Conference on Trade and Development, The Entry into Force of Bilateral
Investment Treaties (BITs) UN Doc. UNCTAD/WEB/ITE/IIA/2006/9 (2006),
there were over 2,500 bilateral investment treaties worldwide, of which more than 1,700 were in force.
Id.
Bilateral Investment Treaties” in Nautilus Institute for Security and Sustainable Development,
International Sustainable and Ethical Investment Rules Project (2002),
1327 See, e.g. id., Zachary T. Elkins et al., Competing for Capital: the Diffusion of Bilateral Investment
and, if the country does not want to enter into the treaty, thereby potentially foregoing investment, it is fully within its rights to do so.

Even following consent to arbitrate before ICSID, it is possible that states will refuse to enforce or execute ICSID awards. Under the ICSID Convention, consent to arbitration under the Convention theoretically constitutes a waiver of sovereign immunity. However, not all courts will necessarily agree that an agreement to arbitrate in a foreign country actually constitutes a waiver of sovereign immunity. To date, four claims have been made challenging the enforcement or execution of ICSID awards. None of them have been successful in preventing the enforcement of the awards in their entirety but some have succeeded in preventing the execution against specific assets.

There are various avenues that a state may pursue in attempting to challenge an ICSID award. First, while the ICSID convention mandates that states treat ICSID awards as final judgment, several countries have provisions through which final judgments may be challenged. Some courts have even held that parties may not restrict appellate review by agreement and, consequently, ICSID’s prohibitions against challenges may not be enforced as they are against the public interest. None of these defenses are commonly successful in domestic litigation. However, given the national interest that may be present in ICSID disputes, it is possible that they may be employed and national courts may uphold them.

If a state were to refuse to enforce an ICSID arbitral award, it may run the risk of discipline from the World Bank or a claim being brought against it in the International Court of Justice. However, such a claim may only be pursued by another signatory state, not the individual investor, so a state may be willing to gamble that the investor’s home state would be unwilling take the effort to pursue the claim further. Furthermore, it is unclear whether the International Court of Justice could actually compel the payment of the ICSID award as opposed to just making a “recommendation” that the state comply with the award. Because states have not challenged many ICSID arbitral awards to date, it is not clear whether aggrieved investors

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1328 Id. U.S. courts have previously held, though, that a blanket agreement to submit all disputes to ICSID is not sufficient to constitute an implicit waiver of sovereign immunity when the agreement did not contemplate a role for U.S. courts. *Maritime Int’l Nominees Est. v. Rep. of Guinea*, 693 F.2d 1094, 1102-04 (D.C. Cir. 1982).
1330 Baldwin, supra note 1297, at 6.
1331 Id. at 9-10. For example, in the United States, a final judgment may be challenged based on mistakes, errors or omissions. Fed. R. Civ. P. 60. Likewise, there are limited circumstances in which a party may challenge the enforcement of an award from a sister state, such as fraud, a lack of jurisdiction or inadequate opportunity to be heard. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 103-05, 113-14, 117 (ALI 1989).
1332 Baldwin, supra note 1297, at 15.
1333 Id.
1334 Id. at 22.
1335 Id. at 22.
1336 Id. at 21.
will be turn to these remedies to ensure enforcement of ICSID awards or whether they will be successful in doing so.

ICSID was designed to address the issue of investors not having an impartial forum in which disputes with nations in which they invested could be heard. On its face, ICSID addresses this issue by requiring signatory states to agree to treat ICSID arbitral decisions just as they would treat decisions of their national courts. While this is not a perfect solution and there is the possibility that, in the future, states will attempt to take advantage of certain loopholes, whether that will be successful remains to be seen and, in any event, ICSID arbitration provides much greater protection in this respect than any of the available alternatives.

XVIII. CHAPTER 18: INTRODUCTION TO INTERNATIONAL LITIGATION

The world has become a smaller place. “International trade is at an all-time high and is increasing steadily; international investment and monetary flows increase apace; businesses from the developed countries establish themselves all over the globe directly or through subsidiaries; business people travel abroad as a matter of routine; ordinary citizens in increasing numbers live temporarily or permanently outside their native countries.” Litigation resulting from cross-border activities, both economic and social, correspondingly has increased.

A direct consequence of this development is that attorneys often must consider features of other countries’ legal systems in advising clients about how to proceed with actual or potential litigation. Skilled counsel must recognize when a suit could be brought in an international jurisdiction or dismissed because the litigation should take place in another country instead of in the United States. He or she must anticipate the strategic and tactical reasons why litigating in another part of the world might be better or worse for a client. And he or she must understand how to navigate issues that cross over into multiple jurisdictions.

This chapter and the chapters that follow explore the fundamentals of international litigation. They address the differences between litigating in the United States and abroad, the reasons one might prefer a particular forum, and the mechanisms to select a forum or obtain dismissal of an action brought in the wrong place. They also address several recurring issues in cross-national practice: service of process, cross-border discovery, and the intersection of criminal and civil matters in different jurisdictions, to name a few.

A. Differences between Common Law and Civil Law Systems

Frequently, litigation in the United States and other common law jurisdictions is compared with litigation in civil law jurisdictions. This section outlines the general differences between the common law system in the United States and civil law litigation. Litigation in the

courts of other countries varies by jurisdiction, however, and practitioners should seek out current information specific to the country in which they expect to litigate.\footnote{1338}{See Oscar G. Chase, \textit{American “Exceptionalism” and Comparative Procedure}, 50 AM. J. COMP. L. 277, 284 (2002) (noting that “differences between nations within a category can be considerable”).}

Traditionally, the common law system is described as “adversarial” while the civil law system is characterized as “inquisitorial.” That distinction goes to the “locus of responsibility for the proper conduct of the litigation.”\footnote{1339}{George Bermann, \textit{Litigation in the Civil Law and the Common Law: The Basics, in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE} 16 (Barton Legum ed., 2005).} In the United States, the attorneys set the course and pace of the litigation.\footnote{1340}{Richard L. Marcus, \textit{Putting American Procedural Exceptionalism into a Globalized Context}, 53 AM. J. COMP. L. 709, 723-24 (2005)} Judges normally do not investigate issues absent a request from one of the parties. In civil law jurisdictions, by contrast, judges tend to identify key issues and determine how to resolve them.\footnote{1341}{Id.} For example, Section 139 of the German Civil Procedure Code imposes an affirmative duty on judges to ascertain the truth.\footnote{1342}{Id.}

That broad distinction between the two systems has implications throughout the various phases and aspects of litigation, including:

\textit{Use of Civil Juries.} “The jury is one of America’s most venerated institutions,”\footnote{1343}{William W. Schwarezer & Alan Hirsch, \textit{The Modern American Jury: Reflections on Veneration and Distrust, in VERDICT} 399 (Robert E. Litan ed., 1993)} and United States Constitution guarantees the right to trial by jury in most civil cases.\footnote{1344}{U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.”).} Although some other common law jurisdictions retain more limited of civil juries, “civil juries have never been found in any of the countries that follow continental procedure.”\footnote{1345}{Chase, supra note 1338, at 288.} The distinction between systems relying on a jury as the trier of fact versus a judge, however, does not perfectly track the distinction between common law and civil law systems: even in the United Kingdom’s common law system, in which the civil jury originated, juries are now used only a tiny subset of non-criminal trials.\footnote{1346}{MARY ANN GLENDON, MICHAEL WALLACE GORDON, & CHRISTOPHER OSAKWE, \textit{COMPARATIVE LEGAL TRADITIONS} 613-27 (2nd ed. 1994).}

\textit{Witness Testimony and the Record.} In civil law jurisdictions, the judge typically decides which witnesses to call, instead of the parties.\footnote{1347}{Id.} Often, the judge will ask open-ended questions to allow the witnesses to tell their story, instead of the counsel controlling the record.\footnote{1348}{Id.} The record is essentially a product of the judge’s decisions and sometimes may not even include verbatim transcripts of oral testimony.\footnote{1349}{Id.} Instead, the judge may summarize the testimony in the

\footnote{1338}{See Oscar G. Chase, \textit{American “Exceptionalism” and Comparative Procedure}, 50 AM. J. COMP. L. 277, 284 (2002) (noting that “differences between nations within a category can be considerable”).}
\footnote{1339}{George Bermann, \textit{Litigation in the Civil Law and the Common Law: The Basics, in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE} 16 (Barton Legum ed., 2005).}
\footnote{1341}{Id.}
\footnote{1342}{Id.}
\footnote{1344}{U.S. CONST. amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.”).}
\footnote{1345}{Chase, supra note 1338, at 288.}
\footnote{1346}{MARY ANN GLENDON, MICHAEL WALLACE GORDON, & CHRISTOPHER OSAKWE, \textit{COMPARATIVE LEGAL TRADITIONS} 613-27 (2nd ed. 1994).}
\footnote{1347}{Bermann, supra note 1339, at 17-18.}
\footnote{1348}{Id.}
\footnote{1349}{Id. at 18.
form of minutes.\textsuperscript{1350} The judge also often appoints his or her own expert and avoids basing decisions on a battle of party experts.\textsuperscript{1351}

\textit{Burden of Proof.} In the adversarial system, parties bear distinct burdens of proof in persuading the trier of fact. The civil law system, on the other hand, usually does not assign a burden of proof.\textsuperscript{1352} That difference stems from the understanding in the civil law system that the judge can arrive at a “personal conviction” regarding the truth.\textsuperscript{1353}

\textit{Timing of Trials.} United States courts clearly delineate between the pretrial and trial phases of litigation. The pretrial phase can be protracted, but the trial normally occurs in a compact period of time.\textsuperscript{1354} Civil law courts allow a more “discontinuous” trial, meaning hearings held on non-consecutive days where the facts and issues are defined progressively.\textsuperscript{1355}

\textit{Appellate Review.} Civil law jurisdictions are much more likely to allow \textit{de novo} review on appeal. Intermediate appellate judges independently assess the evidence introduced in the trial court, and they also may admit and consider new evidence.\textsuperscript{1356}

\textit{Cost of Litigation.} Costs of litigating in the adversarial system are born by the parties. Civil law systems rely more heavily on public funds due to the number of judges needed to administer cases where judges serve the central truth-seeking function. The litigants bear comparatively lower costs in the civil law system because their counsel generate lower fees in their reduced role.\textsuperscript{1357}

The above distinctions have lessened somewhat over time. In the United States, judges now sometimes play a more active managerial role. In civil law jurisdictions, out of necessity due to crowded dockets, judges have given parties greater responsibility for the conduct of the litigation.\textsuperscript{1358}

\textbf{B. Advantages and Disadvantages to Litigating in U.S. Courts}

Litigating in United States courts bears several advantages and disadvantages over other courts, depending on the litigant’s position and case strategy.

For plaintiffs, a key reason to prefer the United States is the availability of several procedural devices that can increase the available recovery. First, as discussed above, a plaintiff

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1350} Id.
\item \textsuperscript{1351} Id.
\item \textsuperscript{1352} Id. at 20.
\item \textsuperscript{1353} Id. at 21.
\item \textsuperscript{1354} Id. at 20.
\item \textsuperscript{1355} Id.
\item \textsuperscript{1356} Id. at 21.
\item \textsuperscript{1357} Id. at 22.
\item \textsuperscript{1358} Id. at 19; see also Scott Dobson & James M. Klebba, \textit{Global Civil Procedure Trends in the Twenty-First Century}, 34 B.C. INT’L & COMP. L. REV. 1, 2 (2011) (describing “trends in both U.S. procedure norms and foreign norms that suggest convergence”).
\end{itemize}
\end{footnotesize}
in the United States can secure a jury trial.\textsuperscript{1359} Second, United States courts generally permit liberal pleading, which can make it easier for plaintiffs to bring and prove their claims.\textsuperscript{1360} The liability standards may also differ, for example, by the United States recognizing strict liability in tort where another country does not.\textsuperscript{1361} Third, punitive damages are available for certain claims in the United States, but not in most other countries.\textsuperscript{1362}

Plaintiffs may also prefer United States courts for the ability to join claims and parties, or to use the class action mechanism.\textsuperscript{1363} Although other countries have started to adopt class action procedures, the procedure in the United States is the most developed.\textsuperscript{1364}

Another factor that is often significant to a party’s choice of where to litigate is the vastly different scope of pretrial discovery available. United States courts afford broad pretrial discovery which may be attractive to plaintiffs who might otherwise have difficulty proving up their claims.\textsuperscript{1365} This contrasts sharply with the rule in continental Europe, Japan, and other civil law jurisdictions, where the investigative power of the parties and their lawyers is generally very limited.\textsuperscript{1366} But that discovery process can be long and expensive, and the defendant of course is entitled to use the same techniques reciprocally to obtain information from the plaintiff.\textsuperscript{1367} The time consumed by discovery also tends to delay a potential recovery.

In many cases, however, these general procedural considerations will give way to case-specific interests. The substantive law or judicial precedent governing a particular claim might differ between jurisdictions. One forum might be substantially more convenient to a party’s attorneys or witnesses. Counsel must balance these interests against the procedural costs and benefits of litigating in United States courts in deciding where to file suit, or deciding as a defendant whether to contest the plaintiff’s choice of forum.

C. Role of Comity in International Litigation

Within a single legal system, a hierarchy typically exists that conveys finality to certain types of decisions or judgments. For example, the Full Faith and Credit Clause of the U.S. Constitution requires states to respect the “public acts, records, and judicial proceedings of every other state.”\textsuperscript{1368} The result is that a judgment in one forum is mutually recognized in

\begin{flushleft}
\textsuperscript{1360} HAROLD HONGJU KOH, \textit{TRANSNATIONAL LITIGATION IN UNITED STATES COURTS} 155 (2008)
\textsuperscript{1361} Id.
\textsuperscript{1362} Teitz, \textit{supra} note 1359, at 59.
\textsuperscript{1363} Id. at 58
\textsuperscript{1364} Id. at 59.
\textsuperscript{1365} Id.
\textsuperscript{1366} MIRJAN R. DAMAKA, \textit{EVIDENCE LAW ADRIFT} 115 n. 80 (1997); \textit{see also} Chase, \textit{supra} note 1338, at 293 (“In civil law countries compulsory production of evidence is viewed as more properly a governmental function and discovery is objectionable because it allows the litigants to exercise powers and functions that should be reserved for the court.”).
\textsuperscript{1367} Teitz, \textit{supra} note 1359, at 59.
\textsuperscript{1368} U.S. CONST. art. IV, § 1.
\end{flushleft}
another forum, through principles such as preclusion, so as to protect the interest in finality that is shared by both courts and litigants.

In most countries, including the United States, however, the standard domestic rules designed to protect finality may not extend to foreign judgments. Instead, for over a century, the United States courts have held that recognition of foreign judgments depends on the principle of comity. International comity is “concerned with maintaining amicable working relationships between nations, a shorthand for good neighborliness, common courtesy and mutual respect between those who labor in adjoining vineyards.” A United States court may “decline to exercise jurisdiction that is otherwise properly asserted” based considerations of international comity.

The United States Supreme Court consistently has characterized comity as an equitable doctrine to be applied at a court’s discretion, rather than a source inviolable duty to respect foreign rules and judgments:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

The bounds of when consideration of comity is appropriate, however, remain relatively poorly defined. Some courts have limited application of international comity to instances “when there is a true conflict between American law and that of a foreign jurisdiction.” In other circumstances, courts have cited the needs for predictability and finality to afford broad preclusive effect to foreign judgments. Two Supreme Court decisions in international antitrust cases issued weeks apart in 2004 underscore the case-specific nature of the doctrine. In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, the Court cited the importance of comity in holding that foreign purchasers could not maintain a damages claim under the Sherman Act “independent of any adverse domestic effect.” Conversely, in *Intel Corp. v. Advanced Micro Devices, Inc.*, the Court rejected the use of comity to limit a European antitrust plaintiff’s ability to obtain discovery in the United States that it could not have obtained in the European forum:

1370 See *Hilton v. Guyut*, 159 U.S. 113 (1895).
1371 *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (internal quotation marks and citations omitted).
1373 *Hilton*, 159 U.S. at 163-64.
“While comity and parity concerns may be important as touchstones for a district court’s exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of” the statute authorizing United States courts to assist foreign tribunals or litigants.1377

The Foreign Relations Law Restatement articulates a non-exhaustive list of eight considerations typically relevant to a court’s decision whether to abstain based on the international comity doctrine:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.1378

United States courts often apply these factors, either explicitly or implicitly,1379 and they likely are the best starting point for an argument for or against abstention based on comity.1380

1378 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2) (1987); see also id. cmt. b (“Not all considerations have the same importance in all situations; the weight to be given to any particular factor depends upon the circumstances.”).
1379 See, e.g., Telenor Mobile Commc’ns v. Storm LLC, 584 F.3d 396, 408 (2d Cir. 2009) (refusing to accord comity when international tribunal lacked jurisdiction or a judgment was fraudulently obtained); Int’l Transactions, Ltd. v. Embottelladora Agral Regiomotana, S.A., 347 F.3d 589, 594 (5th Cir. 2003) (refusing to accord comity when foreign tribunal’s procedures failed to comport with fundamental elements of due process).
A trial court’s determination of whether comity applies is critically important; because the doctrine is discretionary, appellate courts review the initial determination only for abuse of discretion.\textsuperscript{1381} It is clear that a party seeking relief based on a foreign judgment or rule bears the initial burden of proving that such a judgment or rule exists.\textsuperscript{1382} Once that burden is carried, however, there is a split of authority as to which party bears the burden of proof with respect to an argument that the United States court should abstain.\textsuperscript{1383}

**XIX. CHAPTER 19: CHOOSING THE APPROPRIATE FORUM**

At the outset of any civil case, both plaintiffs and defendants typically must address two threshold issues: where a dispute should be heard, and what law should apply. When litigation takes on an international dimension, answering those questions becomes more complex and, in many instances, more important. The law in possibly relevant jurisdictions may differ with respect to statutes of limitations, presumptions, evidentiary burdens, and even the existence of causes of action. This chapter provides a primer on how to analyze those issues, with emphasis placed both on how plaintiffs can avoid costly mistakes in choosing where to litigate and how defendants can combat abusive or otherwise disadvantageous forum selections. The chapter also touches on steps that parties can take before litigation to minimize the risk of forum disputes and to ensure consideration in a preferred forum should litigation arise – most significantly, the use of forum selection clauses and choice of law provisions in transnational agreements.

**A. Contract Formation and International Litigation**

1. **Forum Selection**

Contracting parties often include a forum selection clause in their agreement. The clause may provide for an exclusive forum, a nonexclusive forum, or multiple potential forums. Sometimes, the term “prorogation” is used to describe nonexclusive clauses and the term “derogation” is used to describe exclusive clauses.\textsuperscript{1384}

The key question is “how much deference should [and does] the court pay to that clause?”\textsuperscript{1385} Where a forum selection clause exists and the plaintiff initiates the action within the designated forum, the defendant will have significantly greater difficulty challenging venue. (The general principles applied absent forum selection clauses, for example in tort cases, are discussed in section C, below.) The modern trend in United States courts has been to apply a presumption in favor of forum selection clauses.

\textsuperscript{1381} See Jota v. Texaco, Inc., 157 F.3d 153, 160 (2d Cir. 1998).
\textsuperscript{1382} Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1121 (9th Cir. 1994).
\textsuperscript{1383} Compare, e.g., Ackerman v. Levine, 788 F.2d 830, 842 n.12 (2d Cir. 1986) (requiring party seeking enforcement of foreign judgment to make a prima facie showing that there was subject matter jurisdiction, personal jurisdiction, and regular proceedings conducted in accordance with fundamental due process) with Banque Libanaise Pour le Commerce v. Khreich, 915 F.2d 1000, 1005 (5th Cir. 1990) (placing “the burden of non-recognition” of a foreign judgment on the defendant).
\textsuperscript{1384} Stephen C. McCaffrey & Thomas O. Main, Transnational Litigation in Comparative Perspective 181 (2009).
\textsuperscript{1385} Harold Hongju Koh, Transnational Litigation in United States Courts 165 (2008).
In *The Bremen v. Zapata*, the Supreme Court upheld a forum selection clause that provided the parties would resolve their disputes in the English Courts. Specifically, the parties had agreed: “Any dispute arising must be treated before the London Court of Justice.” Despite that clause, the plaintiff sued in the District Court at Tampa. On the defendant’s motion to dismiss, the district court erroneously gave the forum selection clause little weight and instead applied a *forum non conveniens* analysis. Under that analysis, the district court found no reason to disturb the plaintiff’s choice of forum. The Court of Appeals affirmed.

The Supreme Court reversed, holding that “far too little weight and effect were given to the forum clause in resolving this controversy.” The Court found compelling reasons to give effect to the clause which was “a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power.” According to the Court, the district court should have “enforce[d] the forum selection clause specifically unless Zapata could clearly show the enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.” “[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.”

The *Bremen* has been described as “a ringing endorsement of party autonomy in international business transactions.” The Court noted that “[w]e cannot have trade and commerce in world markets and international water exclusively on our terms, governed by our laws, and resolved in courts.” In addition to party autonomy, the Court’s opinion appears to give significant weight to comity toward other courts, certainty in contracting, and relieving overcrowded dockets.

In *Carnival Cruise Lines v. Shute*, the Supreme Court continued to favor enforcement of forum selection clauses. There, the clause was contained in a form-contract printed on a cruise ticket. It provided that all disputes should be litigated in a court in Florida, to the exclusion of all other courts. Despite that clause, plaintiffs sued in the United States District Court for the Western District of Washington. The district court dismissed the case for lack of personal jurisdiction. The court of appeals reversed on that ground, but held that the forum

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1387 *Id.* at 2.
1388 *Id.* at 6.
1389 *Id.* at 9.
1390 *Id.* at 12.
1391 *Id.* at 15.
1392 *Id.* at 18.
1393 Koh, *supra* note 1385, at 166.
1395 Koh, *supra* note 1385, at 167-68.
1397 *Id.* at 587-88.
selection clause should not be enforced because it was not freely bargained-for and the plaintiffs were “physically and financially incapable of pursuing this litigation in Florida.”\(^{1398}\)

The Supreme Court reversed, applying *The Bremen*. It declined to hold that “a non-negotiated forum-selection clause in a form ticket contract is never unenforceable simply because it is not the subject of bargaining.”\(^{1399}\) “Including a reasonable forum clause in a form contract of this kind may be permissible for several reasons.”\(^{1400}\) The Court held that plaintiffs had not satisfied the “heavy burden of proof” required to set aside the clause on inconvenience grounds.\(^{1401}\)

After *Carnival Cruise Lines*, cases involving foreign sites and parties typically enforce forum selection clauses unless a party can challenge the underlying validity of the clause, carrying the heavy burden of showing fraud or overreaching, or injustice or unreasonableness.\(^{1402}\) If the forum selection clause is found to be valid, the party seeking a different forum generally cannot raise a *forum non conveniens* argument based on its own personal inconvenience; the clause is deemed assent to that inconvenience.\(^{1403}\) In rare circumstances, however, *forum non conveniens* may apply notwithstanding a valid forum selection clause if the inconvenience is to a third party or to the court itself.\(^{1404}\)

Parties facing an action in a United States court and seeking to enforce a forum selection clause that names a different forum should move to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3).

Forum selection clauses are enforceable in principle in most foreign legal systems as well, but some systems preclude forum selection clauses in certain types of contracts.\(^{1405}\) For example, a European Union Council Regulation forbids most pre-dispute forum selection

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\(^{1398}\) Id. at 588-89.

\(^{1399}\) Id. at 593.

\(^{1400}\) Id.

\(^{1401}\) Id. at 595.


\(^{1404}\) Id. (“Even when the parties to a contract have included a privately negotiated forum selection clause, the court is free to consider the question of convenience.”)

agreements in insurance, consumer, and employment contracts, while expressly permitting enforcement of forum selections in other types of contracts.1406

2. Choice of Law

Many commercial contracts specify not only a forum in which the parties intend for a dispute to be heard, but also the source of law under which the parties intend for the dispute to be resolved. Although contracts often will specify a choice of the law of the forum jurisdiction, the two provisions do not need to correspond. For example, a contract might specify exclusive jurisdiction in France but call for resolution pursuant to New York law. In most jurisdictions, including under federal common law in the United States, courts place significant, but not necessarily dispositive, weight on the parties’ choice of law.1407

Choice of law clauses raise two main issues. First, what considerations might cause a court to reject a contractual choice of law? Second, what law does the court apply in the validity of forum selection and choice of law provisions – the law in the court’s jurisdiction or the law chosen by the parties?

Regarding the first question, limits on the enforceability of choice of law provisions typically parallel limits on the enforceability of forum selection clauses. The most commonly applied limit is that choice of law clauses generally may not be enforced if a court deems them contrary to public policy.1408 In almost all United States jurisdictions and most international jurisdictions, however, courts typically enforce choice of law provisions in adjudicating the substance of a transnational contract.1409

Regarding the second question, a court typically will apply the law of the forum – “lex fori” – when determining the validity and enforceability of international forum selection and choice of law clauses.1410

In the United States, that choice is a matter of common law, and courts typically make it without performing an explicit choice of law analysis.1411 That is the case even if the contract includes not only a forum selection clause but also a choice of law provision naming a different jurisdiction’s law.1412 Several courts have questioned this lex fori bias,1413 but to date there has been no serious movement to apply contractually chosen law instead to preliminary questions.1414

1406 Compare Council Regulation 44/2011, art. 23, 2001 O.J. (L 12) 1 (governing forum selection clauses generally) with id. at art. 13 (insurance contracts), id. at art. 17 (consumer contracts), & id. at art. 21 (employment contracts).


1408 Teitz, supra note 1402, at 57.

1409 Id.

1410 Id.


1412 See, e.g., K & V Scientific Co. v. Bayerische Motoren Werke AG, 314 F.3d 494, 496, 500 (10th Cir. 2002); Afram Carriers, Inc. v. Moeykens, 145 F.3d 298, 301 (5th Cir. 1998); Polar Shipping, Ltd. v.
In Europe, a European Union Council Regulation has been interpreted to mandate the use of *lex fori* to adjudicate international forum selection issues.\(^{1415}\) This result mirrors the approach taken by most European courts prior to the adoption of the regulation, and in areas where the regulation does not apply.\(^{1416}\) The one major exception appears to be Germany, where courts typically apply standard contract conflict of law rules to determine what law governs the validity and construction of forum selection clauses and choice of law clauses.\(^{1417}\)

**B. Examination of Choice of Law in International Litigation**

In contract actions involving choice of law provisions, both United States and foreign jurisdictions typically give effect to the law chosen by the parties, unless the choice of law provision is invalid or unenforceable.\(^{1418}\) When a claim is not covered by a contractual choice of law, courts apply a wide range of rules to determine what law should apply in international litigation. That determination generally is made on a claim-by-claim basis; different claims within the same litigation can be governed by different jurisdictions’ substantive law.\(^{1419}\)

Civil law systems tend to have codified rules of private international law.\(^{1420}\) Those rules sometimes govern the substantive resolution of claims; when they do not, they specify how to choose among the substantive law of the forum, the substantive law of the jurisdiction in which some event relevant to the action took place, the substantive law in the domicile of one or more of the parties, or some other source of law.\(^{1421}\) Because the codified rules often are clear and detailed, except in rare tough cases, parties may accurately predict the law the court will apply and the likely outcome based on that law.\(^{1422}\)

In contrast, in the United States, choice of law rules generally are governed by common law, and they vary dramatically from jurisdiction to jurisdiction.\(^{1423}\) Moreover, the law in many states has evolved over the past two decades, in response both the increase in international

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\(^{1413}\) *Oriental Shipping Corp.*, 680 F.2d 627, 632-33 (9th Cir. 1981); *Intermetals Corp. v. Hanover Int’l AG für Industrieversicherungen*, 188 F. Supp. 2d 454, 460 n.3 (D.N.J. 2001). For one of the rare examples of a case applying the choice of law provision to forum selection, see *AVC Nederland B.V. v. Atrium Inv. Pshp.*, 740 F.2d 148, 150 (2d Cir. 1984).

\(^{1414}\) E.g., *Instrumentation Assocs. v. Madsen Elecs.*, 859 F.2d 4, 7 (3d Cir. 1988).

\(^{1415}\) *Symeonides et al., supra* note 1411, at 214.

\(^{1416}\) *Yackee, supra* note 1405, at 72.

\(^{1417}\) *Id.* at 72-73 (describing general trends and citing decisions under French and Belgian law).

\(^{1418}\) *Id.* at 74 (noting that this approach has been described as “controversial”).

\(^{1419}\) *Symeonides et al., supra* note 1411, at 558.

\(^{1420}\) *Teitz, supra* note 1402, at 57.
litigation and changing attitudes towards the role of a forum court.\textsuperscript{1424} The remainder of this section summarizes those varying choice of law rules.

Some states – including Alabama, Georgia, Kansas, Maryland, New Mexico, South Carolina, Virginia, and Wyoming – continue to apply an approach referred to as the “traditional test,” based on the First Restatement of Conflict of Laws.\textsuperscript{1425} Under the traditional test, what law applies depends on single points of contact relevant to the particular cause of action.\textsuperscript{1426} Tort and fraud actions, for example, are governed in nearly all issues by the law of the place of wrong – “the state where the last event necessary to make an actor liable for an alleged tort takes place.”\textsuperscript{1427} Typically, that is the place where the ultimate loss is sustained.\textsuperscript{1428} In contract claims, the law of the place where “the principal event necessary to make a contract occurs” typically governs both validity and interpretation.\textsuperscript{1429} In property claims, the law of the jurisdiction where the property is located – or was located at the time of the disputed transaction, if the property is movable – generally controls.\textsuperscript{1430}

A majority of states, including such key jurisdictions as Delaware, Illinois, and New York, apply some version of the “significant relationship” test set forth in the Second Restatement of Conflict of Laws.\textsuperscript{1431} Under the significant relationship test, absent a relevant constitutional or statutory limitation on choice of law, courts consider seven general principles in determining the applicable law:

1. the needs of the interstate and international systems;
2. the relevant policies of the forum;
3. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
4. the protection of justified expectations;
5. the basic policies underlying the particular field of law;
6. certainty, predictability and uniformity of result; and
7. ease in the determination and application of the law to be applied.\textsuperscript{1432}

\textsuperscript{1425} GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 46 (5th ed. 2011).
\textsuperscript{1426} Id.
\textsuperscript{1427} RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).
\textsuperscript{1428} Id. § 377 illus. 4.
\textsuperscript{1429} Id. § 332; see also id. § 311 cmt. d.
\textsuperscript{1430} Richman & Riley, supra note 1424, at 1209.
\textsuperscript{1431} Symeon C. Symeonides, Choice of Law in the American Courts in 2006: Twentieth Annual Survey, 54 AM. J. COMP. LAW 697, 712 (2006). Other states following this approach include Alaska, Arizona, California (contracts only), Colorado, Connecticut, Idaho, Iowa, Maine, Mississippi, Missouri, Montana, Nebraska, Ohio, South Dakota, Texas, Utah, Vermont, and Washington. Id.
\textsuperscript{1432} RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1975).
In applying these “Section 6 principles,” courts examine jurisdictional facts related to each claim. For example, in assessing contract claims, the Second Restatement calls for consideration of the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered.1433

Finally, some states – including states that nominally apply the substantial relationship test – are moving toward an analysis focused on the relative government interests of the involved jurisdictions. California, for example, uses this approach with respect to tort claims.1434 This government interest analysis proceeds in four steps.

First, the court determines whether the other proposed source of law differs from the law of the forum; if there is no conflict, the forum law applies.1435 In international litigation, if a party proposes to apply foreign law, that party bears the burden of showing that the proposed laws “materially differ[s]” from the forum law, such that its application is likely to lead to different results.1436 Third, if there is a materially difference, the court considers the relative interests of each jurisdiction in applying its laws to the matter.1437 Where neither state has an interest in applying its laws, the laws of the forum will apply.1438 Finally, fourth, if each jurisdiction has a legitimate interest in the application of its rule of decision, then the court analyzes the “comparative impairment” of the interested jurisdictions to identify the law of the state whose interest would be the more impaired if its law were not applied.1439 As part of this final step, courts applying a government interest analysis often will turn back to the substantial relationship factors outlined in the Second Restatement, which are relevant to whether an adjudication would impair a government’s interests.

C. Challenging the Plaintiff’s Choice of Forum

One of the first questions facing a defendant after a lawsuit with an international dimension is filed is whether to attempt to move the litigation out of the forum in which the plaintiff filed it. In some instances, strategic considerations or the cost of seeking a forum change might push a defendant to accept the plaintiff’s forum selection. But because the choice of forum can significantly impact the substantive resolution of a claim, and because a smart plaintiff likely will have chosen a forum that is favorable to its interests, a defendant typically should at least consider whether a challenge to the plaintiff’s forum choice is available. This section address the two primary doctrines that can be used in such a challenge: venue and forum non conveniens. In addition to those two doctrines, a plaintiff always should consider whether a valid forum selection clause provides a basis to assert that the litigation should take place in an alternative forum.

1433 Id. § 188.
1438 Id.
1439 Id. at 1422.
1. Venue

International litigation presents several complex venue issues that are not raised in ordinary domestic litigation. These issues revolve around how to assess venue when the defendant is a foreign state, corporation, or individual.


In United States federal courts, venue is typically governed by 28 U.S.C. § 1391(d). Section 1391(d) provides that non-United States citizens may be sued in any district in which they can be found, meaning any district in which they are subject to personal jurisdiction. The effect of the provision is to minimize the traditional distinction between personal jurisdiction and venue for most kinds of suits against aliens. The Supreme Court has described § 1391(d) “not as a venue restriction at all, but rather as a declaration of the long-established rule that suits against aliens are wholly outside the operation of all the federal venue laws, general and special.” This abrogation of ordinary venue restrictions applies to alien individuals and foreign corporations alike. The plaintiff continues to bear the burden of establishing proper venue, but unless an exception to § 1391(d) applies (see below), that burden necessarily will be met by a showing that the defendant is subject to personal jurisdiction.

2. Venue under the Foreign Sovereign Immunities Act

The FSIA carves out an exception to the above rule. The FSIA is “[t]he only source of subject matter jurisdiction over a foreign sovereign in the courts of the United States.” The FSIA limits the authority of United States courts to exercise jurisdiction over foreign states and their “agencies or instrumentalities” and, when jurisdiction is permitted, restricts the venue in which suits may be brought. This section focuses on those venue restrictions.

Different rules apply to foreign states and political subdivisions, on the one hand, and agencies and instrumentalities of a foreign state, on the other hand. With respect to states and subdivisions, venue is always available in the U.S. District Court for the District of Columbia. Venue also is proper where “substantial part of the events or omissions giving rise to the claim occurred;” where a “substantial part of the property” at issue is located; or, for claims involving maritime liens, where the vessel or cargo is located. In other jurisdictions where

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1440 Of course, the doctrine venue as applied to litigation without an international dimension already presents many complex issues, which are beyond the scope of this discussion. For a good treatment of the subject touching on how domestic venue considerations can be applied in international litigation, see Andrew S. Bell, Forum Shopping and Venue in Transnational Litigation (2003).
1441 Teitz, supra note 1402, at 53.
1443 Teitz, supra note 1402, at 53-54.
1444 Garb v. Republic of Poland, 440 F.3d 579, 581 (2d Cir. 2006).
1446 Id. at § 1391(f)(1).
1447 Id.
1448 Id. at § 1391(f)(2).
there is personal jurisdiction over the state or subdivision but where none of these specific considerations apply, venue is not proper in the FSIA context.

With respect to agencies and instrumentalities of a foreign state, venue options are even more restricted. As with foreign states and subdivisions, venue is proper where a substantial part of the relevant events or omissions occurred or a substantial part of the property at issue is located.\textsuperscript{1449} Venue also is proper in a district where the agency or instrumentality is “licensed to do business or is doing business.”\textsuperscript{1450}

In either context, parties may contract around the FSIA’s venue restrictions.\textsuperscript{1451} Because the statutory bases are fairly restrictive, contractual consent to venue can be especially useful.

3. \textit{Forum Non Conveniens}

Even if venue is proper – as it often will be in cases against foreign defendants, especially if the defendant is not a foreign state or an agent or instrumentality of a foreign state – a defendant may be able to overcome a plaintiff’s choice of forum under the doctrine of \textit{forum non conveniens}. To apply the doctrine, the defendant must show that an adequate alternative forum exists, that the relevant public and private interests weigh in favor of dismissal, and that the plaintiff can bring suit in an alternative forum without undue inconvenience or prejudice. That analysis tends to be very fact specific and affords the court considerable flexibility in determining whether to dismiss the case.\textsuperscript{1452} That flexibility in turn leads to significant unpredictability, expensive litigation, and the potential for abuse.\textsuperscript{1453}

In 1947, the United States Supreme Court applied the doctrine of \textit{forum non conveniens} for the first time in its decision in \textit{Gulf Oil Corp. v. Gilbert}.\textsuperscript{1454} The Court explained: “The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute.”\textsuperscript{1455} “The doctrine leaves much to the discretion of the court to which plaintiff resorts.”\textsuperscript{1456} The Court identified the factors to be considered, including the private interest of the litigant (for example “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive”) and the public interest (for example, “[a]dmninistrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin”).\textsuperscript{1457} Taking into account all those factors, the Court ruled

\begin{itemize}
\item \textsuperscript{1449} Id. at § 1391(f)(1).
\item \textsuperscript{1450} Id. at § 1391(f)(3).
\item \textsuperscript{1451} BORN & RUTLEDGE, supra note 1425, at 368.
\item \textsuperscript{1452} Teitz, supra note 1402, at 56.
\item \textsuperscript{1453} Id.
\item \textsuperscript{1454} Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).
\item \textsuperscript{1455} Id. at 507.
\item \textsuperscript{1456} Id. at 508.
\item \textsuperscript{1457} Id. at 508-09.
\end{itemize}
that the district court had not exceeded its powers or discretion in dismissing the complaint under the forum non conveniens doctrine.

The leading contemporary articulation of the doctrine of forum non conveniens comes from the Supreme Court’s opinion in *Piper Aircraft Co. v. Reyno*. Plaintiff sued on behalf of the estates of several Scottish citizens killed in an air crash. The district court granted defendants’ motion to dismiss on the ground of forum non conveniens. The court of appeals reversed because the law of the alternative forum, Scotland, was less favorable to the plaintiff. The Supreme Court reversed, holding that the possibility of unfavorable law does not by itself bar dismissal. The Court also stressed the deferential review standard: “The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.”

The Court approved of the distinction the district court drew between citizen plaintiffs and foreign plaintiffs. “Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.” The Court also concluded that the court of appeals should not have rejected the district court’s Gilbert analysis of the private and public interests. At bottom, the district court “did not act unreasonably” in deciding that the private and public interests favored trial in Scotland.

In *Sinochem International Co. v. Malaysia International Shipping Corp.*, the Supreme Court clarified the function of the forum non conveniens doctrine. The Court held that:

>a district court has discretion to respond at once to a defendant’s forum non conveniens plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant, if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.

That process furthers the purpose of the forum non conveniens doctrine, which is to protect defendants from unnecessary effort and expense. It also is the less burdensome course for the courts.

**XX. CHAPTER 20: PARALLEL PROCEEDINGS: LIS ALIBI PENDENS AND ANTISUIT INJUNCTIONS**

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1459 *Id.* at 238.
1460 *Id.* at 257.
1461 *Id.* at 256.
1462 *Id.* at 261.
1463 *Id.*
1465 *Id.* at 425.
International commercial relationships create the potential for the courts of different sovereigns to adjudicate the same dispute. Parties to these disputes will often want proceedings to be consolidated in one forum, and will also often have economic and strategic incentives to prefer a particular jurisdiction over another. There are three principal mechanisms through which parties may attempt to select a desired forum. First, parties may bring a motion for dismissal of the case in an undesired forum based on *forum non conveniens*. Second, parties may attempt to stay proceedings in one forum pending the resolution of proceedings in the other forum, under the doctrine of *lis alibi pendens*. Third, parties may petition the court of their desired forum to issue an antisuit injunction to prevent opponents from litigating in other fora. The doctrine of *forum non conveniens* is discussed in chapter 20. This chapter addresses the doctrine of *lis alibi pendens* and antisuit injunctions.

A. The Lis Alibi Pendens Doctrine

*Lis alibi pendens* is a common-law doctrine under which a court will decline to exercise jurisdiction pending the resolution of a parallel proceeding in a foreign jurisdiction. *Lis alibi pendens* is a similar doctrine to *forum non conveniens* – indeed, some courts have treated the two as identical – but differs in that it involves a stay of domestic litigation in favor of the completion of foreign proceedings, as opposed to outright dismissal. The ultimate effect of a *lis alibi pendens* stay may nevertheless be the same as a dismissal, since a judgment entered in the foreign forum can often be pled as *res judicata* in the domestic forum.

The *lis alibi pendens* doctrine in the United States developed in the context of parallel domestic proceedings in two federal courts or a federal court and state court. Courts faced with parallel international proceedings have relied heavily on cases from these domestic contexts for guidance. In *Colorado River Water Conservation District v. United States*, the Supreme Court addressed the question of when a federal court with concurrent jurisdiction over a case pending in state court should stay proceedings pending resolution of the state case. The Court held that such circumstances were rare:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. . .  
> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and

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1467 One commentator has argued that this reliance is misplaced and courts considering *lis alibi pendens* stays should rely more heavily on the body of law on *forum non conveniens*. See N. Jansen Calamita, *Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings*, 27 U. PA. J. INT’L ECON. L. 601, 671-674 (Fall 2006).

narrow exception to the duty of a District Court to adjudicate a controversy properly before it.1469

*Colorado River* was followed by *Quackenbush v. Allstate Insurance Co.*, in which the Court affirmed that federal district courts have a “strict duty to exercise the jurisdiction that is conferred upon them by Congress,” even in the face of duplicative state proceedings.1470

In contrast to these cases, an earlier Supreme Court case, *Landis v. North American Co.*, addressed the question of when federal courts should abstain from exercising jurisdiction when parallel litigation is occurring in another federal court.1471 In *Landis*, the Court upheld a district court’s grant of a stay pending the conclusion of parallel litigation on the grounds that the issuance of a stay was within the district court’s “discretion.”1472 The Court did not indicate that stays were “exceptional,” and rather characterized a court’s power to issue stays broadly, stating that such power is “incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”1473

The Supreme Court has never decided what standard governs the issuance of stays pending the resolution of parallel foreign proceedings and the somewhat divergent rules of *Colorado River* and *Landis* have left space in which the lower courts have charted different courses. The majority approach has followed *Colorado River* in holding that stays for pending parallel international litigation should be granted only in “exceptional circumstances.”1474 These courts generally find that there is little distinction between stays in favor of parallel domestic litigation and parallel international litigation. The Ninth Circuit has stated, for instance, that it “reject[s] the notion that a federal court owes greater deference to foreign courts than to our own state courts.”1475 Some courts that follow *Colorado River*, however, state that international comity introduces different considerations to the analysis. Thus, the Eleventh Circuit has stated:

the Supreme Court’s admonition that courts generally must exercise their nondiscretionary authority in cases over which Congress has granted them jurisdiction can only apply to those abstention doctrines addressing the unique concerns of federalism. . . . [T]he relationship between the federal courts and the states (grounded in federalism and the Constitution) is different from the

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1469 *Id.* at 813.
1472 *Id.* at 254.
1473 *Id.*
1474 BORN & RUTLEDGE, supra note 1466, at 533. See also *Answers in Genesis of Ky., Inc. v. Creation Ministries Int’l, Ltd.*, 556 F.3d 459 (6th Cir. 2009); *AAR Int’l, Inc. v. Nimelias Enters. S.A.*, 250 F.3d 510 (7th Cir. 2001); *Neuchatel Swiss Gen. Ins. Co. v. Lufthansa Airlines*, 925 F.2d 1193 (9th Cir. 1991).
1475 *Neuchatel*, 925 F.2d at 1195; see also *Ingersoll Milling Mach. Co. v. Granger*, 833 F.2d 680, 685 (7th Cir. 1987) (explaining that in contrast to international fora, U.S. federal courts owe a “special obligation of comity” to state courts under the Constitution).
relationship between federal courts and foreign nations (grounded in the historical notion of comity).\textsuperscript{1476}

A minority of lower courts have followed Landis in holding that such \textit{lis alibi pendens} stays may be granted at the district court’s discretion, rather than only in “exceptional circumstances,” as per \textit{Colorado River}.\textsuperscript{1477} The Eleventh Circuit has observed that courts in the Landis line have generally placed a “clearer emphasis on the concerns of international comity” than courts following \textit{Colorado River}.\textsuperscript{1478} A judge in the Southern District of New York explained the Landis-line view of the applicability of \textit{Colorado River} to parallel international proceedings thusly: “While \textit{Colorado River} and its progeny may be instructive in the present context, the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings, where concerns of international comity arise and issues of federalism and federal supremacy are not in play.”\textsuperscript{1479}

1. The Standard for Issuance of a Stay

Whether or not courts espouse the view from \textit{Colorado River} that they have an “unflagging obligation” to exercise jurisdiction, they generally consider similar factors in determining whether a stay is appropriate. As a threshold matter, courts consider whether foreign proceedings are truly parallel to domestic proceedings – that they involve substantially the same parties and issues. If this threshold requirement is met, courts in various circuits employ slightly different multifactor tests to determine whether a stay should issue, all of which can generally be characterized as totality-of-the-circumstances tests.

a. Proceedings In The United States and Abroad Must Be Substantially Similar For A Stay To Issue

As a threshold matter, courts consider whether the foreign litigation is substantially similar to the litigation in the United States. “If there is substantial doubt as to whether the foreign proceeding will resolve the federal action, there is no need to even undertake [further] analysis.”\textsuperscript{1480} Parallel proceedings are different where they involve materially different issues and parties.\textsuperscript{1481} Wholly- or majority-owned subsidiaries of companies are treated as the same party as their parent for purposes of this test, thus the presence of both entities in a suit does not

\begin{footnotesize}
\bibitem{1476} Posner \textit{v. Essex Ins. Co.}, 178 F.3d 1209, 1223 (11th Cir. 1999); see also Goldhammer \textit{v. Dunkin’ Donuts, Inc.}, 59 F. Supp. 2d 248, 252 (D. Mass. 1999) (“\textit{Quackenbush} does not crisply govern in the area of international abstention because the considerations involved in deferring to state court proceedings are different from those involved in deferring to foreign proceedings.”).
\bibitem{1478} \textit{Turner Entm’t Co. v. Degeto Film GmbH}, 25 F.3d 1512, 1518 (11th Cir. 1994).
\bibitem{1479} Evergreen Marine, 954 F. Supp. at 104 n. 1.
\bibitem{1480} Farhang \textit{v. Indian Inst. of Tech., Kharagpur}, No. 08-02658, 2010 WL 2228936, at *2 (N.D. Cal. June 1, 2010).
\bibitem{1481} \textit{Seguros del Estado, S.A. v. Scientific Games, Inc.} 262 F.3d 1164, 1170 (11th Cir. 2001).
\end{footnotesize}
make it different from a suit involving only one of them. In addition, the “mere existence of additional parties in one suit does not of itself destroy parallelism.” The issues to be decided must be materially different for parallelism not to exist; for instance, where the foreign proceeding is in rem and the domestic proceeding in personam.

b. Courts Employ Similar Multi-Factor Tests To Determine Whether A Stay Is Appropriate

Once courts determine that proceedings are, in fact, parallel, both the courts that follow Colorado River and the courts that follow Landis generally employ a totality-of-the-circumstances test to determine whether a stay should issue. For instance, the Seventh Circuit – which follows Colorado River – has stated that the following factors should be considered in deciding whether to stay proceedings:

(1) the identity of the court that first assumed jurisdiction;
(2) the relative inconvenience of the federal forum;
(3) the need to avoid piecemeal litigation;
(4) the order in which the respective proceedings were filed;
(5) whether federal or foreign law provides the rule of decision;
(6) whether the foreign action protects the federal plaintiff’s rights;
(7) the relative progress of the federal and foreign proceedings; and
(8) the vexatious or contrived nature of the federal claim.

Similarly, a leading case in the Landis line has articulated the standard thusly: “In determining whether to dismiss or stay an action in favor of parallel litigation ... a federal court should consider wise judicial administration, conservation of judicial resources, and comprehensive disposition of litigation.” While this test manifestly emphasizes the burden of duplicative litigation, the court also considers “the adequacy of relief available in the alternative forum,” the “possibility of prejudice,” the “convenience and preferences of the parties,” and the “chronological sequence of these actions.”

A third, but again similar standard, has been adopted by the Eleventh Circuit. This test primarily considers: “(1) a proper level of respect for the acts of our fellow sovereign nations – a rather vague concept referred to in American jurisprudence as international comity; (2) fairness

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1482 Finova Capital Corp. v. Ryan Helicopters U.S.A., Inc., 180 F.3d 896, 899 (7th Cir. 1999).
1483 Tyrer v. City of South Beloit, 456 F.3d 744, 753 n. 9 (7th Cir. 2006).
1484 Belcher Co. of Ala., Inc. v. M/V Maratha Mariner, 724 F.2d 1161, 1165 (5th Cir. 1984).
1485 See Finova Capital, 180 F.3d at 900.
1486 Id. Similarly, the Sixth Circuit has considered the following factors: (1) whether there exists a clear federal policy evincing the avoidance of piecemeal adjudication; (2) how far the parallel proceeding has advanced in the other sovereign’s courts; (3) the number of defendants and complexity of the proceeding; (4) the convenience of the parties; (5) whether a sovereign government is participating in the suit. Answers in Genesis, 556 F.3d at 467.
1487 Evergreen Marine, 954 F. Supp. at 103-04.
1488 Id. at 104-05.
1489 Turner Entm’t, 25 F.3d at 1518.
to litigants; and (3) efficient use of scarce judicial resources.”  

Thus, while courts in different circuits place different degrees of emphasis on the burdens of duplicative litigation and the importance of international comity, they all generally consider the same factors in deciding whether a stay is appropriate.

c. Applying The Factors

The following section discusses how cases have applied the standards identified above governing when to stay litigation under *lis alibi pendens*.

1) The “first-filed rule” and the progress made in the foreign forum

Courts are split over whether the fact that a foreign proceeding was the first filed weighs in favor of a stay. Several lower courts have stated that significant deference should be given to the first-filed suit, citing the maxim that the plaintiff has the right to choose its forum. Others have held that the deference shown to a plaintiff’s choice of forum is inapplicable to foreign suits. Courts generally agree, however, that where a plaintiff itself files suit in two fora (as opposed to a defendant bringing a countersuit in the United States) a defendant’s motion for a stay to avoid burdensome duplicative litigation should more readily be granted.

Courts regularly consider the extent of the progress in pending foreign proceedings in determining whether to grant a stay. A court following the *Landis* approach has, in fact, stated that “concerns about duplicative litigation may by themselves provide sufficient cause for a federal court to refrain from assuming jurisdiction.” Courts following the *Colorado River* line, in contrast, attribute less weight to this factor. Thus, the Ninth Circuit has stated: “The

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1490 Id.
1491 Id. at 1522.
1493 See Am. Cyanamid Co. v. Picaso-Anstalt, 741 F. Supp. 1150, 1159 (D.N.J. 1990) (“[T]he ‘first to file’ rule is a rule of resource conservation adopted to deal with situations involving similar lawsuits pending within the same sovereign’s jurisdiction, not situations involving similar lawsuits pending in different jurisdictions.”); Evergreen Marine, 954 F. Supp. at 105 (“the forum choice of a foreign plaintiff is entitled to less deference”).
1494 Brinco Mining Ltd. v. Fed. Ins. Co., 552 F. Supp. 1233, 1241 (D.D.C. 1982); Wendt v. Offshore Trust Serv., Inc., No. 08-C-3612, 2010 WL 1849426, at *17 (N.D. Ill. May 7, 2010) (“[N]or is it of any moment that the federal case was filed first, since the plaintiffs filed both suits.”).
1495 See Posner, 178 F.3d at 1224 (granting stay where action in Bermuda had been pending for one year); Evergreen Marine, 954 F. Supp. at 104 (granting stay where Belgian proceedings had advanced six months); Am. Cyanamid, 741 F. Supp. at 1159 (denying stay where “there was no indication that the French court ha[d] taken any action”); I.J.A., 524 F. Supp. at 199 (denying stay where litigation in Canada was only in its “incipiency”).
1496 Brinco Mining, 552 F. Supp. at 1241.
mere fact that parallel proceedings may be further along does not make a case ‘exceptional’ for the purpose of invoking the *Colorado River* exception to the general rule that federal courts must exercise their jurisdiction concurrently with courts of other jurisdictions.”

One important case in the *Colorado River* line, however, turned entirely on the progress of proceedings in the foreign jurisdiction. In *Ingersoll Milling Machine Co. v. Granger*, the Seventh Circuit praised the district court’s “pragmatic” and “careful” actions in initially denying a stay in favor of proceedings in Belgium, but later granting a stay after the Belgian trial court had rendered a verdict that the court deemed unlikely to be overturned on appeal. The Court stated: “it is very significant that the district court’s action in this case was a decidedly measured one. . . . The court did not dismiss the action; it simply stayed further proceedings until the Belgian appeals were concluded.” The Court noted that the Belgian interest in adjudicating the dispute – arising out of an employment relationship in Belgium – was “very significant” and the Belgian judgment was not “repugnant to Illinois public policy.”

2) **Whether there is a strong federal interest in adjudicating the claim to uphold federal policies or provide the parties with a fair forum**

Courts faced with a motion for a *lis alibi pendens* stay also consider whether the United States has a strong interest in deciding the question at issue and whether foreign courts would do so fairly. Courts generally hold that there is no strong federal interest in adjudicating contract claims between international parties, even where the contract is governed by United States law. Where contracts are governed by the law of a foreign jurisdiction, there is even less of a federal interest in deciding the case. The Eleventh Circuit, for instance, has approved a stay in favor of litigation over an insurance contract in Bermuda where the Bermuda court was “competent to hear the claims,” the insurance contract was governed by Bermuda law, and the defendant was a Bermuda company. Courts also have held that claims arising out of employment relationships abroad generally do not implicate strong federal interests.

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1497 *Neuchatel*, 925 F.2d at 1195.
1498 *Ingersoll Milling*, 833 F.2d 680.
1499 Id. at 686.
1500 Id.
1501 Id. at 683.
1502 *Finova Capital*, 180 F.3d at 899 (“[T]he federal interest in the adjudication of a contractual dispute . . . is far from overwhelming.”); *Evergreen Marine*, 954 F. Supp. at 101 (concluding that the fact that the foreign forum would apply New York law did not tip the balance against a stay where the New York court would have had to consider Belgian law).
1503 *Posner*, 178 F.3d at 1224.
1504 See *Ingersoll Milling*, 833 F.2d at 685 (“[T]here is no particularly strong federal interest [where a case] involves an employment relationship that spanned international boundaries.”).
courts find that they would have reached the same result as that reached in a foreign forum, they will also generally abstain from exercising jurisdiction.\footnote{1505}

In contrast, where a court has concerns about the fairness of the foreign forum, it may decline to stay its proceedings.\footnote{1506} In \textit{Johns Hopkins Health System Corp. v. Al Reem General Trading & Company’s Representation Establishment}, an Abu Dhabi company sought a stay of proceedings in the United States pending resolution of a declaratory judgment action in Abu Dhabi.\footnote{1507} The plaintiff had contested the validity of the contract that the Abu Dhabi company had sued upon, claiming it had been altered after being signed.\footnote{1508} The district court denied the motion for a stay, stating that it was “not convinced that the U.A.E. proceedings are adequate to protect the parties’ rights.”\footnote{1509} The court cited the facts that the U.A.E. court had not addressed the forgery issue in two years of proceedings and would examine only a translated version of the contract, which would make it more difficult to detect the forgery alleged by the defendant.\footnote{1510}

A particularized showing of prejudice, like that made in \textit{Johns Hopkins}, is often the type of showing necessary to convince a court that foreign proceedings will not be fair.\footnote{1511}

\section*{3) The existence of a federal policy against piecemeal litigation}

The Sixth Circuit has placed strong emphasis on whether there is a federal policy at issue that favors the avoidance of piecemeal adjudication in deciding whether to stay its proceedings.\footnote{1512} In \textit{Answers in Genesis of Kentucky, Inc. v. Creation Ministries International, Ltd.}, the Court identified this as the “most important factor” considered by the Supreme Court in \textit{Colorado River}.\footnote{1513} In \textit{Colorado River}, the Court held that federal laws providing for comprehensive regulation of state water rights evinced a policy against piecemeal litigation.\footnote{1514} The Sixth Circuit contrasted this to the Federal Arbitration Act, holding that that Act “clearly” is consistent with piecemeal litigation since it specifically contemplates bifurcated proceedings.\footnote{1515}

\footnotesize
\begin{itemize}
\item \footnote{1505}{See, e.g., \textit{Turner Entm’t}, 25 F.3d at 1521 (granting stay where a German decision had been entered that “was not inconsistent with” the Eleventh Circuit’s interpretation of the contract at issue); \textit{Ingersoll Milling}, 833 F.2d at 684.}
\item \footnote{1506}{See \textit{Sector Navigation}, 2006 WL 2946356, at *8 (“[B]ecause the court has found that the Nigerian remedy is not an adequate alternative, dismissal may be denied on that ground alone.”).}
\item \footnote{1508}{\textit{Id.} at 469.}
\item \footnote{1509}{\textit{Id.}}
\item \footnote{1510}{\textit{Id.} at 475.}
\item \footnote{1511}{\textit{EFCO}, 983 F. Supp. at 824 (rejecting party’s argument that “Canadian procedural and substantive law would not afford adequate protection of its rights” without a showing of “some concrete examples”).}
\item \footnote{1512}{\textit{Answers in Genesis}, 556 F.3d at 468.}
\item \footnote{1513}{\textit{Id.}}
\item \footnote{1514}{\textit{Colo. River}, 424 U.S. at 818 (citing the “highly interdependent” relationships among water rights governed by the McCarran Amendment, 43 U.S.C. §666).}
\item \footnote{1515}{\textit{Answers in Genesis}, 556 F.3d at 468.}
\end{itemize}
The Court thus held that the district court did not err in retaining jurisdiction while foreign arbitration proceedings were pending.\textsuperscript{1516}

A district court has emphasized that only \textit{federal} policies against piecemeal litigation are relevant to this analysis, and have held that state statutes are irrelevant to the question.\textsuperscript{1517}

4) The convenience to the parties

The relative convenience of the alternative forum is a factor that United States courts consider in deciding whether to issue a stay, but is rarely by itself decisive. This factor is assigned more weight in the \textit{Landis} line of cases that grant stays more readily.\textsuperscript{1518} Even the cases following \textit{Colorado River} will occasionally rely heavily on this factor, however. In \textit{Groeneveld Transport Efficiency Inc. v. Eisses}, for instance, a district court in Ohio held that the totality of the circumstances weighed in favor of a stay where the plaintiff lived in Canada and sued on the basis of his employment in Canada.\textsuperscript{1519}

The convenience factor inquires into the convenience to the \textit{parties}, rather than the parties’ lawyers.\textsuperscript{1520} In \textit{AAR International, Inc. v. Nimelias Enters. S.A.}, the Seventh Circuit reversed the district court’s grant of a stay based on the convenience of litigating in Greece where the district court improperly considered the convenience to a party’s lawyers, who were part of a large international law firm, rather than the parties.\textsuperscript{1521}

B. Antisuit Injunctions

A party to an international dispute may seek a \textit{lis alibi pendens} stay in an undesired forum pending resolution of proceedings in the preferred forum. Where a party is in a favorable forum, however, and would like proceedings stayed in an undesired foreign forum, it may seek an antisuit injunction. An antisuit injunction is an order that prevents a party from commencing or continuing a proceeding in a foreign forum. If a party subject to an antisuit injunction continues pursuing claims in the foreign forum, the court issuing the injunction may hold it in contempt to enforce the injunction. Thus, while an antisuit injunction is “leveled against the party bringing the suit, it nonetheless effectively restricts the jurisdiction of the court of a foreign [forum].”\textsuperscript{1522}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1516} \textit{Id.}
\item \textsuperscript{1518} \textit{See Evergreen Marine}, 954 F. Supp. 101.
\item \textsuperscript{1520} \textit{See AAR Int’l}, 250 F.3d at 522.
\item \textsuperscript{1521} \textit{Id.}
\item \textsuperscript{1522} \textit{Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc.}, 369 F.3d 645, 655 (2d Cir. 2004).
\end{itemize}
\end{footnotesize}
While there are no federal statutes (nor many state statutes) granting courts the power to issue antisuit injunctions, it is well-established that United States courts can enjoin any party over whom they have personal jurisdiction from pursuing litigation in foreign courts. Foreign courts also have the power to issue antisuit injunctions to restrain proceedings in the United States. Both United States and foreign tribunals thus occasionally issue anti-antisuit injunctions in an attempt to preserve their own jurisdiction.

While the Courts of Appeals differ somewhat on the standard governing the issuance of an antisuit injunction, they are in agreement that two threshold criteria must be met: (1) the United States suit and the foreign suit must involve the same or substantially similar parties and (2) the suits must involve substantially the same issues. Parties do not need to be identical to satisfy the first criterion, but only “substantially similar.” With respect to the second threshold criterion, the Second Circuit has held that the issues in the two proceedings must be sufficiently similar such that the domestic proceeding would be “dispositive” of the foreign proceeding. Courts have not decided, however, whether it is permissible for a “federal court to protect the full res judicata effect of a domestic judgment by enjoining claims that, while not litigated, arose from the same common nucleus of operative facts as the litigated claim.”

The Courts of Appeals are also in agreement that the test for an antisuit injunction is different from the test for an ordinary preliminary injunction.

Beyond these threshold requirements, the Courts of Appeals are divided over whether a more liberal or restrictive standard applies to the issuance of antisuit injunctions. The District of Columbia, Second, Third, Sixth and Eighth Circuits have adopted a more restrictive test for the issuance of antisuit injunctions. The Eleventh Circuit has not definitively announced a

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1523 BORN & RUTLEDGE, supra note 1466, at 541.
1524 Quaak v. KPMG, 361 F.3d 11, 16 (1st Cir. 2004); Kaepa, Inc. v. Achilles Corp., 76 F.3d 624, 626 (5th Cir. 1996); China Trade & Dev. Corp. v. M.V. Choong Yong, 837 F.2d 33, 35 (2d Cir. 1987).
1526 See id.
1527 Quaak, 361 F.3d at 20; E&J Gallo Winery v. Andina Licores S.A., 446 F.3d 984, 991 (9th Cir. 2006); SEC v. Pension Fund of Am., L.C., No. 10-10464, 2010 WL 3582429, at *3 (11th Cir. Sept. 15, 2010) (refusing to grant injunction where parties were not identical and United States litigation would not be dispositive of Costa Rican litigation).
1528 Paramedics, 369 F.3d at 652 (finding that there was “substantial similarity and affiliation” between a U.S. corporation and its Brazilian subsidiary); see also Int’l Equity Invs., Inc. v. Opportunity Equity Partners Ltd., 441 F.Supp.2d 552, 562 (S.D.N.Y. 2006) (“[W]here parties to the two actions are affiliated or substantially similar, such that their interests are represented by one another, courts have found the first requirement is met.”).
1529 Karaha Bodas Co. v. Perusahaan Pertambangan, 500 F.3d 111, 121 (2d Cir. 2007).
1530 Id. at 123 n.15.
1531 See, e.g., E&J Gallo Winery, 446 F.3d at 991.
1532 Laker Airways, 731 F.2d at 926-27; Paramedics, 369 F.3d at 653; Karaha Bodas, 500 F.3d at 119; Stonington Partners, Inc. v. Lernout & Hauspie Speech Products NV, 310 F.3d 118, 127 (3d Cir. 2002); Gen. Elec. Co. v. Deutz AG, 270 F.3d 144, 161 (3d Cir. 2001); Gau Shan Co., Ltd. v. Bankers Trust Co., 956 F.2d 1349, 1355 (6th Cir. 1992); Goss Int’l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft, 491 F.3d 355, 360-61 (8th Cir. 2007).
standard for issuing antisuit injunctions but has expressed affinity for the restrictive approach.\textsuperscript{1533} These circuits generally hold that an antisuit injunction should issue only to enjoin an action that would (1) imperil the jurisdiction of the United States court or (2) threaten a strong national policy.\textsuperscript{1534} Under the restrictive standard, there is a “rebuttable presumption against the issuance of an order that has the effect of halting foreign judicial proceedings.”\textsuperscript{1535} Thus, an antisuit injunction should not issue to prevent a party from seeking slight advantages in substantive or procedural law in a foreign court.\textsuperscript{1536} Nor does the mere fact that the United States action was the first filed justify issuing an injunction.\textsuperscript{1537}

The Fifth, Seventh, and Ninth Circuits have adopted the more liberal standard that an antisuit injunction may issue whenever the parties and issues are the same and when the injunction would promote the speedy and efficient determination of the case.\textsuperscript{1538} These Courts emphasize that the expenses and inconveniences of duplicative litigation may justify an injunction.\textsuperscript{1539} While these courts give weight to considerations of international comity, they “tend to define that interest in a relatively narrow manner and to assign it only modest weight.”\textsuperscript{1540}

The First Circuit has charted a middle path between these two approaches, adopting a “totality of the circumstances”\textsuperscript{1541} standard more restrictive than the liberal standard and more liberal than the restrictive standard.\textsuperscript{1542}

\textsuperscript{1533} Canon Latin Am., Inc. v. Lantech (CR), S.A., 508 F.3d 597, 601 (11th Cir. 2007).
\textsuperscript{1534} Karaha Bodas, 500 F.3d at 119 (explaining that these two grounds are the “most important” considerations in deciding whether to issue an antisuit injunction, but also holding that courts should consider whether litigation would “be vexatious, prejudice other equitable considerations, or result in delay, inconvenience, expense, inconsistency, or a race to judgment”); see also Daniel Tan, Antisuit Injunctions and the Vexing Problem of Comity 5, PRACTICING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE COURSE HANDBOOK SERIES (Mar. 23, 2010).
\textsuperscript{1535} Quaak, 361 F.3d at 18; accord China Trade, 837 F.2d at 36 (“Since parallel proceedings are ordinarily tolerable, the initiation before a foreign court of a suit concerning the same parties and issues as a suit already pending in a United States court does not, without more, justify enjoining a party from proceeding in the foreign forum.”).
\textsuperscript{1536} China Trade, 837 F.2d at 37; Jose I. Astigarraga & Scott A. Burr, Antisuit Injunctions, Anti-Antisuit Injunctions and Other Worldly Wonders 92, in INTERNATIONAL LITIGATION STRATEGIES AND PRACTICE (Barton Legum, ed., 2005).
\textsuperscript{1537} Compagnie des Bauxites de Guinea v. Ins. Co. of N. Am., 651 F.2d 877, 887 n.10 (3d Cir. 1981) (explaining that the “first-filed rule has never been applied, and in fact . . . was never meant to apply where the two courts involved are not courts of the same sovereignty”).
\textsuperscript{1539} See, e.g. Seattle Totems, 652 F.2d at 856 (enjoining litigation in Canada largely on grounds of preventing duplicative litigation, where the validity of a single agreement would have been a central issue in both litigations).
\textsuperscript{1540} Quaak, 361 F.3d at 17.
\textsuperscript{1541} As with \textit{lis alibi pendens} stays, there is reason to believe that all circuits apply a totality-of-the-circumstances test to antisuit injunctions. \textit{See Laker Airways}, 731 F.2d at 927 (“There are no precise
Commentators have opined that the principal difference among the Courts of Appeal is the weight that each accords to international comity.\textsuperscript{1543}

1. United States Courts Will Issue an Antisuit Injunction to Protect Their Jurisdiction

Under both the liberal and restrictive approaches, United States courts will issue an injunction to protect their jurisdiction. Thus, in \textit{Quaak v. KPMG} the First Circuit affirmed the district court’s grant of an injunction to prohibit a defendant from petitioning a Belgian court to impose heavy monetary sanctions on the plaintiff for attempting to obtain discovery materials in the United States that were prohibited to it in Belgium.\textsuperscript{1544} The Court characterized the defendant’s actions as an “attempt to chill legitimate discovery by in terrorem tactics” that could “scarcely be viewed as anything but an attempt to quash the practical power of the United States courts.”\textsuperscript{1545}

Conversely, a California district court has issued an injunction to stop a French proceeding where the plaintiff’s suit was based on evidence that was subject to a confidentiality order in the United States that prohibited its use.\textsuperscript{1546} Similarly, the Second Circuit has enjoined a United States national from pursuing an action in the Cayman Islands in an attempt to gain evidence for use in the United States.\textsuperscript{1547}

On the other hand, where the possibility that a foreign tribunal will infringe upon a United States court’s jurisdiction is low, courts have held that antisuit injunctions should not issue. Thus, in \textit{General Electric Co. v. Deutz AG}, the Third Circuit held that a district court improperly issued an injunction to prevent a party from seeking review in England of its determination that a contract did not compel arbitration.\textsuperscript{1548} The Court noted that the English rules governing the appropriateness of antisuit injunctions. The equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice.”).

\textsuperscript{1542} \textit{Quaak}, 361 F.3d at 16; see also \textit{LAIF X SPRL v. Axtel, SA de CV}, 390 F.3d 194, 199 (2d Cir. 2004).

\textsuperscript{1543} See Daniel Tan, \textit{Antisuit Injunctions and the Vexing Problem of Comity} 10, PRACTICING LAW INSTITUTE LITIGATION AND ADMINISTRATIVE COURSE HANDBOOK SERIES (Mar. 23, 2010); \textit{compare Allendale Mut.}, 10 F.3d at 433 (“The only concern with international comity is a purely theoretical one that ought not trump a concrete and persuasive demonstration of harm to the applicant for the injunction, if it is denied, not offset by any harm to the opponent if it is granted.”) \textit{with Compagnie des Bauxites}, 651 F.2d at 887 n.10 (“[R]estraining a party from pursuing an action in a court of foreign jurisdiction involves delicate questions of comity and therefore requires that such action be taken only with care and great restraint.”)

\textsuperscript{1544} \textit{Quaak}, 361 F.3d at 20.

\textsuperscript{1545} Id.


\textsuperscript{1547} See \textit{United States v. Davis}, 767 F.2d 1025 (2d Cir. 1985).

\textsuperscript{1548} \textit{Gen. Elec. Co.}, 270 F.3d at 159.

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court had “shown no inclination to disagree with the non-arbitrability ruling” and had itself abstained from issuing an antisuit injunction to halt proceedings in the United States.1549

Considerations of comity may outweigh encroachments on the jurisdiction of United States courts where the party potentially subject to the antisuit injunction is a foreign sovereign. Thus, in Republic of Philippines v. Westinghouse Electric Corp., the Third Circuit overturned the district court’s injunction against the Philippine government, which had prohibited it from punishing Filipino citizens who testified against it in United States litigation.1550 The Court stated that such an injunction was “extraordinarily intrusive” into the activities of a sovereign government with respect to its own citizens.1551

United States courts are particularly protective of their jurisdiction where a United States judgment already has been entered.1552 Thus, the Second Circuit held that an antisuit injunction should issue in the same dispute in which the Fifth Circuit had previously held that it should not on the grounds that “additional federal judgments enforcing [a plaintiff’s award] had been entered,” whereas previously “there had been no definitive determination that [the plaintiff] was entitled to the funds that [the defendant] held in the New York bank accounts.”1553

2. Antisuit Injunctions Will Issue To Protect Important Public Policies

Both liberal and restrictive circuits also hold that an antisuit injunction should issue to uphold an important public policy of the forum. Courts have frequently held that there is a “strong public policy in favor of international arbitration,”1554 and issued antisuit injunctions to terminate foreign proceedings adjudicating issues that they have found committed to arbitration.1555 Courts have also held that contracts with forum selection clauses placing disputes in American fora warrant the issuance of antisuit injunctions.1556 As the Ninth Circuit explained, such clauses are favored because they are “increasingly used in international business” to avoid the problems of forum-selection that engender jurisdictional disputes.1557

1549 Id.
1551 Id.
1552 Karaha Bodas, 500 F.3d at 120 (“[T]he discretionary [] factors will tend to weigh in favor of an anti-foreign-suit injunction that is sought to protect a federal judgment.”); Philips, 8 F.3d at 605 (holding that an injunction properly issued to protect a judgment); see also BORN & RUTLEDGE, supra note 1466, at 558; George A. Bermann, The Use of Antisuit Injunctions in International Litigation, 28 COLUM. J. TRANSNAT’L L. 589, 610 (1990).
1553 Karaha Bodas, 500 F.3d at 124, distinguishing Karaha Bodas, 335 F.3d 357.
1554 Karaha Bodas, 500 F.3d at 126.
1556 E&J Gallo Winery, 446 F.3d at 992; Farrell Lines Inc. v. Columbus Cello-Poly Corp., 32 F. Supp. 2d 118, 130-31 (S.D.N.Y. 1997) (enjoining foreign suit brought in violation of forum selection clause, on grounds that enforcement of such clauses was important U.S. public policy).
1557 E&J Gallo Winery, 446 F.3d at 992.
Other courts have found that litigation implicated important public policies of the United States where it affected noncompetition clauses\textsuperscript{1558} or United States antitrust laws.\textsuperscript{1559} Generally speaking, “when the primary purpose of the foreign action is to avoid the regulatory effects of the domestic forum’s statutes, then an injunction is more readily issued.”\textsuperscript{1560}

3. Other Considerations

Besides the two principal rationales for issuing antisuit injunctions, other factors are considered in the decisional calculus, particularly in the circuits that issue antisuit injunctions more liberally.

a. The length of time a party has participated in a proceeding

Courts will consider the length of time parties have participated in United States and/or foreign litigation, and the amount of expense and effort expended, in determining whether to issue an antisuit injunction.\textsuperscript{1561} Thus, the Fifth Circuit, which has adopted the liberal standard for issuance of antisuit injunctions, has held that the fact that a foreign defendant participated in litigation in the United States for nearly a year before attempting to file suit in a foreign jurisdiction justified an injunction.\textsuperscript{1562} Similarly, the Second Circuit, which has adopted a more restrictive standard, has held that a party’s participation in litigation in the United States for six years weighed in favor of issuing an injunction.\textsuperscript{1563} On the other hand, under the conservative test applicable in the Third Circuit, the Court held that a district court abused its discretion when the “duplication of issues and [the party’s] delay in filing the London action were the sole bases for the district court’s injunction.”\textsuperscript{1564}

As with \textit{lis alibi pendens} stays, courts find that there is more reason to avoid duplicative proceedings where one forum has already entered judgment.\textsuperscript{1565}

b. Whether a foreign proceeding affords a party unique rights

An antisuit injunction is not appropriate where the foreign proceeding provides rights to a party that it does not have in the domestic forum. In \textit{Canon Latin America, Inc. v. Lantech (CR), S.A.}, the Eleventh Circuit reversed a district court’s antisuit injunction where it barred a Costa Rican plaintiff from bringing a claim under a Costa Rican law that prohibited certain


\textsuperscript{1559} \textit{Laker Airways}, 731 F.2d at 932.

\textsuperscript{1560} \textit{Id.} at 931 n. 73.

\textsuperscript{1561} See \textit{BORN & RUTLEDGE, supra} note 1466, at 550.

\textsuperscript{1562} \textit{Kaepa, Inc.}, 76 F.3d 624.

\textsuperscript{1563} \textit{Karaha Bodas}, 500 F.3d at 120.

\textsuperscript{1564} \textit{Compagnie des Bauxites}, 651 F.2d at 887.

\textsuperscript{1565} \textit{Paramedics}, 369 F.3d at 654 (“There is less justification for permitting a second action after a prior court has reached a judgment on the same issues. An anti-suit injunction may be needed to protect the court’s jurisdiction once a judgment has been rendered.”).
terminations of exclusive distributorship agreements.\textsuperscript{1566} The Court noted this claim was not a compulsory counterclaim to the contract action decided by the lower court because a counterclaim is not compulsory if “at the time the action was commenced the claim was the subject of another pending action,” and the Costa Rican action was filed first.\textsuperscript{1567}

On the other hand, the Second Circuit has held that a party’s claim to “moral damages” from termination of a distributorship agreement under a Brazilian statute was contractually committed to arbitration, and issued an injunction to prevent the Brazilian party from pursuing claims in Brazil.\textsuperscript{1568}

c. The adequacy of the foreign forum

While courts consider the capacity of a foreign forum to competently and fairly adjudicate a dispute, this analysis presents the prospect of making sensitive political determinations. Recognizing this, courts have “repeatedly emphasized that when considering the adequacy of a foreign forum, no foreign forum will be declared inadequate merely because its justice system differs from that of the United States.”\textsuperscript{1569} Furthermore, courts generally hold that the mere fact that one forum would apply the law of another is immaterial to whether that forum is adequate.\textsuperscript{1570} On the other hand, where a court fears that a foreign forum would be overburdened by litigation that United States courts are better equipped to handle, an injunction will more readily issue.\textsuperscript{1571}

d. Foreign Courts May Issue Antisuit Injunctions To Bar Litigation in United States Courts

Just as United States courts issue antisuit injunctions to bar parties from bringing claims in foreign fora, foreign tribunals issue antisuit injunctions to bar parties from suing in the United States. United States courts will, indeed, issue anti-antisuit injunctions to prevent parties from seeking antisuit injunctions in foreign jurisdictions.\textsuperscript{1572} The potential for a standoff between two jurisdictions that enter conflicting antisuit injunctions is a prospect that inclines courts against entering such injunctions.\textsuperscript{1573}

\textsuperscript{1566} Canon, 508 F.3d at 602.
\textsuperscript{1567} Id., citing FED.R.CIV.P. 13(a)(1).
\textsuperscript{1568} Paramedics, 369 F.3d at 654.
\textsuperscript{1570} See E&J Gallo Winery, 446 F.3d at 991 (“[T]o the degree that Ecuadorian law does apply, federal courts are capable of applying it.”).
\textsuperscript{1571} Allendale Mut., 10 F.3d at 429 (affirming an antisuit injunction to prevent litigation over a major insurance coverage dispute in France where the case would be heard by part-time judges who might not be capable of sorting through the massive collection of documents and deposition testimony already taken in the United States).
\textsuperscript{1573} See BORN & RUTLEDGE, supra note 1466, at 552.
The standards for the issuance of antisuit injunctions in foreign jurisdictions vary widely and are changing quickly in response to increased international commerce and the development of international legal regimes.\textsuperscript{1574} In the United Kingdom, courts may not grant an antisuit injunction unless the U.K. has a strong interest in the case and the foreign proceedings are vexatious and oppressive.\textsuperscript{1575} A similar standard governs in Canada, where anti-suit injunctions should be granted only to prevent “serious injustice.”\textsuperscript{1576} In Germany, in contrast, antisuit injunctions will rarely issue.\textsuperscript{1577} In one notable case, however, an injunction did issue to prevent German banks from complying with a discovery order in a United States suit to which they were not parties, on the grounds that discovery was sought of materials that were confidential under German law.\textsuperscript{1578}

International practitioners are advised to consult local counsel familiar with the law governing antisuit injunctions in foreign jurisdictions.

C. Managing Parallel Litigation

\textit{Lis alibi pendens} stays and antisuit injunctions are powerful tools for parties in international disputes to limit costs and strategically position their cases for adjudication in fora that are more convenient, efficient, and amenable to their claims. These devices may even be a practical necessity to avoid a single team of lawyers having to shuttle back and forth between distant fora to litigate contemporaneous cases.

Parties are encouraged to take early steps to anticipate the jurisdictional problems of parallel litigation, including by incorporating forum selection and choice-of-law clauses into international contracts. As described above, courts have been deferential to such clauses, acknowledging the key role they play in providing parties predictability.

Lawyers considering seeking a \textit{lis alibi pendens} stay or antisuit injunction should carefully analyze the governing substantive and procedural law in the alternative fora to determine whether a single forum is best suited to hear their claims and, if so, to determine the identity of that forum. In this regard, lawyers should consider the \textit{res judicata} or other collateral

\textsuperscript{1578} See \textit{id.} at 275 (citing \textit{LG Kiel}, IPRax, 4 (1984)).
effects that foreign rulings would have, if reached. Lawyers also ought to pay particular early attention to the anticipated costs of duplicative litigation.

*Lis pendens* stays and antisuit injunctions are powerful tools, and courts and commentators increasingly emphasize the importance of international comity in deciding whether to stay proceedings or enjoin parties from seeking relief in foreign jurisdictions. Thus, practitioners are advised to carefully consider the scope and duration of the relief they seek to mitigate its limiting effect on national sovereignty.

**XXI. CHAPTER 21: SERVICE OF PROCESS**

**A. Overview**

Service of process is considered one of the most basic litigation procedures. In the United States, service of process is a routine matter, governed by relatively straightforward rules. However, service of process abroad is often “difficult, slow, and costly.” Federal Rule of Civil Procedure 4(f) governing service abroad incorporates the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the “Hague Service Convention”) in order to “call attention to the important effect of the Hague Convention and other treaties bearing on service of documents in foreign countries.” In practice, however, the deference granted to the Hague Service Convention by U.S. courts is unclear.

**B. Relevant Law Governing Service of Process Abroad**

1. **FRCP 4(f)**

Federal Rule of Civil Procedure 4 was amended in 1993 to address transnational variations in service of process law. Unlike previous versions of the Federal Rules, Rule 4(f) generally requires “that service of U.S. process abroad comply with foreign law.” Rule 4(f) establishes six methods of service upon individuals in a foreign country. Specifically, Rule 4(f) provides:

Unless federal law provides otherwise, an individual - other than a minor, an incompetent person, or a person whose waiver has been filed - may be served at a place not within any judicial district of the United States:

1. by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents;

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1580 *Id.* at 823 (internal citations omitted).
1581 *Id.* at 837.
(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
   (A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
   (B) as the foreign authority directs in response to a letter rogatory or letter of request; or
   (C) unless prohibited by the foreign country's law, by:
      (i) delivering a copy of the summons and of the complaint to the individual personally; or
      (ii) using any form of mail that the clerk addresses and sends to the individual and that requires a signed receipt; or
   (3) by other means not prohibited by international agreement, as the court orders.\textsuperscript{1582}

First, under Rule 4(f)(1), service may be effectuated “by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention . . . ”\textsuperscript{1583} The Hague Service Convention “create[s] an intergovernmentally approved method for serving documents abroad in a signatory state by enabling litigants to use their own State’s Central Authority to forward to a designated Central Authority in the receiving state a request to serve process on the defendant.”\textsuperscript{1584}

Second, under Rule 4(f)(2)(A) service may be made “as prescribed by the foreign country’s law.”\textsuperscript{1585} A foreign government is less likely to object to service under this rule.\textsuperscript{1586} However, “a U.S. court might later find the foreign method of service ‘not reasonably calculated to give notice’ as due process requires, thus rendering the judgment null and void.”\textsuperscript{1587}

Third, under Rule 4(f)(2)(B), service may be made by a method “as the foreign authority directs in response to a letter rogatory or letter of request.”\textsuperscript{1588} A letter rogatory is a formal court-to-court letter of request from a U.S. court invoking the aid of the foreign court in helping to serve process.\textsuperscript{1589} Letters rogatory are governed by statute and federal regulations.\textsuperscript{1590} To use this procedure, a litigant will usually apply to the relevant U.S. court for the letter, with an affidavit, two copies of the document to be served, certified translations, and a request for international judicial assistance.\textsuperscript{1591} The court then signs, seals, and sends the request to the

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{1582}] Fed. R. Civ. P. 4(f).
\item[\textsuperscript{1583}] Id. at 4(f)(1).
\item[\textsuperscript{1586}] Koh, supra note 1584, at 176.
\item[\textsuperscript{1587}] Id.
\item[\textsuperscript{1588}] Fed. R. Civ. P. 4(f)(2)(B).
\item[\textsuperscript{1589}] Koh, supra note 1584, at 176.
\item[\textsuperscript{1590}] See 28 U.S.C. § 1781 (authorizing the U.S. Department of State to receive and transmit letters rogatory).
\item[\textsuperscript{1591}] Koh, supra note 1584, at 177.
\end{itemize}
\end{footnotesize}
U.S. Department of State special consular services with a check, and the papers are then delivered by the U.S. Embassy to the receiving country’s Minister of Foreign Affairs (or similar entity) with a request to transmit through the appropriate channels. The service return then comes back through the same channels.

Fourth, Rule 4(f)(2)(C)(i) provides for personal service. This method is the most likely to satisfy U.S. standards of due process, but could violate other nations’ laws. Fifth, Rule 4(f)(2)(C)(ii) provides for service by return receipt mail. This method is inexpensive, quick, and requires no action by anyone besides the postal service. However, “service by mail does not permit enforcement of a U.S. judgment in those countries that require personal service and is considered offensive by some countries, such as Switzerland and Germany.

The four means of service set forth in Rule 4(f)(2) can be used if there are no “internationally agreed means.” Rule 4(f)(2) is therefore applicable in several circumstances:

First, Rule 4(f)(2) applies if service is to be made in a nation that is not a party to the Hague Service Convention. This is true of a majority of foreign states. Second, Rule 4(f)(2) is applicable if service is to be made in a nation that is a signatory to the Inter-American Convention or another non-exclusive service agreement. That is because such international agreements ‘allow[]’ other means of service than the mechanisms they establish. Third, Rule 4(f)(2) is applicable in cases which fall outside the scope of the Hague Service Convention. In these cases, there is no applicable ‘internationally agreed means,’ and service under Rule 4(f)(2) is permitted. Fourth, Rule 4(f)(2) arguably permits types of service that are not ‘authorized’ by the Hague Service Convention, but that are ‘allowed’ by it (e.g., mail service).

Finally, Rule 4(f)(3) provides for service “by any other means” as ordered by the court. The Rule provides that the ordered method may not be “prohibited by international agreement,” but a district court may permit service in a manner that is not “explicitly authorized by international agreement.” This means that a district court could order service of process abroad in violation of foreign law.

\[1592\] Id.
\[1593\] Id.
\[1595\] Koh, supra note 1584, at 178.
\[1596\] Id.
\[1598\] BORN & RUTLEDGE, supra note 1579, at 825.
\[1600\] See, e.g., Rio Prop., Inc. v. Rio Int’l Interlink, 284 F.3d 1007, 1014 (9th Cir. 2002) (holding that “as long as court-directed and not prohibited by an international agreement, service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country”).

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2. The Hague Service Convention

When serving process abroad, the litigant attempting service must consider whether the procedure comports with the Hague Service Convention or any other relevant treaty. The United States ratified the Hague Service Convention in 1964.1601 This multilateral convention is referred to in and incorporated by Federal Rule 4(f)(1) and only applies to civil and commercial matters.1602

The Hague Service Convention, by itself, does not provide a basis for personal jurisdiction in federal court. Instead, personal jurisdiction is established by Federal Rule 4 or the state and federal long-arm statutes that it incorporates.1603 The Hague Service Convention consists of thirty-one Articles, the most important being Articles two through seven that establish the “Central Authority” mechanism for service abroad.1604

Under Article 2, “[e]ach Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States . . . and [e]ach State shall organize the Central Authority in conformity with its own law.”1605 After the Central Authority receives a request, it must serve the document or arrange to have it served by an appropriate agency, unless it believes that the request does not comply with the provisions in the Hague Service Convention.1606 Under Article 5, the Central Authority may serve process by a method prescribed by its internal law in domestic actions upon persons within its territory or by a particular method requested by the applicant, unless that method is incompatible with the law of the state addressed.1607 The Hague Service Convention also sets language requirements for letters of request and the translation of documents accompanying these letters.1608

The Hague Service Convention also permits service without the use of the Central Authority, for example: Articles 8 and 9 provide for service through the state’s consular or diplomatic agents; Article 10(b) and (c) permit service by “judicial officers or other competent persons”; Article 10(a) permits “sending” of documents by mail; and Article 19 permits service

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1602 Hague Service Convention, art. 1.
1603 BORN & RUTLEDGE, supra note 1579, at 855; see also DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 288 (3d Cir. 1981) (“We believe that the purpose and nature of the [Hague Service Convention] demonstrates that it does not provide independent authorization for service of process in a foreign country. The treaty merely provides a mechanism by which a plaintiff authorized to serve process under the laws of its country can effect service that will give appropriate notice to the party being served and will not be objectionable to the country in which that party is served.”).
1604 Hague Service Convention, art. 2-7.
1605 Id. at art. 2.
1606 Id. at art. 4-5.
1607 Id. at art. 5.
1608 Id. at art. 7.
pursuant to the “internal law of a contracting State” where service is to be effected.\footnote{1609} However, these methods must be approved by the receiving state.\footnote{1610}

Finally, under Article 15, “a default judgment cannot be entered unless it is shown either that: (a) service abroad was in accordance with local law in the place where service was effected, or (b) service was actually delivered to the defendant or his residence pursuant to a method permitted by the Convention.”\footnote{1611} There must also be “a showing that the defendant received service in sufficient time to respond.”\footnote{1612}

3. \textit{Volkswagenwerk AG v. Schlunk}

When examining the Hague Service Convention in relation to U.S. law, the question arises whether its mechanisms for service must be used, even if U.S. law provides for different mechanisms.\footnote{1613} The United States Supreme Court answered this question in the affirmative in dicta when it decided \textit{Volkswagenwerk AG v. Schlunk}, the leading decision with respect to service of process abroad.\footnote{1614} However, while Federal Rule 4(f) and the Hague Service Convention provide several methods for service abroad, the Court held that service does not have to be made in accordance with the Hague Service Convention when a foreign defendant can be found and served within the United States under the relevant U.S. law.\footnote{1615}

In \textit{Schlunk}, the plaintiff brought a wrongful death action in Illinois state court against Volkswagen of America.\footnote{1616} When Volkswagen of America denied that it had designed or assembled the vehicle in question, the plaintiff amended his complaint to add the defendant parent company, Volkswagen AG.\footnote{1617} The plaintiff attempted to serve the amended complaint on Volkswagen AG by serving the American subsidiary as Volkswagen AG’s agent.\footnote{1618} Volkswagen AG moved to quash the service on the grounds that it could be served only in accordance with the Hague Service Convention, and that the plaintiff did not comply with the Hague Service Convention’s requirements.\footnote{1619} The Illinois courts held that because the subsidiary and the parent are so closely related, the subsidiary is the parent’s agent for service of process as a matter of law.\footnote{1620} Therefore, because service was accomplished in the United States, the Hague Convention did not apply.\footnote{1621} The Supreme Court affirmed.\footnote{1622}
In its opinion, the Court noted that at issue was Article 1 of the Hague Convention.\textsuperscript{1623} Article 1 of the Hague Convention states, “[t]he present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.”\textsuperscript{1624} The Court acknowledged that this language is mandatory and that the “Convention pre-empts inconsistent methods of service prescribed by state law in all cases to which it applies.”\textsuperscript{1625} However, in this case, the Hague Service Convention did not apply because there was no “occasion to transmit” the document abroad.\textsuperscript{1626} Under Illinois law, it was not necessary to serve the document abroad because there was an agent of the defendant within the United States.\textsuperscript{1627}

The Court’s decision in Schlunk has been criticized as being naïve and blind to international realities:

While recognizing the mandatory language in Article I, the Court nevertheless treated the Convention as a kind of optional protocol for facilitating service abroad, but only in a very narrow class of cases. If, as the Court suggests, it is up to each forum’s internal law to determine when there is “occasion for service abroad,” each jurisdiction could gut the Convention’s mandatory language simply by deciding under its local law never to require “service abroad.”\textsuperscript{1628}

Regardless of the criticism, lower U.S. courts are bound by the Court’s decision and several courts have considered and affirmed claims “that local service within the United States on a foreign defendant or its U.S. representative obviated the need to serve process abroad under the Convention.”\textsuperscript{1629}

XXII. CHAPTER 22: ESTABLISHING JURISDICTION IN INTERNATIONAL DISPUTES

A. Personal Jurisdiction

Establishing personal jurisdiction over a foreign defendant requires (1) plaintiff effect proper service of process; (2) legal authority providing for service of process; and (3) satisfying due process concerns. In other words, “personal jurisdiction requires three elements: proper service, pursuant to statutory authority for service, with sufficient contact with the forum to satisfy constitutional due process concerns.”\textsuperscript{1630}

\begin{flushleft}
\textsuperscript{1622} Id.
\textsuperscript{1623} Id. at 699.
\textsuperscript{1624} Hague Service Convention, art. 1.
\textsuperscript{1625} Schlunk, 486 U.S. at 699 (citing its previous decision in Societe Nationale Industrielle Aerospatiale v. United States Dist. Court, 482 U.S. 522, 534 n.15 (1987)).
\textsuperscript{1626} Id. at 700.
\textsuperscript{1627} Id. at 706.
\textsuperscript{1628} Koh, supra note 1584, at 186.
\textsuperscript{1629} BORN & RUTLEDGE, supra note 1579, at 883.
\textsuperscript{1630} Mwani v. bin Laden, 417 F.3d 1, 8 (D.C. Cir. 2005).
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The proper method of service is often described or identified by the specific source providing the legal authority for service.\footnote{1631 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS, § 1:1 (September 2011).}

In the federal context, legal authority can be established under Federal Rule of Civil Procedure 4(k).\footnote{1632 Id.} Some federal statutes, however, also provide legal authority for service in cases dealing with particular types of claims, e.g. the Clayton Act.\footnote{1633 Id.} Finally, in the foreign context, Rules 4(f), 4(h)(2), and (j)(1) govern.\footnote{1634 Id.}

Once the threshold issues involving service of process are met, a court analyzes whether exercising personal jurisdiction over the defendant is consistent with due process. If the legal authority for service is provided by the forum state’s long-arm statute, the due process clause of the Fourteenth Amendment applies.\footnote{1635 Id.} In cases where there is an alternate source of legal authority, e.g. a federal statute, the courts apply the Fifth Amendment’s due process clause.\footnote{1636 Id.} Under that Clause, most courts will evaluate whether personal jurisdiction is proper based upon the defendant’s national contacts rather than its forum state contacts.\footnote{1637 Id.}

1. **Long-Arm Statute**

Under Federal Rule of Civil Procedure 4(k)(1)(A), personal jurisdiction in a federal court is limited by the long-arm statute of the state in which the court sits.\footnote{1638 Fed. R. Civ. P. 4(k)(1)(A).} If the state’s long-arm statute is satisfied, a court then determines whether exercising personal jurisdiction over the defendant is consistent with the requirements of due process.

A state’s long-arm statute generally takes one of two forms: The statute either permits the forum to exercise jurisdiction to the fullest extent permitted by Constitutional due process considerations or it prescribes state standards which may fall short of the fullest extent permitted by due process.\footnote{1639 NANDA & PANSIUS, supra note 1631, at § 1:3.} For the latter statutory form, a two-step inquiry is required which examines both the specified jurisdictional standards under state law as well as constitutional due process requirements.\footnote{1640 Id.} If a state’s requirements are not satisfied, the Constitutional due process inquiry is moot unless an alternative federal basis of jurisdiction exists that is independent of the state’s long-arm statute.\footnote{1641 Id.} A federal court applies a State’s own interpretation of its long-arm statute in the court’s jurisdictional analysis.\footnote{1642 Id.}
2. Specific and General Jurisdiction

There are two general frameworks available to U.S. courts for establishing personal jurisdiction in international disputes. Both frameworks reflect standards or criteria developed by courts to ensure that the due process clauses of the Fourteenth and Fifth Amendments are not violated if a forum exercises personal jurisdiction over a foreign defendant. First, a court may exercise specific jurisdiction when the controversy in the case arises out of the defendant’s contacts with the forum.1643 Alternately, a court may exercise general jurisdiction when the defendant has “continuous and systematic” contacts with the forum which are independent of the underlying controversy. Although each circuit utilizes its own tests for determining whether a court may exercise specific or general jurisdiction, courts generally focus on a defendant’s contacts with the forum and the reasonableness of exercising jurisdiction over the defendant.1644

Specific jurisdiction typically involves a three-part test in which the court analyzes whether: (1) the plaintiff’s claim arises out of or results from the defendant’s activities or conduct in the forum; (2) the defendant’s contacts involved some act in which the defendant purposefully availed itself of the forum; and (3) the court’s exercise of jurisdiction over the defendant is reasonable.1645 At the heart of the test is an analysis by the court as to whether the defendant “purposefully avails” itself of the benefits of conducting business in the forum.1646

One test used to determine whether a non-resident defendant purposefully avails itself of the forum is the **Calder** effects test. Under that test, a defendant purposefully avails itself if its contacts with the forum are attributable to (1) intentional acts; (2) expressly aimed at the forum; and (3) causing harm, the brunt of which is suffered, and which the defendant knows is likely to be suffered, in the forum.1647 In **Rio Properties, Inc. v. Rio International Interlink**, a Costa Rican company was subject to personal jurisdiction in Nevada for running a gambling website that used the plaintiff’s trademark.1648 Because the defendant had used plaintiff’s name on its interactive website as well as in radio and print advertisements in Las Vegas, the court concluded that the defendant knowingly injured the plaintiff in Nevada.1649

Finally, factors which a court can consider and balance in determining whether specific jurisdiction is reasonable include: (1) the extent of a defendant’s purposeful interjection; (2) the burden on the defendant in defending in the forum; (3) the extent of conflict with the sovereignty of the defendant’s state; (4) the forum state’s interest in adjudicating the dispute; (5) the most

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1644 NANDA & PANSIUS, supra note 1631, at § 1:4.
1645 Id.
1648 284 F.3d 1007 (9th Cir. 2002).
1649 Id. at 1021. In contrast, a pro-life advocacy organization was not subject to personal jurisdiction in Maryland for having a website which allowed viewers to donate directly online to help Chicago-area women. The court concluded that any harm allegedly caused by the organization’s trademark infringement was not “expressly aimed” at Maryland and that defendant must have acted with the “manifest intent” of targeting Marylanders. *Carefirst of Md., Inc. v. Carefirst Pregnancy Ctr., Inc.*, 334 F.3d 390, 400 (4th Cir. 2003).
efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff’s interest in convenient and effective relief; and (7) the existence of an alternative forum.\textsuperscript{1650}

In contrast to the three-prong test for specific jurisdiction, the analysis as to whether a court may exercise general jurisdiction involves evaluating the general nature and quantity of the defendant’s overall contacts with the forum. The analysis is typically a two-part test in which the court will (1) determine whether the defendant has substantial and systematic contacts with the forum, and (2) examine the reasonableness of exercising jurisdiction over the defendant.\textsuperscript{1651} As the First Circuit has noted, the standard for evaluating contacts under the general jurisdiction test is “considerably more stringent” than that used for specific jurisdiction.\textsuperscript{1652} In other words, minimum or “limited and intermittent” contacts by the defendant with the forum are not sufficient to establish general jurisdiction.\textsuperscript{1653}

Courts generally do not consider the unilateral activity of a third party as a qualifying “contact” under either jurisdictional test.\textsuperscript{1654} For example, in one case the fact that a defendant cashed checks from a bank within the forum was not sufficient to establish jurisdiction.\textsuperscript{1655}

3. Minimum Contacts Analysis

Due process requires that a non-resident defendant have “minimum contacts” with the forum, such that the exercise of jurisdiction by the court does not offend “traditional notions of fair play and substantial justice.”\textsuperscript{1656} This principle applies as well in the context of international disputes and there are several issues which arise in the case law that are particularly relevant for foreign defendants.

a. Internet Usage

The classic test for determining whether Internet usage qualifies as minimum contacts for the purpose of exercising personal jurisdiction over a nonresident defendant is the \textit{Zippo} sliding scale.\textsuperscript{1657} Courts have generally “clutched onto the \textit{Zippo} sliding scale test as the predominant, if not exclusive, means of analyzing personal jurisdiction over Internet Web sites.”\textsuperscript{1658} Under the \textit{Zippo} framework, there are three levels or categories of Internet usage which take into account the nature of the relationship between the forum resident and the foreign defendant as well as the degree to which a website is interactive and commercial in nature.

First, sufficient minimum contacts exist for a court to exercise personal jurisdiction when the defendant has entered into contracts with residents of a foreign jurisdiction and those

\textsuperscript{1650} Rio Prop., Inc. v. Rio Int’l Interlink, 284 F.3d 1007, 1021 (9th Cir. 2002).

\textsuperscript{1651} NANDA & PANSIUS, \textit{supra} note 1631, at § 1:4.

\textsuperscript{1652} United States \textit{v.} Swiss American Bank, Ltd., 274 F.3d 610, 619 (1st Cir. 2001).

\textsuperscript{1653} \textit{Id.} at 620.

\textsuperscript{1654} NANDA & PANSIUS, \textit{supra} note 1631, at § 1:4.

\textsuperscript{1655} Swiss American, 274 at 619.

\textsuperscript{1656} \textit{Int’l Shoe Co. v. Washington}, 326 U.S. 310, 316 (1945).


\textsuperscript{1658} NANDA & PANSIUS, \textit{supra} note 1631, at § 1:31.
contracts involve the knowing and repeated transmission of computer files via the internet. For example, a court concluded that a Japanese website which provided English-language, pay-per-view adult content via paid subscriptions and which had a large number of subscribers in the U.S. had purposefully availed itself of the privileges of conducting activities in the forum. In another case, a website that allowed users to download copyrighted music without authorization involved “doing business” in the forum for the purpose of establishing personal jurisdiction.

Second, personal jurisdiction does not exist when a website is merely passive in nature by doing little more than making information available to those who reside in a foreign jurisdiction. For example, a court determined that personal jurisdiction did not exist where an overseas company which merely posted information about the sale of beanie babies but did not allow those who viewed the website to purchase online, and instead required that users purchase the products by mail. In another case, passive defamatory comments on a Hong Kong corporation’s website about a former director did not provide a basis for an Illinois court to exercise jurisdiction over the corporation president in Illinois.

Finally, interactive websites require a more nuanced analysis under Zippo. This third category of cases involve situations where a user can exchange information with a host computer located in a foreign jurisdiction. In order to determine whether it may exercise jurisdiction over the defendant, a court will engage in a fact-intensive analysis to determine the level of互动性 on the site and the nature of the exchange of information that occurs. The more interactive and commercial a site, the more likely a court will conclude it can exercise jurisdiction over the defendant. A court, for example, concluded that two Finnish websites had minimum contacts with Wisconsin for the purpose of establishing personal jurisdiction given that the sites provided an 800 number for customers to call, allowed customers to email the company, and provided a link enabling customers to request information or a quote.

While the Zippo framework has been widely applied by courts in different jurisdictions, some courts have cautioned that interactivity itself cannot form the basis for personal jurisdiction.

b. Wireless Providers

A federal district court concluded that it could not exercise personal jurisdiction over non-U.S. wireless providers who were sued by an American patent holder. The court

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1664 See, e.g., Hy Cite Corp. v. Badbusinessbureau.com, LLC, 297 F. Supp. 2d 1154, 1160 (W.D. Wis. 2004) (stating that “regardless of how interactive a Web site is, it cannot form the basis for personal jurisdiction unless a nexus exists between the Web site and the cause of action or unless the contacts through the Web site are so substantial that they may be considered ‘systematic and continuous’ for the purpose of general jurisdiction. Thus, a rigid adherence to the Zippo test is likely to lead to erroneous results.”).
emphasized that the defendants did not supply wireless services outside their native countries and the fact that their wireless subscribers sent text messages to Maryland residents was insufficient to establish that the providers engaged in a purposeful interaction with Maryland. The court further concluded that defendants did not fully control how text messages were transmitted to Maryland, and the roaming agreements among wireless companies that permitted the texting were themselves insufficient to qualify as purposeful activity aimed at the forum state, Maryland.

c. Parent-Subsidiary Relationship

As a general rule, the existence of a parent-subsidiary relationship is not alone sufficient for a court to exercise personal jurisdiction over a foreign parent corporation. A court may, however, assert jurisdiction over the parent based on either an alter ego or agency theory of control. Under the alter ego theory, a court can exercise personal jurisdiction over a foreign parent if the parent so dominates and controls the affairs of the subsidiary located in the forum such that the subsidiary could be considered the parent’s alter ego. State law varies as to what is required to sue a parent or an affiliate as an alter ego. Relevant factors which courts consider in determining whether a parent enjoys minimum contacts with the forum under an alter ego theory include whether the parent corporation owns all of the stock in the subsidiary; the subsidiary is adequately capitalized; the parent and subsidiary share corporate officers and directors; the subsidiary pays formal dividends; and the subsidiary has its own officers, employees, administrative services, bank accounts, and property.

In General Electric Co. v. Deutz AG, the court concluded that a German parent corporation was subject to personal jurisdiction in X because it had acted as its subsidiary’s guarantor; shared common officers and directors with the subsidiary; negotiated directly with the plaintiff; regulated the number of employees the subsidiary committed to the venture; and its top officials made numerous trips to Pennsylvania to oversee the joint venture with the subsidiary.1666 Similarly, in another case a Canadian parent corporation was subject to personal jurisdiction in Michigan based on the extent of its dominance and control of its U.S. subsidiary.1667 The parent actively directed the operations of its subsidiary, the parent’s officers regularly met in Michigan while being compensated and reimbursed solely by the parent, and the parent infused over $700,000 into the subsidiary without interest or repayment terms. In contrast, the Fifth Circuit held that it could not justify exercising jurisdiction over a Swedish parent corporation even though it was the ultimate owner of the U.S. subsidiaries, had some directors and officers in common with the subsidiaries, and had made some interest-bearing loans to the subsidiaries.1668

A court might also exercise personal jurisdiction over a foreign parent based upon an agency theory of control. Under this theory, a parent has the requisite minimum contacts with the forum if the subsidiary is merely an agent through which the foreign parent conducts business in the forum or its separate corporate status is formal only and without any semblance

1666 270 F.3d 144 (3d Cir. 2001).
1668 Alpine View Co. v. Atlas Copco AB, 205 F.3d 208 (5th Cir. 2000).
of an individual or distinct identity. In *Meier v. Sun International Hotels*, the court concluded that the corporate existence of Bahamian corporations’ subsidiaries in Florida was simply a formality given that the subsidiaries acted as the parent corporations’ accounting, advertising, and booking departments in the forum. Consequently, the parent corporations were subject to personal jurisdiction in Florida.

**B. Subject Matter Jurisdiction**

A court must be able to exercise subject matter jurisdiction in order to resolve disputes in certain types of cases. State courts exercise “general” subject matter jurisdiction, i.e. state courts exercise jurisdiction over those types of cases which do not fall under the exclusive jurisdiction of federal courts, administrative tribunals, or other types of courts. Federal courts, in contrast, exercise “limited” subject matter jurisdiction, i.e. jurisdiction must be granted by the Constitution or be given to the federal courts by statute. The two primary sources of federal court jurisdiction in both domestic and international disputes are “federal question” jurisdiction, 28 U.S.C. § 1331, and diversity jurisdiction, 28 U.S.C. § 1332. Federal courts can also exercise supplemental jurisdiction over state law claims that “form part of the same case or controversy” as a party’s federal claims. 28 U.S.C. § 1367.

1. **Federal Question Jurisdiction**

Federal courts exercise federal question jurisdiction in those cases where the claims arise under federal law. Such claims, for example, include those that arise in securities and antitrust litigation under the Securities Exchange Act of 1934, the Sherman Antitrust Act, and the Clayton Antitrust Act.

a. **Extraterritoriality of U.S. Laws**

One issue implicated by federal question jurisdiction is the extent of the extraterritoriality of federal laws. In some cases, a court may determine that the legitimate sovereign interests of a foreign nation prevent federal courts from exercising jurisdiction in cases where conduct causes independent foreign injury. For example, in *F. Hoffman-La Roche Ltd. v. Empagran S.A.* the Supreme Court interpreted the scope of The Foreign Trade Antitrust Improvements Act of 1982 as excluding certain anticompetitive conduct causing foreign injury from the reach of the Sherman Act. Domestic and international vitamin manufacturers allegedly engaged in price fixing, causing injury in the United States and overseas. The Court applied a canon of statutory interpretation to “assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.” As a result of that deference, the Court held that U.S. courts could not exercise jurisdiction in cases involving claims of foreign anticompetitive conduct causing independent foreign harm. The Court stated that the

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1669 288 F.3d 1264 (11th Cir. 2002).
1671 Id. at 164.
1672 Id. at 166.
“application of [American securities] laws creates a serious risk of interference with a foreign nation’s ability independently to regulate its own commercial affairs.”

In a recent case, *Morrison v. National Australia Bank Ltd.*, non-U.S. plaintiffs sued a non-U.S. issuer of securities based on securities transactions which occurred outside the United States. The non-U.S. investors sought to bring a securities fraud class action against an Australian bank in U.S. federal court by arguing that the bank’s subsidiary in Florida falsified its corporate records, thereby causing the bank to submit materially false filings to foreign securities markets.

The Second Circuit, using the “conduct and effects” test, concluded that the federal court lacked subject matter jurisdiction over plaintiffs’ class action because the foreign activity of the Australian bank was a more dominant factor in the fraud alleged by plaintiffs and, consequently, led more to the injury of the plaintiff investors than the conduct of the bank’s subsidiary in the United States. The court stated the “actions taken and the actions not taken by [the bank] in Australia were, in our view, significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida.”

The Supreme Court affirmed the Second Circuit’s decision but on different grounds. The Court emphasized the existence of the well-recognized canon of statutory interpretation establishing a presumption against the extraterritorial application of U.S. laws unless Congress has clearly expressed an affirmative intent to give a statute extraterritorial effect. That canon, as applied to the Securities and Exchange Act of 1934 and its accompanying regulations, prevented federal courts from exercising jurisdiction because Congress did not affirmatively provide that the statute should apply in a situation as presented in *Morrison*. Justice Scalia, writing for the majority, also criticized the conduct and effects test as giving federal judges the power to decide what they think Congress would have decided about the extraterritorial applicability of federal laws. According to the Court, such policy judgments regarding the intent of Congress were unnecessary given the existence of the relevant canon which presumes that extraterritoriality does not characterize U.S. laws.

b. **Self-Imposed Limitations on Jurisdiction**

Similar to the political question doctrine which applies to some types of domestic cases, federal courts will sometimes decline to exercise jurisdiction over foreign defendants in certain types of international disputes even if jurisdiction may be proper as a matter of federal law. Such
deference is based on prudential concerns of manageability or the practicalities associated with litigation and concern for the sovereignty of foreign nations and their court systems.

In Sarei v. Rio Tinto, for example, foreign plaintiffs filed suit against Rio Tinto, a coal mining company, in federal district court under the Alien Tort Statute (“ATS”). The ATS grants jurisdiction to federal courts over civil actions by aliens for torts that allegedly violate international law or treaties to which the U.S. is a party. Plaintiffs, residents of Papua New Guinea, alleged that Rio Tinto engaged in war crimes, environmental torts and racial discrimination. The Ninth Circuit held that some of plaintiffs’ claims under the ATS required that remedies in the country of origin be exhausted because of the claims’ weak “nexus” to the United States and the claims’ do not involve matters of “universal concern,” i.e. those “offenses for which a state has jurisdiction to punish without regard to territoriality or the nationality of the offenders.”

When dealing with prudential concerns, courts may avoid bright line rules for fact-intensive analyses in order to determine whether jurisdiction is proper. For example, in Bondi v. Capital & Fin. Asset Mgmt., the successor in interest to an Italian dairy and food company that filed for bankruptcy as a result of financial fraud filed a motion in federal district court to prevent plaintiffs in U.S. class actions from directly suing the company’s successor. The district court rejected the Italian company’s motion and the decision was affirmed on appeal. The Second Circuit emphasized that the U.S. legal and regulatory scheme for which “there is no Italian analog” would necessarily be evaluated by any Italian court which handled the securities fraud litigation. Additionally, the appellate court determined that the district court’s denial of the motion reflected principles of international comity since it also concluded that Italian courts would handle the enforcement of any U.S. judgments against the bankrupt company’s successor.

c. Express Versus Implied Causes of Action

Federal courts have expressed a strong preference for express, rather than implied, causes of action when exercising federal question jurisdiction under the Constitution, federal statutes or treaties. In one recent case, the D.C. Circuit reversed the district court by holding that the Treaty of Amity did not provide a plaintiff with a private right of action. Plaintiff, an American company, owned shares in an Iranian company and alleged that Iranian government illegally expropriated its equity interest in the company and unlawfully withheld its dividends. The appellate court concluded that while treaties are presumed to be self-executing, it is also commonly presumed that international agreements do not provide for implied private causes of

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1682 550 F.3d 822 (9th Cir. 2008) (en banc).
1683 Id. at 824.
1684 Id. at 824-25 (internal quotation marks omitted).
1685 535 F.3d 87 (2nd Cir. 2008).
1686 Id. at 92.
1687 Id.
1688 McKesson Corp. v. Islamic Rep. of Iran, 539 F.3d 485 (D.C. Cir. 2008).
1689 Id. at 487.
The treaty in question, the Treaty of Amity, did not include any language or provision to overcome this presumption. The court also cautioned that the notion of recognizing implied causes of action in treaties “embroils the judiciary in matters outside its competence and authority.”

d. Foreign Arbitral Awards

Federal law grants district courts the jurisdiction to hear all actions falling under the New York Convention.

This statutory grant of jurisdiction by Congress, however, has also been applied in some cases to hold that federal courts lack subject matter jurisdiction over some cases involving non-U.S. arbitration awards. In Gulf Petro Trading v. Nigerian Nat’l Petrol. Corp., the Fifth Circuit held that plaintiff, a Texas company, could not sue a Nigerian oil company in federal court after the latter company received a Swiss arbitral award. The Texas company alleged that the award was the result of a scheme of corruption, bribery and fraud but the Fifth Circuit considered the lawsuit as an impermissible collateral attack on a non-U.S. arbitration award.

In its decision, the Fifth Circuit noted that the New York Convention distinguished between a country of primary jurisdiction, i.e. the country where the arbitral award is made, and a country of secondary jurisdiction, i.e. all other countries. The court concluded that the Convention limited the review of awards in court of secondary jurisdiction to whether such awards should be enforced. As such, the court considered jurisdiction lacking in the Gulf Petro case because the Texas company’s claims and injury were not caused directly by the Nigerian company’s alleged acts, but by the effect the alleged acts had on the arbitral award.

C. Comparative Examination of Jurisdiction

Whether the courts of a particular state can exercise personal jurisdiction over a foreign plaintiff or defendant is determined by the internal procedural rules which govern that state’s adjudicative process, e.g. the Federal Rules of Civil Procedure used in U.S. federal courts, as well as by the treaties, conventions, and bilateral agreements which have been adopted or ratified by the state.

At the supernational level, nations employ a variety of treaties and conventions to govern or regulate the right of private litigants to invoke the jurisdiction of foreign courts and to enforce the judgments obtained by those courts. Examples include:

1690 Id. at 489.
1691 Id.
1692 Id. at 490.
1694 512 F.3d 742 (5th Cir. 2008).
1695 Id. at 751.
1696 Id. at 747.
1697 Id.
1698 Id. at 750.
The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters: The Convention governs the issue of jurisdiction among signatory European nations as well as the enforcement of foreign courts’ judgments.


Hague Convention on Foreign Judgments in Civil and Commercial Matters: The Convention is currently only ratified by four nations. Its purpose is to govern the judgments entered by one nation’s courts in other signatory nations.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The Convention has been adopted by over 140 nations and is intended to require the courts of contracting states to recognize private agreements to arbitrate and to enforce arbitration awards made in other contracting states.

These treaties and conventions each have their own set of jurisdictional rules. For example, according to the Brussels Convention, persons domiciled in a contracting state shall, regardless of their nationality, be sued in the courts of the state where they are domiciled. In order to determine where a contracting party is domiciled, a court shall apply its own internal law. In other cases, the “place of performance” determines whether a state’s courts may exercise jurisdiction. Finally, the Brussels Convention permits contracting parties to make an agreement as to which state’s courts will have jurisdiction to adjudicate disputes.

XXIII. CHAPTER 23: CROSS-BORDER DISCOVERY

Seeking discovery across international borders can be a daunting and arduous task. United States laws and international treaties have sought to ease those burdens, but their respective procedural requirements can nonetheless be tedious and the fruits of such efforts are often mixed.

A. Foreign Litigants Seeking Discovery in the United States.

Foreign litigants may obtain discovery from entities or persons in the United States through either the Hague Convention or United States law, specifically 28 U.S.C. § 1782. Section 1782 is far less cumbersome than the Hague Convention and has increasingly become the chosen method for obtaining United States-based discovery.1699

1699 Discovery under the Hague Convention is discussed in more detail in infra Chapter 23.A.1.e.1. While discussed in terms of obtaining discovery outside of the United States borders, it can also be utilized from foreign countries seeking discovery from parties within the United States.
1. Section 1782 Statutory Requirements.

Section 1782 allows, but does not require, a federal district court to order discovery if (1) the applicant is a foreign tribunal, international tribunal, or interested party; (2) the discovery is sought from a person residing or found in the court’s jurisdiction; and (3) the discovery is for use in; (4) a foreign or international tribunal, including criminal investigations.\(^{1700}\)

a. Applicant is a foreign tribunal, international tribunal, or interested party.

Section 1782 specifically allows the foreign or international tribunal or “any interested person” to apply for discovery under the statute.\(^{1701}\) The Supreme Court has pointed out that “[t]he text of § 1782(a) ‘upon the application of any interested person,’ clearly reaches beyond the universe of persons designated as ‘litigant’” in the foreign proceeding.\(^{1702}\) Thus, anyone with a “reasonable interest in obtaining judicial assistance” qualifies as an interested person under the statute.\(^{1703}\) Courts have found that foreign litigants,\(^{1704}\) complainants in foreign investigations,\(^{1705}\) the Tokyo district prosecutor’s office,\(^{1706}\) the Minister of Legal Affairs in Trinidad and Tobago,\(^{1707}\) and an agent for the court-appointed trustee in a bankruptcy action\(^{1708}\) all qualify as interested parties for purposes of Section 1782.

b. Discovery is sought from a person residing or found in the court’s jurisdiction.

Discovery may only be sought pursuant to Section 1782 from a person residing or found in the district court’s jurisdiction.\(^{1709}\) “Person” includes both natural persons and organizations.\(^{1710}\) One court has found that discovery can even be obtained from a person who is only temporarily in the court’s jurisdiction.\(^{1711}\)

c. Discovery is “for use in.”

At least one court has addressed the standard under which the discovery sought is “for use in” a foreign proceeding. In *Fleischmann v. McDonald’s Corp.*, the court found that the for

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\(^{1700}\) 28 U.S.C. § 1782(a).

\(^{1701}\) Id.


\(^{1703}\) Id.

\(^{1704}\) *In re Merck & Co., Inc.*, 197 F.R.D. 267, 274 (M.D.N.C. 2000).

\(^{1705}\) *Intel Corp.*, 542 U.S. at 256-57.

\(^{1706}\) *In re Letters Rogatory from the Tokyo Dist. Prosecutor’s Office*, 16 F.3d 1016, 1019 (9th Cir. 1994).

\(^{1707}\) *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1155 (11th Cir. 1988).

\(^{1708}\) *Lancaster Factoring Co. v. Mangone*, 90 F.3d 38, 42 (2d Cir. 1996).


\(^{1711}\) *In re Edelman*, 295 F.3d 171, 177 (2d Cir. 2002) (discovery can be obtained from a person visiting the United States).
use in standard mirrored the Rule 26(b)(1) of the Federal Rules of Civil Procedure and that materials are for use in the foreign proceeding if the “discovery [] is relevant to the claim or defense of any party, or for good cause, any matter relevant to the subject matter involved in the foreign action.”\textsuperscript{1712} The court cautioned, however, that this standard does not include the second sentence of Rule 26 that the materials be reasonably calculated to lead to the discovery of admissible evidence.\textsuperscript{1713} The Supreme Court has ruled that the discovery sought pursuant to Section 1782 need not be admissible in the foreign proceeding in order to be discoverable.\textsuperscript{1714} Thus, the information or materials sought need only be relevant in order to be discoverable.\textsuperscript{1715}

d. A foreign or international tribunal, including criminal investigations.

The Supreme Court in Intel Corp. v. Advanced Micro Devices, Inc. resolved a circuit split and held that Section 1782 does not require that a foreign proceeding be pending or imminent in order to obtain discovery.\textsuperscript{1716} Rather, a valid Section 1782 request only requires that the dispositive ruling be within “reasonable contemplation.”\textsuperscript{1717} This conclusion was based on the fact that in amending Section 1782, Congress removed the word “pending” from the statute and that the legislative history indicated that Congress intended that Section 1782 be available for both foreign proceedings and investigations.\textsuperscript{1718}

1) Federal courts have discretion whether to grant an application for discovery.

Federal courts, guided by several judicially-imposed considerations, have discretion over whether to grant an application for foreign discovery.\textsuperscript{1719} In Intel Corp. v. Advanced Micro Devices, Inc., the Supreme Court laid out three guiding principles for district courts.\textsuperscript{1720} First, the need for the assistance of Section 1782 is less where the discovery is sought from a participant in the foreign proceeding.\textsuperscript{1721} That is, when the party is a participant, the foreign tribunal can likely obtain the discovery itself.\textsuperscript{1722} Second, the district court should take into account the nature of the foreign tribunal and its receptivity to assistance from the United States.\textsuperscript{1723} Finally, the court

\textsuperscript{1712} 466 F. Supp. 2d 1020, 1029 (N.D. Ill. 2006).
\textsuperscript{1713} Id.
\textsuperscript{1714} Intel Corp., 542 U.S. at 253.
\textsuperscript{1715} Fleischmann, 466 F. Supp. 2d at 1029.
\textsuperscript{1716} Intel Corp., 542 U.S. at 258.
\textsuperscript{1717} Id. at 259.
\textsuperscript{1718} Id. (citing S. Rep. No. 1580, at 9 (Section 1782 should be available “whether the foreign or international proceeding or investigation is of criminal, civil, administrative, or other nature”)).
\textsuperscript{1719} 18 U.S.C. § 1782 (“The district court…may order” discovery) (emphais added).
\textsuperscript{1720} 542 U.S. 241, 263 (2004).
\textsuperscript{1721} Id. at 264.
\textsuperscript{1722} Id.
\textsuperscript{1723} Id.
should consider the nature of the request itself, the burden it imposes on the party, and the true purpose of the request.\footnote{1724}

The Seventh Circuit found that the application for discovery in \textit{Heraeus Kulzer v. Biomet, Inc.} presented “a textbook predicate for a successful § 1782 request.”\footnote{1725} The plaintiff, a German company, sued another company in a German court for theft of trade secrets and applied to the federal District Court for the Northern District of Indiana for discovery from the defendant pursuant to Section 1782.\footnote{1726} The Seventh Circuit noted that none of the Supreme Court’s cautionary cautions were present in this case: there was no indication that the discovery sought would be inadmissible in the German court, that discovery was sought in order to obtain documentation to overwhelm the court, or that it was sought to take advantage of a forum selection clause for substantive law but avoid its discovery limitations.\footnote{1727}

Courts are not always quick to grant Section 1782 requests. Courts have denied applications for United States discovery where the foreign tribunal where the case is pending has specifically requested that the United States court not grant the application.\footnote{1728} In addition, Section 1782 applications are often denied when the discovery sought is not located within the United States, as courts have noted that Section 1782 is not the proper mechanism to obtain foreign discovery.\footnote{1729}

\begin{enumerate}
\item \textbf{Federal Rules of Civil Procedure Still Apply to Section 1782 Applications.}
\end{enumerate}

Although Section 1782 allows a federal district court to grant discovery from to be used in a foreign proceeding, the Federal Rules of Civil Procedure still govern the discovery process.\footnote{1730} Thus, district courts can use their discretion in limiting and overseeing discovery in the same manner in which they would in a domestic case.\footnote{1731}

\begin{footnotes}
1724 \textit{Id.} at 265.
1725 \textit{633 F.3d 591, 597 (7th Cir. 2011)}.
1726 \textit{Id.} at 593.
1727 \textit{Id.} at 594-96.
1728 \textit{Schmitz v. Bernstein Liebhard & Lifshitz, LLP}, 376 F.3d 79, 84-85 (2d Cir. 2004) (no abuse of discretion to deny § 1782 application where German court requested that U.S. court deny the request because it would jeopardize the ongoing German investigation).
1729 \textit{Four Pillars Enterprises Co., Ltd. v. Avery Dennison Corp.}, 308 F.3d 1075, 1079-80 (9th Cir. 2002) (no abuse of discretion to deny application for documents located outside the United States); \textit{Norex Petroleum Ltd. v. Chubb Ins. Co. of Canada}, 384 F. Supp. 2d 45, 53 (D.D.C. 2005) (denying discovery application when documents sought were not located in within the United States, noting that the “body of case law suggests that § 1782 is not properly used to seek documents held outside the United States as a general matter”).
1730 \textit{28 U.S.C. § 1782(a)}; \textit{In re Bayer AG}, 146 F.3d 188, 195 (3d Cir. 1998) (“under ordinary circumstances the standards for discovery under [the Federal Rules of Civil Procedure] should also apply when discovery is sought under the statute”); \textit{Fleischmann}, 466 F. Supp. 2d at 1033 (“Once the court has decided to grant discovery, the discovery is managed by the Federal Rules of Civil Procedure unless the court orders otherwise.”).
1731 \textit{Id.}
\end{footnotes}
e. U.S. Litigants Seeking Discovery Abroad.

Litigants to domestic proceedings in the United States can obtain discovery from sources abroad through the Hague Convention or the Federal Rules of Civil Procedure. Both methods have their own unique advantages and drawbacks, although many litigants find the Federal Rules of Civil Procedure to be an easier and more fruitful method by which to obtain the requested discovery.


The Hague Convention of 1970 governs the ability to obtain discovery for use in domestic litigation from sources residing in countries outside United States borders that are signatories to the Convention. To date, forty-seven countries are signatories to the Convention and thus discovery may be sought from a person or entity residing in those jurisdictions by way of the Convention. The Hague Convention is an optional procedure that can be used in place of the Federal Rules of Civil Procedure.

Evidence and other discovery may be obtained pursuant to the Convention through a process known as letters of request, or through diplomatic officers, consular agents, and commissions. Each signatory country must designate a Central Authority which accepts and transmits letters of request and a judicial authority of one country may send a letter of request to the “Central Authority” of another country to obtain evidence or “perform some other judicial act.” The Convention allows the receiving country to apply its own laws as to the methods and procedures of obtaining the requested materials, and a country may refuse to comply with a letter of request if it “is incompatible with the international law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.”

There are several factors that limit the scope and effectiveness of letters of request. Of primary importance, Article 12(b) permits a signatory state to refuse to execute a letter of request when it “considers that its sovereignty or security would be prejudiced.” In addition, Article 23 allows a country to “declare that it will not execute Letters of Request issued for the

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1733 Hague Evidence Convention – Acceptances of Accessions, Hague Conference on Private Int’l Law, http://hcch.net/upload/overview20e.pdf (last visited Nov. 16, 2012). Signatories of note include Australia, Belgium, China, Denmark, Finland, France, Germany, Greece, Hungary, India, Ireland, Israel, Italy, Japan, Korea, Mexico, Monaco, Netherlands, Poland, Russian Federation, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Id.
1735 Hague Evidence Convention, arts. 1-22.
1736 Id. at arts. 1-2.
1737 Id. at art. 8.
1738 Id. at art. 12(b).
purpose of obtaining pre-trial discovery of documents as known in Common Law countries.°°°1739

Nearly every signatory country, except the United States, has lodged some form of formal reservation under Article 23.°°°° Some countries have also enacted what have become known as “blocking statutes” that may prohibit entities from providing information or other documents to parties in other countries. For example, the European Union enacted a directive that requires Member States to enact measures necessary to prevent the transfer of personal data to third countries, such as the United States, that do not ensure an adequate level of protection for personal information.1741

Simply because a blocking statute is in place, however, does not excuse compliance by the foreign entity. In Societe Internationale v. Rogers pour Participants Industrielles et Commerciales, S.A., the Supreme Court stated that noncompliance with a discovery order for fear of prosecution still constitutes nonproduction and subjects the entity to discovery sanctions.°°°°° With the increasing advent of blocking statutes, some courts require that litigants utilize the Hague Convention,°°°°° while others nonetheless allow discovery to proceed via the Federal Rules.°°°°°


The Federal Rules of Civil Procedure provide an alternative option for seeking discovery abroad. Federal Rule 28(b) allows litigants in federal court to obtain foreign discovery (1) pursuant to any applicable treaty or convention; (2) pursuant to a letter of request;°°°°°° (3) on notice before a person authorized to administer oaths in the foreign country; or (4) before a

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1739 Id. at art. 23.
1741 European Union Directive 95/46/EC (Member States are required to “protect the fundamental rights and freedoms of natural persons, and in particular, their right to privacy with respect to the processing of personal data”); see also United Kingdom Data Protection Act 1998, Principle 8 (“Personal data shall not be transferred to a country or territory outside the European Economic Area unless that country or territory ensures adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data.”).
1742 357 U.S. 197, 212 (1958) (noting that although sanctions may be imposed, dismissal as a sanction is inappropriate “when it has been established that failure to comply has been due to inability, and not willfulness, bad faith, or other fault.”).
1745 Letters of Request under the Federal Rules are governed by 28 U.S.C. § 1781 (vesting the State Department with authority to transmit letters rogatory and letters of request) and 22 C.F.R. § 92. The State Department has noted that letters of request are a “time consuming, cumbersome process and should not be utilized unless there are no other options available.” U.S. Dept. of State Circular, Serving Legal Documents Abroad, http://travel.state.gov/law/judicial/judicial_680.html (last visited Nov. 17, 2012).
person commissioned by the court to take oaths. Further, Rule 29 allows the parties to agree by stipulation as to the procedures for taking discovery.

Discovery under the Federal Rules may be sought from Hague signatories and non-signatories alike. There is no requirement that a party seeking discovery abroad utilize the Hague Convention before resorting to the Federal Rules. The Supreme Court has provided five factors that lower courts should consider when determining whether a party may utilize the Federal Rules or the Hague Convention: (1) the importance to the litigation of the documents or other information sought; (2) the degree of specificity of the request; (3) whether the information originated in the United States; (4) the availability of alternate means of securing the information; and (5) the extent to which noncompliance with the request would undermine important interests of the United States, or compliance would undermine the interests of the country where the information is located. The Court also noted that comity should guide the courts, “refer[ing] to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states.”

Given the difficulty of obtaining discovery through the Hague Convention, the majority of lower courts that have considered the issue side in favor of allowing discovery to proceed according to the Federal Rules of Civil Procedure. In addition to the Supreme Court factors, courts have analyzed the hardship of compliance on the party or witness, the good faith of the party resisting discovery, the extent to which the required discovery will take place outside the United States, and the nationality of the entity involved.

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1747 Id. at 29.
1748 Societe Nationale, 482 U.S. at 536 (“[T]he text of the Evidence Convention, as well as the history of its proposal and ratification by the United States, unambiguously supports the conclusion that it was intended to establish optional procedures that would facilitate the taking of evidence abroad.”); In re Auto. Refinishing Paint Antitrust Litig., 358 F.3d 288, 299 (3d Cir. 2004) (discovery may be taken through normal U.S. discovery procedures even if the material to be produced is located abroad); In re Vitamins Antitrust Litig., 120 F. Supp. 2d 45, 57 (D.D.C. 2000) (no requirement to seek discovery under the Hague Convention before utilizing the Federal Rules of Civil Procedure).
1749 Societe Nationale, 482 U.S. at 544 (citing Restatement (Third) of the Foreign Relations Law of the United States § 437(1)(c) (1987)).
1750 Id. at 543-44.
a) **Document Requests and Requests for Production.**

Under Federal Rule of Civil Procedure 34, parties may obtain documents, electronically stored information, and other tangible things from another party that are in that party’s possession, custody, or control.\(^{1753}\) Rule 34 also allows a party to obtain discovery from another party’s foreign affiliate if the party sufficiently “controls” the affiliate.\(^{1754}\) Whether there is sufficient control between the entities depends on several factors, including any complicity in storing or withholding documents. [Other factors] include (a) commonality of ownership, (b) exchange or intermingling of directors, officers or employees of the two corporations, (c) exchange of documents between the corporations in the ordinary course of business, (d) any benefit or involvement by the non-party corporation in the transaction, and (e) involvement of the non-party corporation in the litigation.\(^{1755}\)

Documents can also be obtained from non-parties. If the non-party voluntarily complies with the discovery request, the procedures of Rule 34 govern. If a non-party is unwilling to comply but is within the subpoena power of the court, Rule 45 allows the court to issue a subpoena to produce “designated books, documents or tangible things in the possession, custody, or control of that person.”\(^{1756}\) However, if the non-party is unwilling to voluntary comply and is not within the subpoena power of the court, the party seeking discovery must use the Hague Convention to attempt to obtain the requested materials.

b) **Depositions.**

Litigants in domestic courts may be able to obtain deposition of a foreign witness. If the foreign witness is a party to the litigation, Rule 30 allows a party to take the deposition of any other party upon notice and without leave of the court.\(^{1757}\) This applies not only to foreign parties, but also the officers, directors, and managing agents of a foreign party.\(^{1758}\)

Taking the deposition of a foreign third party presents a more difficult challenge. If the would-be deponent agrees to be deposed, any of Rule 28’s methods of obtaining discovery can be used.\(^{1759}\) However, if the foreign party will not voluntarily comply, the party requesting the

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\(^{1755}\) *Ericsson*, 181 F.R.D. at 306.
\(^{1757}\) *Id.* at 30(a)(1).
\(^{1758}\) *Id.* at 30(b)(6).
\(^{1759}\) *Id.* at 28(b).
deposition must generally rely on the Hague Convention and issuing a letter of request since the
deponent is not within the subpoena power of the court.1760

c) Interrogatories.

Under the Federal Rules of Civil Procedure, only parties may be required to respond to
interrogatories.1761 Thus, there will generally be no need to seek foreign interrogatories as parties
to the litigation are subject to the court’s power to issue discovery sanctions.1762

f. Attorney-Client Privilege in Cross-Border Discovery.

While nearly every country recognizes attorney-client privilege in some form, the nature
and extent of the privilege varies widely across jurisdictions. Section 1782,1763 the Hague
Convention,1764 and the Federal Rules of Evidence1765 all prohibit the discovery of attorney-client
privileged materials. Questions of whether to apply United States or foreign law with respect to
attorney-client privilege depend on a choice of law analysis.

Courts have generally applied one of two tests to determine whether United States
privilege law or the foreign country’s privilege law applies. The broader approach holds that
“any communications touching base with the United States will be governed by the federal
discovery rules while any communications related to matters involving [another] country will be
governed by the applicable foreign statute.”1766 When the communication took place abroad or
involved foreign attorneys, courts typically defer “to the law of the country that has the
predominant or most direct and compelling interest in whether those communications should
remain confidential.”1767 The jurisdiction with the predominant interest is the place where the
privileged relationship was entered into or where the relationship was centered.1768 At least one
court has criticized this approach, noting that it is overly broad by allowing any document that
touches the United States to be governed by United States privilege law.1769

(requiring the use of the Hague Convention where an involuntary third party deponent was not subject
to the court’s subpoena power).
1762 See id. at 37.
1763 28 U.S.C. § 1782(a) (“A person may not be compelled to give his testimony or statement or to
produce a document or other thing in violation of any legally applicable privilege.”).
1764 Hague Evidence Convention, art. 11 (“In the execution of a Letter of Request the person
concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the
evidence”).
1768 Id.
2007).
The second approach, grounded in comity, looks to the foreign nation’s law to determine the extent to which the privilege attaches.\textsuperscript{1770} Courts employ a two step test: first, it must determine whether the foreign nation would extend privilege to the communication in question, and if so, then consider the specific capacity in which the agent was functioning with respect to a given document.\textsuperscript{1771}

XXIV. CHAPTER 24: ENFORCEMENT OF FOREIGN JUDGMENTS IN THE U.S.

Once a plaintiff prevails in international litigation, there remains an important question: will the defendant’s domestic court recognize and enforce the foreign judgment? The U.S. Supreme Court succinctly phrased the root of the problem in \textit{Hilton v. Guyot}: “No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived.”\textsuperscript{1772} In U.S. domestic litigation, the issue of interstate enforcement of judgments is dealt with by Article IV, § 1 of the U.S. Constitution, which requires that each state give full faith and credit to the judgments of other states absent certain exceptions. The Full Faith and Credit Clause does not, however, extend to the domestic enforcement of judgments obtained abroad.\textsuperscript{1773} In fact, there is neither a federal statute nor any international agreement addressing the circumstances under which a U.S. court must or may enforce an extraterritorial judgment.\textsuperscript{1774} Instead, each state has its own regime governing the matter.\textsuperscript{1775}

Thus, a state court’s decision to give effect to a foreign judgment is generally based upon either state common law tracing back to the Supreme Court’s 1895 decision in \textit{Hilton v. Guyot}, or the Uniform Foreign Money-Judgments Recognition Act (the “UFMJRA”), if the state in question has adopted that statute. In addition to these two main sources of law, the court may also look to the \textit{Restatement (Third) of Foreign Relations Law}. Finally, while the U.S. is not yet a party to any international treaties governing the enforcement of foreign judgments, it has signed but not yet ratified the very narrow Hague Convention on Choice of Court Agreements.

While these sources of governing law may vary from state to state, however, in practice there is little substantive variation in the factors the court will look to in order to determine whether a foreign judgment will be enforced.\textsuperscript{1776}

\begin{thebibliography}{9}
\bibitem{1770} Smithkline Beecham Corp. v. Apotex Corp., 193 F.R.D. 530, 535 (N.D. Ill. 2000).
\bibitem{1771} \textit{Id.}
\bibitem{1772} \textit{Hilton v. Guyot}, 159 U.S. at 113, 163 (1895).
\bibitem{1774} Cedric C. Chao & Christine S. Neuhoff, Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective, 29 Pepp. L. Rev. 147, 147 (2001).
\bibitem{1775} \textit{Id.}
\bibitem{1776} \textit{Id.}
\end{thebibliography}
A. The Common Law & Statutory Standards for Enforcing Foreign Judgments In the U.S.

1. Hilton v. Guyot

The single most important guide for enforcing foreign judgments in the United States is the Supreme Court’s 1895 decision in Hilton v. Guyot. Despite the Supreme Court’s ostensible elimination of federal common law in Erie R.R. v. Thompkins, the Hilton v. Guyot decision provides the standard upon which both state common law and the UFMJRA are founded, such that there are “surprisingly few fundamental differences in the approaches taken by the various states.”

In Hilton v. Guyot, Justice Gray wrote that the extent to which a foreign judgment should be “allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call ‘the comity of nations.”’ The Court defined comity as follows:

‘Comity,’ in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

In deciding whether to enforce the French Court’s judgment against New York residents Henry Hilton and William Libbey, the Supreme Court formulated what would become the most important and enduring rule for enforcing foreign judgments in the U.S.:

[W]e are satisfied that where there has been an opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

\[1777\] Born & Rutledge, supra note 1773, at 1013.
\[1778\] Guyot, 159 U.S. at 163 (1895).
\[1779\] Id. at 163-164.
\[1780\] Id. at 202-203.
The Supreme Court’s ruling, which has since been interpreted as championing a “presumptive recognition of foreign judgments,”\textsuperscript{1781} signified a sharp departure from English common law, which had held that a foreign judgment for money was only “prima facie evidence of the demand and was subject to be examined and impeached.”\textsuperscript{1782} For example, in \textit{Walker v. Witter},\textsuperscript{1783} Lord Mansfield refused to enforce a chancery decision from Wales on grounds that the “original decree was in the court of Wales, whose decisions are clearly liable to be examined.” Lord Hardwicke’s statement in \textit{Gage v. Bulkeley},\textsuperscript{1784} is particularly illustrative of English common law concerning the enforcement of foreign judgments:

Can a sentence or judgment pronounced by a foreign jurisdiction be pleaded in this Kingdom to a demand for the same thing in any court of justice here? I always thought it could not, because every sentence, having its authority from the sovereign in whose dominion it is given, cannot bind the jurisdiction of foreign courts, who own not the same authority, and who have a different sovereign, and are only bound by judicial sentence given under the same sovereign power by which they themselves act.

Nevertheless despite its decision’s principled break with English common law, the \textit{Hilton} court nonetheless refused to enforce the French judgment on the more limited grounds that “international law is founded upon mutuality and reciprocity,” and French courts allowed American judgments “no more effect than of being prima facie evidence of the justice of the claim.”\textsuperscript{1785}

The rule formulated in \textit{Hilton v. Guyot} is still the dominant legal standard in state court decisions to enforce foreign judgments, and remains “substantially unchanged.”\textsuperscript{1786} The main exception is that “lack of reciprocity (that the foreign country would not enforce a U.S. judgment under like circumstances) is no longer an automatic bar to the enforcement of a foreign country judgment,” but its importance as a factor depends upon the state in which the action is brought.\textsuperscript{1787} In states where the reciprocity requirement has been dispensed with, it has often been singled out from the other \textit{Hilton v. Guyot} factors as a “provincial” notion that undermines the American “call[] for an end to litigation.”\textsuperscript{1788}

2. \textbf{UFMJRA}

In 1962, the National Conference of Commissioners on Uniform State Law and the American Bar Association drafted the UFMJRA in hopes of increasing uniformity among state

\textsuperscript{1781} BORN & RUTLEDGE, \textit{supra} note 1773, at 1013.
\textsuperscript{1782} Id. at 180.
\textsuperscript{1784} [1744] 3 Atk. 215.
\textsuperscript{1785} \textit{Guyot}, 159 U.S. at 168 (1895).
\textsuperscript{1787} Id.
approaches to enforcing foreign judgments. Although there is little variation from state to state, after Erie R.R.Co. v. Tompkins, the Hilton v. Guyot factors were binding only to the extent that state courts wanted them to be. The drafters may also have been concerned that while variations were few, the few that did exist, such as some state’s continued adherence to either a mandatory or discretionary reciprocity requirement, led to major differences in enforcement. There was also a concern that most civil law countries only grant conclusive effect to foreign money judgments based upon reciprocity. The drafters hoped that by increasing the recognition of foreign judgments in the states, the UFMJRA would increase the enforcement of U.S. judgments abroad. The UFMJRA has since been adopted by thirty-one states along with Washington D.C. and the U.S. Virgin Islands.

The UFMJRA basically codifies Hilton v. Guyot. A foreign judgment that is “final and conclusive and enforceable where rendered” is “conclusive between the parties to the extent that it grants or denies recovery of a sum of money.” A foreign judgment is one that arises from any territory outside the United States, “or any state, district, commonwealth, territory… or the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands.” Whether the judgment is final or conclusive depends heavily upon the state in which the action is brought, but a “court will generally look to the law of the rendering country.” Many states recognize a judgment as “final and conclusive” even when the judgment remains subject to change; the fact that it is subject to appeal does not usually undermine its finality. However, when a judgment is only preliminary under the law of the foreign country, the majority of state courts will not deem it to be final and conclusive. The UFMJRA requires that the judgment involve a sum of money, but the Act does extend to include a “judgment for taxes, a fine or penalty, or a judgment for support in matrimonial or family matters.”

The UFMJRA provides a comprehensive list of grounds for mandatory and discretionary nonenforcement, as well as exceptions to mandatory nonenforcement in the case that the foreign court lacked personal jurisdiction.

1791 Commissioners’ Prefatory Note to the Uniform Foreign Money-Judgments Recognition Act.
1792 Id.
1794 Chao & Neuhoff, supra note 1774, at 150.
1795 UFMJRA §§ 2-3.
1796 Id. § 1.(1).
1797 Chao & Neuhoff, supra note 1774, at 152.
1799 Id.
1800 UFMJRA § 1.(2)
a. **Mandatory Nonenforcement**

Nonenforcement of foreign judgments is mandatory in any of the following three situations: (1) “the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;” (2) “the foreign court did not have personal jurisdiction over the defendant;” or (3) the “foreign court did not have jurisdiction over the subject matter.”\(^{1801}\)

Courts have dealt with each of the three factors in a variety of ways. For example, with respect to the first factor, some courts have held that voluntarily participating in a foreign country’s judicial system does not impair a party’s ability to later challenge the fairness of that system.\(^{1802}\) One way of proving the unfairness/impartiality of a foreign judicial system is by using U.S. State Department Country Reports.\(^{1803}\) As to personal jurisdiction, while courts do not generally require that service of process be entirely translated, when a summary is provided in the defendant’s native language, and the summary does not mention that the documents included in another language detail a legal action commenced against the defendant, some courts have held that service of process fails and the foreign tribunal lacks personal jurisdiction over the defendant.\(^{1804}\) Finally, United States courts “normally presume that the foreign court had jurisdiction over the subject matter of the action… [but] courts do not employ such a presumption with respect to a foreign judgment affecting rights in land in the United States or rights in a United States patent, trademark, or copyright.”\(^{1805}\)

b. **Discretionary Nonenforcement**

Nonenforcement of foreign judgments is discretionary in any of the following six situations: (1) “the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;” (2) “the judgment was obtained by fraud;” (3) “the [cause of action] [claim of relief] on which the judgment is based is repugnant to the public policy of this state;” (4) “the judgment conflicts with another final and conclusive judgment;” (5) “the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court;” or (6) “in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.”\(^{1806}\)

Each of the above factors has received broad and extensive treatment in the U.S. courts. For example, with respect to the first factor, some courts have held that whether a defendant received notice of proceedings in sufficient time depends upon “whether a reasonable method of notification [was] employed and reasonable opportunity to be heard [was] afforded to the person affected.”\(^{1807}\) In determining fraud, some courts have declined to require that defendants produce

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\(^{1801}\) *Id.* §§ 4(a)(1)-4(a)(3).

\(^{1802}\) *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 141 (2d Cir. 2000).

\(^{1803}\) *Id.*


\(^{1805}\) *Chao & Neuhoff, supra* note 1774, at 168.

\(^{1806}\) UFJMJA §§ 4(b)(1)-4(b)(6).

clear and convincing evidence, requiring only that the court be “satisfied” that the judgment was fraudulently obtained. For example, in *Transportes v. Aereos Pegaso, S.A. de C.V. v. Bell Helicopter Textron, Inc.*, the District Court of Delaware was not “satisfied” that a Mexican judgment against a Delaware defendant was not obtained by fraud when the judge named a court-appointed expert out of step with normal procedures, returned to appointing experts according to Mexican law in subsequent cases, the appointed expert attempted to solicit a bribe from the American defendant, and the judge was then under criminal investigation by the Mexican authorities.1809

The third exception to enforcement is for the most part “very narrowly construed;” “[e]nforcement will not be denied merely because the foreign cause of action is not recognized in the jurisdiction in which enforcement is sought.” Nonetheless, a judgment is repugnant and the principles of comity fail where “recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our citizens.” In a rare example of this exception at work, a Maryland court refused to enforce a British court’s judgment in a libel action against an American defendant because the “contrast between English standards governing defamation and the present Maryland standards [was too] striking.” Under British law, the plaintiff did not have to prove fault, and “defamatory statements [were] presumed to be false,” such that “recognition of English defamation judgments could well lead to wholesale circumvention of fundamental public policy in Maryland and the rest of the country.”

As to the fourth exception, one way a judgment may be found to conflict with another judgment is when a litigant seeks to “circumvent [domestic] judicial rulings by obtaining favorable foreign judgments through the use of false or incomplete information and [then] registering those foreign judgments with United States courts.” Finally, in order for a proceeding in a foreign country to be contrary to an agreement between the parties, some courts have held that it is not enough that the agreement provides that the parties are to be bound by a certain law, as the agreed upon law may nonetheless still favor enforcement. Instead, the agreement should contain a choice of forum clause.

c. Exceptions to Nonenforcement

Lack of personal jurisdiction over the defendant is usually grounds for mandatory nonenforcement, but the UFMJRA provides a number of important exceptions to the rule. In any of the following six situations, the domestic court will not deny enforcement even though the

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1809 *Id.* at 538.
1810 Chao & Neuhoff, supra note 1774, at 157.
1813 *Id.*
1816 *Id.*
foreign court lacked personal jurisdiction over the defendant: (1) “the defendant was served personally in the foreign state;” (2) “the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;” (3) “the defendant prior to the commencement of the proceedings had agreed to the jurisdiction of the foreign court with respect to the subject matter involved;” (4) “the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;” (5) “the defendant had a business office in the foreign state and the proceedings in the foreign court involved a [cause of action] [claim of relief] arising out of business done by the defendant through that office in the foreign state;” or (6) “the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a [cause of action] [claim of relief] arising out of such operation.”

**d. Important State Modifications to UFMJRA**

While it is true that there is little variation among state applications of the UFMJRA, some states have made small but important modifications to their adopted versions. One of the most important variations is the addition of the reciprocity requirement that *Hilton v. Guyot* initially championed, but which did not ultimately become a part of the majority of state enforcement regimes.\(^\text{1818}\) There are currently six states that have added a reciprocity requirement to their adopted versions of the UFMJRA: FL, ID, OH, TX, GA, and MA.\(^\text{1819}\) In the first four states, nonenforcement is discretionary if the foreign country would not recognize a U.S. judgment.\(^\text{1820}\) In the last two states, nonenforcement is mandatory given the same circumstances.\(^\text{1821}\)

In states that have adopted this modification, the party challenging enforcement generally bears the burden of proving non-reciprocity.\(^\text{1822}\) In *Banque Libanaise Pour Le Commerce v. Khreich*, the burden was met by testimony from an American lawyer regularly practicing in the foreign jurisdiction who had no knowledge of the foreign jurisdiction ever enforcing a U.S. judgment. Whether a foreign jurisdiction can cite to laws encouraging enforcement of U.S. judgments is generally less important than evidence that the foreign jurisdiction actually enforces U.S. judgments.\(^\text{1823}\)

3. **The Restatement (Third) of Foreign Relations Law**

Whether a state court applies the common law or has adopted the UFMJRA, the *Restatement (Third)* is often relied upon for additional guidance. Section 482 of the

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\(^{1817}\) UFMJRA §§ 5(a)(1)-5(a)(6).

\(^{1818}\) Chao & Neuhoff, *supra* note 1774, at 152.

\(^{1819}\) *Id.*

\(^{1820}\) *Id.*

\(^{1821}\) *Id.*


\(^{1823}\) *Banque Libanaise Pour Le Commerce*, 915 F.2d at 1005.
RESTATEMENT (THIRD) requires mandatory nonrecognition in the event that the foreign judicial system did not provide an impartial tribunal, or if the foreign court lacked personal jurisdiction.\textsuperscript{1824} Nonrecognition means that the court will not rely “upon a judicial ruling to preclude litigation of a claim,” whereas nonenforcement refers to the situation where a court will not employ its “coercive powers to compel a defendant... to satisfy a judgment rendered abroad.”\textsuperscript{1825} While the UFMJRA requires nonenforcement if the foreign jurisdiction lacked subject matter jurisdiction, the RESTATEMENT (THIRD) makes it discretionary.\textsuperscript{1826} The RESTATEMENT (THIRD) also lacks a provision for discretionary enforcement in the event of \textit{forum non conveniens}. Finally, while the UFMJRA is limited to foreign money judgments, the RESTATEMENT (THIRD) “covers the recognition and enforcement of any type of foreign judgment.”\textsuperscript{1827} In all other respects, the RESTATEMENT (THIRD) mirrors the UFMJRA. It also tracks most of the \textit{Hilton v. Guyot} factors such that all three bodies of law typically relied upon in a court’s decision to enforce a foreign judgment are in fact “not that different.”\textsuperscript{1828}

4. The Hague Convention on Choice of Court Agreements

On June 30, 2005, the Hague Conference on Private International Law completed the Hague Convention on Choice of Court Agreements.\textsuperscript{1829} The Convention is the “litigation counterpart to the New York Arbitration Convention.”\textsuperscript{1830} It has been signed but not yet ratified by the U.S., and is the closest the U.S. has come to recognizing a “treaty governing the recognition and enforcement of foreign judgments.”\textsuperscript{1831} Nonetheless, the Convention only applies to foreign judgments rendered by a court designated in a forum selection clause between two businesses; it does not apply to foreign judgments where the court was not selected by a valid choice of court agreement. The convention’s scope is therefore quite narrow.

The Convention’s intent is simple: to establish an “international legal regime that provides certainty and ensures the effectiveness of conclusive choice of court agreements between parties to commercial transactions and that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements.”\textsuperscript{1832} To that end, the Convention can be boiled down to three rules: (1) “[t]he courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies;”\textsuperscript{1833} (2) “a court of a Contracting State other than that of the chosen court shall

\textsuperscript{1824} Restatement (Third) of Foreign Relations Law § 482(1)(a)–(b) (1987).
\textsuperscript{1825} BORN & RUTLEDGE, \textit{supra} note 1773, at 1010.
\textsuperscript{1826} Restatement (Third) of Foreign Relations Law § 482(2)(a).
\textsuperscript{1828} \textit{Id}.
\textsuperscript{1829} \textit{Id.} at 44.
\textsuperscript{1831} Berlin, \textit{supra} note 1827, at 48.
\textsuperscript{1832} Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294.
\textsuperscript{1833} \textit{Id.} at art. (5).
suspend or dismiss proceedings to which an exclusive choice of court agreement applies;¹⁸³⁴ and (3) “[a] judgment given by a court of a contracting state designated in an exclusive choice of court agreement shall be recognized and enforced in other Contracting States.”¹⁸³⁵ Each of the three main provisions is accompanied by a list of exceptions, and the Convention itself only “govern[s] international business-to-business agreements that designate a single court, or the courts of a single country, for resolution of disputes.”¹⁸³⁶ The convention does not extend to cover matters such as “anti-trust… insolvency, employment contracts, tort claims, and personal contracts.”¹⁸³⁷

If the U.S. were to fully ratify the Convention, the current “imbalance between litigation and arbitration” (arising from the New York Arbitration Convention) would be remedied.¹⁸³⁸ As has been seen earlier in this chapter, outside of the Convention, there is no international framework for enforcing judgments. There is, however, an international framework for enforcing foreign arbitral awards. But just as the rules outlined above only pertain to foreign judgments, the New York Convention only applies to arbitral awards. This has created the “anomaly that foreign arbitral awards – the products of private ordering – are more likely to be enforced in a transnational setting than are official judgments of national courts.”¹⁸³⁹ The narrow convention is therefore important in that it may be seen as a first (though small) step in the direction of placing foreign judgments on equal footing with foreign arbitral awards, breaking down the “monopoly of international arbitration in the international context,” and “offer[ing] corporate counsel a wider variety of choices for resolution of transnational disputes.”¹⁸⁴⁰ As noted above, however, the U.S. is a member, but not yet a party, to the Convention.

B. Enforcement of U.S. Judgments Abroad

The U.S. does not belong to any bilateral or multilateral treaties covering the enforcement of foreign judgments. Just as domestic enforcement depends upon the laws of the 50 states, enforcement of U.S. judgments abroad depends upon the laws of the relevant foreign jurisdiction. It is a hard and simple fact that with few exceptions, a foreign plaintiff attempting to enforce a foreign judgment in a U.S court is much more likely to succeed than an American plaintiff attempting to enforce a U.S. judgment abroad.¹⁸⁴¹ The reluctance of foreign jurisdictions can be traced to the “complexity of U.S. litigation procedures, the size of damage awards, and the nature of U.S. jurisdictional claims.”¹⁸⁴² U.S. damage awards have in fact been at the heart of most U.S. treaty making failures in this arena; “punitive (or exemplary) damage awards... are

¹⁸³⁴ Id. at art. (6).
¹⁸³⁵ Id. at art. (8).
¹⁸³⁶ Brand, supra note 1830.
¹⁸³⁷ Berlin, supra note 1827, at 57.
¹⁸³⁸ Koh, supra note 1789, at 230.
¹⁸³⁹ Id. at 205.
¹⁸⁴² BORN & RUTLEDGE, supra note 1773, at 1016.
common in the U.S. context but are considered excessive in the European context.”\textsuperscript{1843} Furthermore, foreign plaintiffs in U.S. courts benefit from the “comparative generosity of the United States’ \textit{Hilton} standard,” while U.S. plaintiffs abroad often run into legal regimes far less amenable to enforcement.\textsuperscript{1844} A brief overview of foreign approaches to recognizing U.S. judgments follows.

1. \textbf{Canada}

Until very recently, Canadian courts “safely ignored” almost all foreign judgments based on an adherence to 19th century English law.\textsuperscript{1845} In fact, up until 1990, a judgment from one province in Canada was not generally granted recognition in the courts of another province.\textsuperscript{1846} In 1990, however, the Supreme Court of Canada – arguing that “19th century English rules fl[ew] in the face of the obvious intention of the Constitution to create a single country with a common market and common citizenship” – held that “one province should give ‘full faith and credit’ to the judgments given by a court in another province.”\textsuperscript{1847} In doing so, Canada’s highest court also sowed the seeds for future recognition of foreign judgments, admitting its current stance on the topic was anachronistic: “[m]odern states cannot live in splendid isolation and do give effect to judgments given in other countries.”\textsuperscript{1848} In 2003, the Supreme Court of Canada followed up on this conclusion and revolutionized Canadian law on the recognition of foreign judgments:

International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in Morguard can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a different approach by statute, the ‘real and substantial connection’ test should apply to the law with respect to the enforcement and recognition of foreign judgments.”\textsuperscript{1849}

The test requires that a “significant connection exist between the cause of action and the foreign court.”\textsuperscript{1850} The standard was originally formulated for disputes between provinces within Canadian boarders, and was “deliberately general to allow for flexibility in [its] application,” being “simply intended to capture the idea that there must be some limits on the claims of jurisdiction.”\textsuperscript{1851} A list of several factors has, however, emerged over time, and includes the following: (1) the connection between the forum and the plaintiff’s claim; (2) the connection between the forum and the defendant; (3) unfairness to the defendant in assuming jurisdiction;

\textsuperscript{1843} Koh, \textit{supra} note 1789, at 222. 
\textsuperscript{1844} \textit{Id.} at 212. 
\textsuperscript{1845} Fairley, \textit{supra} note 1841, at 305. 
\textsuperscript{1846} \textit{Id.} 
\textsuperscript{1847} Morguard Investments, Ltd. V. DeSavoye, 3 S.C.R. 1077 (S.C.C. 1990). 
\textsuperscript{1848} \textit{Id.} 
\textsuperscript{1850} \textit{Id.} 
\textsuperscript{1851} Moscutt v. Courcelles (2002), 60 O.R. 3d 20 (Can. Ont. C.A.)
(4) unfairness to the plaintiff in not assuming jurisdiction; (5) the involvement of other parties to the suit; (6) the foreign court’s willingness to recognize and enforce a Canadian judgment; (7) whether the case is international in nature; and (8) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.1852

Typical bars to enforcement despite the test having been satisfied are fraud, that the foreign procedure was out of step with Canadian concepts of natural justice and due process, or that the judgment was against Canadian public policy and views of basic morality.1853 But the bars are seldom grounds for denying the foreign judgment, such that “barring extensive procedural sloppiness by an originating court,” the foreign judgment will more than likely be enforced.1854 Some have even argued that “Canada is [now] one of the most hospitable jurisdictions in the world for the recognition and enforcement of judgments from foreign jurisdictions.”1855

2.  China

If Canada is one of the countries most likely to enforce a U.S. judgment, China falls on the opposite side of the spectrum. A judgment entered in a U.S. court is “not enforceable [in China] due to lack of reciprocity or international treaty.”1856 China’s assessment of whether or not reciprocity exists appears to depend only on whether it has entered a treaty with the foreign jurisdiction stipulating mutual recognition of court judgments.1857 But in case there was any doubt, in 1992, the Supreme People’s Court published Article 306: a “litigant’s request to the people’s court to acknowledge and execute the foreign court decision or rules shall not be approved… [unless] both sides have signed or participated in an international treaty.”1858 In 2007, the Standing Committee of the National People’s Congress revised the Civil Procedure Law to clarify the enforcement of domestic judgments, but did not alter the law on the enforcement of foreign judgments.1859 At this point in time, “neither the Standing Committee nor the Supreme People’s Court has indicated [that there will be] any change to the policy against enforcement of foreign court judgments.”1860

3.  Italy

The law covering enforcement of foreign judgments in Italy is broken up into three different categories: (1) foreign judgments arising from a fellow EU member state; (2) foreign judgments arising from countries that have a bilateral treaty with Italy; and (3) foreign judgments

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1852 Id.
1853 Id.
1854 Fairley, supra note 1841, at 316.
1855 Id.
1858 Wang, supra note 1856, at 312 (quoting Opinions of the Sup. People’s Ct. on the Implementation of Civil Procedure Law, art. 306 (1992) (P.R.C.)).
1859 Id. at 333.
1860 Id.
arising from countries such as the U.S, which are neither members of the EU nor parties to a bilateral treaty.\textsuperscript{1861} While judgments from the first category generally receive automatic recognition, and judgments from the second merely require a bilateral treaty to be in force, judgments from the third category must first meet certain conditions.\textsuperscript{1862} The conditions are as follows: (1) “[t]he foreign judge rendering the judgment had jurisdiction according to the Italian jurisdiction principles;” (2) “[t]he defendant was properly served;” (3) “[t]he parties appeared before the court in accordance with the law in force in the place where the proceeding was held;” (4) “[t]he judgment became final;” (5) “[t]he judgment does not conflict with any final judgment rendered by an Italian court;” (6) “[n]o proceeding is pending before any Italian court between the same parties and on the same subject matter;” and (7) “[t]he judgment is not contrary to public policy.”\textsuperscript{1863} The conditions have made the “Italian system more open to foreign judgments,” and in most respects mirror the conditions listed in the UFMJRA.\textsuperscript{1864}

4. England

As with the case of Italy, English enforcement of foreign judgments depends upon the relationship England has with the foreign jurisdiction rendering the decision. Since the U.S. is not a party to an international agreement with England covering enforcement, the decision is subject to England’s common law standard. The standard is succinct and reminiscent of American law:

\begin{quote}
[\text{A}ny foreign judgment for a debt or definite sum of money (not being a sum payable in respect of taxes, or other charges of a like nature, a fine or penalty) which is final and conclusive on the merits, may be enforced at Common Law in the absence of fraud or some overriding consideration of public policy provided that the foreign court had jurisdiction over the defendant in accordance with conflict of law principles.}^\textsuperscript{1865}
\end{quote}

There are several seemingly byzantine regimes that may guide a U.S. court’s decision to enforce a foreign judgment, but which in practice merge into a somewhat homogenous scheme. Compared to the laws of most other countries, and putting aside the handful of states that still require mandatory or discretionary reciprocity, the U.S. position on enforcing foreign judgments is quite liberal. As to enforcement outside the U.S., while there remains to emerge an international treaty broadly covering enforcement, the narrow application of the Hague Convention on Choice of Court Agreements provides some stability in cases litigated pursuant to forum selection clauses between international businesses. Enforcement of foreign judgments is a worldwide concern, yet the global crawl towards a more stable regime is currently a patchwork

\textsuperscript{1862} Id.
\textsuperscript{1863} Id. (quoting Law No. 218, art. 64 (Italy) \textit{translated in Reform of the Italian System of Private International Law,} 35 I.L.M. 760, 779-80.\textsuperscript{)}
\textsuperscript{1864} Id. at 61.
\textsuperscript{1865} BORN & RUTLEDGE, \textit{supra} note 1773, at 1016 (quoting D. Campbell and S. Rodriguez, \textit{International Execution Against Judgment Debtors} (1998)).
of disparate laws attempting to navigate the difficult balance between sovereignty and the need for finality in international disputes.

XXV. CHAPTER 25. APPLICATION OF U.S. LAW ABROAD

The vast majority of United States statutes govern only conduct within the territorial jurisdiction of the United States. It is critical, however, to understand the exceptions to this principle. This chapter describes the background rules governing when U.S. law can have extraterritorial application, then details the most important of the specific statutory regimes that do have extraterritorial reach.

A. Extraterritoriality of U.S. Law Generally

Three sources of law influence the authority of Congress to give statutes extraterritorial effects. First, international law principles, as set forth in the RESTATEMENT (THIRD) of Foreign Relations, limit the situations in which any nation, including the U.S., may regulate outside its borders, but those principles do permit several significant classes of extraterritorial legislation. Second, the U.S. Constitution may limit Congress’s authority to enact statutes with extraterritorial reach, although courts have been reluctant to narrow or strike down statutes on that basis. Third, despite the absence of serious application of a constitutional limit on extraterritoriality, courts have applied a strong presumption against extraterritoriality, requiring Congress to state explicitly that a statute is intended to apply abroad before it does.

1. International Law Limits on Extraterritorial Application of U.S. Law

Putting to the side questions regarding the constitutionality of Congressional exercises of extraterritorial legislative power, contemporary international law generally recognizes three bases for legislative jurisdiction, any one of which might result in an exercise of extraterritorial legislative power.1866

(1) Territoriality: Under the territoriality principle, each state is permitted to regulate (i.e., exercise legislative jurisdiction over) conduct that takes place, either in whole or in substantial part, within its national territory.

(2) Nationality: Under the Nationality principle, each state is permitted to regulate the conduct, status, etc. of its nationals and citizens, even when their actions take place outside of the state’s territory.

(3) The Effects Doctrine: Under the Effects Doctrine, the most controversial of the three, a state may regulate conduct wholly outside the state’s national territory and not involving a nation’s nationals as long as the conduct has sufficient effects within the state’s territory.

1866 GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 571 n.3 (5th ed. 2011).
These three bases for jurisdiction are reflected in Section 402 of the Restatement (Third) of Foreign Relations, a resource often relied on by federal courts confronted with challenges to the extraterritorial application of federal statutes.\footnote{In full, that Restatement section states:}

\section*{2. \textbf{Hard (Constitutional) Limits on Extraterritorial Application of U.S. Law}}

Independent of any constraints imposed by international law, Congress’s exercise of extraterritorial legislative power has often been challenged on Constitutional grounds, specifically under the Due Process Clause of the Fifth Amendment. Such challenges have been entirely unsuccessful. Territoriality and Nationality have long been recognized as constitutionally permissible bases for the application of domestic law abroad. And, in 1945, the most controversial justification for extraterritorial exercise of legislative power, the Effects Doctrine, was firmly entrenched in American jurisprudence by Judge Hand’s United States v. Aluminum Co. of America (“Alcoa”) decision, wherein he announced as “settled law” that a state may “impose liability even upon persons not within its allegiance for conduct outside its borders that has [negative] consequences within its borders.”\footnote{148 F.2d 416, 443 (2d Cir. 1945).} Judge Hand’s recognition that a Congress otherwise acting within its sphere of authority might extend its reach simultaneously beyond its borders and beyond its citizenry “triggered the modern era of extraterritoriality”\footnote{Harold Hongju Koh, Transnational Litigation in United States Courts 61 (2008).} that continues today. To date the Supreme Court has yet to articulate a Constitutionally-derived limiting principle, instead time and again summarily upholding the extraterritorial application of challenged U.S. laws.\footnote{See, e.g., EEOC v. Aramco, 499 U.S. 42 (1991) (“Both parties concede, as they must, that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States.”).} Some lower courts, though no more willing to actually invalidate the extraterritorial application of a federal law on constitutional grounds, have articulated what they understand to be constitutional limits on Congress’s ability to apply U.S. law abroad.\footnote{Born & Rutledge, supra note 1866, at 579 n. 82 (collecting cases).}

\footnote{Subject to § 403, a state has jurisdiction to prescribe law with respect to –}
\begin{itemize}
  \item[(1)] (a) conduct that, wholly or in substantial part, takes place within its territory;
  \item[(2)] (b) the status of persons, or interests in things, present within its territory;
  \item[(3)] (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
  \item[(2)] the activities, interests, status, or relations of its nationals outside as well as within its territory; and
  \item[(3)] certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.
\end{itemize}

Restatement (Third) of Foreign Relations § 402.
3. Soft (Presumptive) Limits on Congressional Exercises of Extraterritorial Authority

The absence of clearly defined constitutional limits on Congress’s authority to enact extraterritorial legislation means that the most important limitation on the extraterritorial sweep of U.S. law comes in the form not of a proscription, but a presumption. In *American Banana Co. v. United Fruit Co.*, the Supreme Court explained that “in cases of doubt,” the Court would adopt “a construction of any statute as intending to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power.”\(^{1872}\) Subsequent cases have applied this rule with a tenacity approaching that of a clear statement principle.\(^{1873}\) In *EEOC v. Arabian American Oil Co. (Aramco)*, the Court refused to apply U.S. employment law to a dispute between a U.S. company that employed a U.S. citizen in Saudi Arabia reasoning that “unless there is ‘affirmative intention of the Congress clearly expressed,’ we must presume [Congress] ‘is primarily concerned with domestic conditions.’”\(^{1874}\)

Although seemingly rooted in comity and respect for national sovereignty, Supreme Court cases employing the presumption where there were no other foreign interests at stake—in Antarctica\(^{1875}\) and on the high seas\(^{1876}\)—have suggested to some that application of the presumption may also be driven by separation of powers concerns.\(^{1877}\)

B. Specific Statutory Regimes

In practice, the most significant limits on extraterritoriality come from federal statutes themselves. Although only a relatively small number of statutes explicitly overrides the presumption against extraterritoriality, those statutes are highly important to businesses subject to jurisdiction in the U.S.

1. Foreign Corrupt Practices Act (the “FCPA”)

The FCPA was passed in 1977 in the wake of investigations by the SEC into the payment of bribes by U.S. companies to foreign officials. Its anti-bribery provision prohibits a range of U.S.-related individuals and entities from making or facilitating any offer, payment, or promise of anything of value to certain foreign officials and entities in exchange for obtaining or retaining business.\(^{1878}\) Over the past several years, the Department of Justice has applied the FCPA with

\(^{1872}\) 213 U.S. 347, 357 (1909); *see also* *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949) (“The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed congressional intent may be ascertained. . . . Congress is primarily concerned with domestic conditions.”).

\(^{1873}\) Koh, *supra* note 1869, at 72.


\(^{1877}\) Koh, *supra* note 1869, at 74-76.

increased tenacity, increasing the FCPA’s extraterritorial application by targeting companies and conduct with increasingly tenuous connections to the United States.  

The FCPA is facially similar to, but in many ways narrower than, a recently enacted law in the United Kingdom. In April of 2011, the UK’s Bribery Act took effect. Although the exact scope of the Act will remain unclear until some of its more important phrases are interpreted by UK courts, it is already apparent that the Bribery Act sweeps broader than the FCPA in a number of ways.

- First, the Act prohibits bribes to *any* person, not just foreign officials.
- Second, bribes need only be designed to induce an individual to act “improperly,” the purpose need not be obtaining or retaining business.
- Third, the Act prohibits both the payment and receipt of bribes, whereas the U.S. law relies on statutes other than the FCPA to criminalize the receipt of bribes by U.S. government officials.
- Fourth, corporate compliance portion of the Act applies to all organizations that conduct any part of their businesses in the UK, regardless of where the bribery occurred. Generally speaking, the FCPA applies to non-U.S. organizations operating in the U.S. only where part of the conduct constituting the bribe occurred in the U.S.
- Fifth, there are fewer express affirmative defenses or exceptions under the Act; most exceptions will undoubtedly be judicially-created based on the British courts’ interpretation of what is “improper.”
- Sixth, liability under the corporate compliance provision is strict. Under the FCPA in order for a corporation to be liable for the conduct of a third party the corporation must either know or be deliberately ignorant of the fact that third party is paying bribes on its behalf.

2. Cross-Border Internal Investigations

With the proliferation of national statutes prohibiting various forms of extraterritorial conduct, cross-border internal investigations are an increasingly common method of investigating misconduct performed under overlapping, and sometimes competing, regulatory schemes. Nevertheless, cross-border investigations inevitably face unique challenges that the average internal investigation does not. For example, several countries restrict the exportation of certain types of personal data (even for use by a related or affiliate company), or have blocking statutes forbidding the transfer of materials for use in litigation. Practitioners engaged in cross-border investigations must be sensitive to these types of legal complications.


1880 *Bribery Act, 2010, c. 23 (U.K.).*
3. Sherman Act

The Sherman Act is the United States’ oldest and most-used competition law. Its two primary provisions prohibit agreements in restraint of trade as well as unilateral anticompetitive conduct by a monopoly to acquire or maintain a monopolist position. Although at one time the Supreme Court interpreted the Sherman Act not to apply to the wholly extraterritorial conduct of foreign or domestic entities, it is now well settled that the Act does apply to extraterritorial conduct that was “meant to produce and did in fact produce some substantial effect in the United States.” In 1982 Congress passed the Foreign Trade Antitrust Improvements Act (the “FTAIA”), expressly setting out the Sherman Act’s application to foreign activity that has a “direct, substantial, and reasonably foreseeable effect” on certain types of U.S. commerce. Together, Hartford Fire and the FTAIA establish the boundaries of the extraterritorial application of the Sherman Act to wholly foreign conduct.

4. U.S. Securities Laws

U.S. securities regulations are primarily organized under two statutes—the Securities Act of 1933 (15 U.S.C. §§ 77a et seq.) and the Securities Exchange Act of 1934 (15 U.S.C. §§ 78a et seq.) (collectively, the “SEA”). Unlike the FCPA and the Sherman Act (as amended in 1982), the texts of the SEA have historically been silent regarding their extraterritorial application. U.S. courts have nevertheless long applied the SEA to foreign ownership transactions (some in U.S.-exchange-listed stock, some not) when either (1) “the wrongful conduct had a substantial effect in the United States or upon United States citizens” (the “Effects Test”), or (2) some of “the wrongful conduct occurred in the United States” (the “Conduct Test”).

In 2010, in Morrison v. National Australia Bank Ltd., Supreme Court eschewed both tests in the context of §10(b) fraud actions, criticizing the circuit courts for abandoning without textual justification the longstanding presumption against extraterritorial effect and reaffirming the presumption’s application to U.S. securities laws. With the presumption properly applied, the Court easily concluded that Congress did not intend §10(b) to reach wholly extraterritorial

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1881 Unlike the FCPA, private actions to enforce the Sherman Act are permitted and treble damages are available to those litigants who prevail. Private actions have become the predominate method of enforcement under the Sherman Act.
1885 Government enforcement actions are brought by the DOJ, which publishes guidelines regarding its interpretation of the extraterritorial reach of the Sherman Act under Hartford Fire and the FTAIA. See, e.g., U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Enforcement Guidelines for International Operations (April 1995).
conduct. Nor, even, does it reach partially territorial conduct, unless that conduct is of the particular type prohibited by Congress: “the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.” Accordingly, the Act only applies to “transactions in securities listed on domestic exchanges, and domestic transactions in other securities” and does not reach domestic fraud in foreign-listed securities where the sale ultimately takes place abroad.

Congress responded to Morrison by amending both securities acts to include provisions authorizing district courts to hear cases involving conduct that would satisfy the Second Circuit’s Effects and Conduct tests. How this amendment will be applied remains to be seen. As some have already pointed out, Congress’s grant of jurisdiction very well may fail to cure the defect found in Morrison—that the Acts’ substantive prohibitions do not have extraterritorial effect—and so the amendment may end up having no effect at all.

5. Human Rights Litigation

The Alien Tort Claims Act (the “ACTA”) is a jurisdictional provision “unlike any other in American law and of a kind apparently unknown to any other legal system in the world.” It provides original jurisdiction in federal court over the “relatively modest set” of civil tort actions brought by aliens for violations of customary international law specific enough to be cognizable under federal common law. The ATCA was passed in 1789 but was largely unused until the Second Circuit’s landmark decision in Filartiga v. Pena-Irala. Since Filartiga, courts have recognized a variety of actions under the ATCA, including torture, genocide, war crimes, crimes against humanity, summary execution, arbitrary detention, and disappearance. Although yet to

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1889 Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010).
1890 Id. at 17.
1891 Extraterritorial jurisdiction:
The district courts of the United States and the United States courts of any Territory shall have jurisdiction of an action or proceeding brought or instituted by the Commission or the United States alleging a violation of [the antifraud provisions] of this title involving—

(1) conduct within the United States that constitutes significant steps in furtherance of the violation, even if the securities transaction occurs outside the United States and involves only foreign investors; or
(2) conduct occurring outside the United States that has a foreseeable substantial effect within the United States.
1892 At best the inclusion of a provision expressly granting jurisdiction over classes of cases excluded from the Acts under Morrison might prompt the Court to reevaluate its extraterritoriality analysis on the Acts’ substantive provisions.
1893 Kiobel, 621 F.3d at 115.
1895 630 F.2d 876, 890 (2d Cir.1980) (upholding the constitutionality of the ATCA and recognizing that modern international norms are actionable).
be specifically considered, courts routinely apply the ATCA to wholly extraterritorial violations of international law.

Not surprisingly, the main issues in most ATCA cases are whether the asserted norm has achieved international acceptance and, if so, whether a common-law cause of action should be recognized to remedy violations. In 2004, in the Supreme Court’s only decision on the ATCA, the Court explained that only norms “accepted by the civilized world and defined with a specificity comparable to” the violation of safe conducts, infringement of the rights of ambassadors, and piracy, were candidates for enforcement. Lower courts have since been guided by the historical principle that “[o]ffenses against the law of nations principally involved the rights or interests of whole states or nations, and did not necessarily involve the private interests of individuals seeking relief in court.” Further, although some norms may be violated by the conduct of private individuals, such as war crimes, “state actors are the main objects of the law of nations.”

One important and recurring issue is corporate liability under the ATCA. Recently, in *Kiobel*, the Second Circuit considered whether a class of Nigerian residents could recover from Shell oil company on allegations that Shell aided and abetted human rights violations in Nigeria. The violations were allegedly committed against the plaintiffs by the Nigerian government with the help of Shell because the plaintiffs protested Shell’s oil exploration activities in Nigeria. After a lengthy analysis of the international acceptance of corporate liability for violations of international law, the court concluded that corporate liability has not achieved recognition as a “specific, universal, and obligatory” norm, and dismissed the plaintiffs’ claims. *Kiobel* conflicts with at least one decision out of the Eleventh Circuit expressly recognizing corporate liability for international law violations.

Over the years there have been several high profile ATCA actions, though perhaps none more so than the ongoing litigation between Chevron and a class of indigenous residents of Ecuador’s Lago Agrio oil field. In 1993 the plaintiffs brought suit against Texaco in the Southern District of New York, alleging that Chevron’s (more specifically, its subsidiary Texaco’s) oil

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*Morrison*, the ATCA ought not be construed to provide a remedy for international law violations that take place abroad.

1897 *See Kiobel*, 621 F.3d at 117 (noting that the Second Circuit has yet to consider whether the ATCA applies extraterritorially).

1898 *See Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 266-68 (2nd Cir. 2007) (J. Katzmann, concurring) for a detailed discussion of the two-step process under *Sosa*.

1899 *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009).

1900 *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1316 (11th Cir. 2008); *see also Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir. 1995).

1901 *Kiobel*, 621 F.3d at 145.

1902 *Sinaltrainal*, 578 F.3d at 1263 (“In addition to private individual liability, we have also recognized corporate defendants are subject to liability under the [ATCA] and may be liable for violations of the law of nations.” (citing *Romero*, 552 F.3d at 1315 (“The text of the Alien Tort Statute provides no express exception for corporations, and the law of this Circuit is that [ATS] grants jurisdiction from complaints of torture against corporate defendants.”)));

*see also Kiobel*, 621 F.3d at 161 n.14 (Leval, J., dissenting) (collecting cases).
operations polluted the land and water in and around the oil field. The plaintiffs sued to recover both for illnesses they trace to exposure to hazardous chemicals and for environmental damage, basing their claims, in part, on the ATCA. They argued that Chevron’s oil extraction activities “violated evolving environmental norms of customary international law,” a claim the district court found unlikely to survive a motion to dismiss. However, rather than dismiss the action, the court granted Chevron’s *forum non conveniens* motion, moving the case to Ecuador. With no evidence that the pollution was directed from inside the United States, the U.S. “has no special public interest, under the ATCA or otherwise, in providing a forum for plaintiffs pursuing an international law action against a United States entity that plaintiffs can adequately pursue in the place where the violation actually occurred.” The *Aguinda* case highlights the common tension between extraterritorial application of the ATCA and prudential considerations – such as exhaustion and the doctrine of *forum non conveniens* – that favor trying the action where the offense occurred.

XXVI. CHAPTER 26: LITIGATION AGAINST FOREIGN GOVERNMENTS

Private litigation against foreign governments in United States courts carries significant implications for national interests, impacting state sovereignty, comity and political relations. To address these issues, both Congress and the courts have created rules for how litigation against foreign governments may proceed, particularly the substantive and procedural rules in the Foreign Sovereign Immunities Act of 1976 and the judicially- created “act of state” abstention doctrine. This Chapter addresses those rules.

A. The Foreign Sovereign Immunities Act

The general principle that foreign sovereigns are immune from suit was established in United States law by *The Schooner Exchange v. McFaddon*, in which the Supreme Court held that a French naval vessel was immune from the jurisdiction of United States courts. While no statute or constitutional principle mandated this holding, the Court’s opinion by Chief Justice Marshall rooted itself in a concern for mutual respect for territorial sovereignty. For over a century, United States courts followed the principle established in *The Schooner Exchange* that foreign sovereigns were absolutely immune from suit. As global affairs developed, however, foreign countries increasingly employed the so-called “restrictive theory” of sovereign immunity, which holds that states do not enjoy immunity with respect to their private or commercial activities, but retain it for sovereign or public acts. In 1952, Jack Tate, the State Department’s Legal Adviser, issued a letter advocating that the United States also adopt this theory, arguing that the United States should not grant immunities to foreign sovereigns that it would not enjoy in their courts. Courts followed this recommendation and employed the restrictive theory for several years. Ultimately, in 1976, Congress enacted the FSIA, codifying the restrictive theory in a comprehensive and uniform way. The FSIA’s purpose, as described by its drafters, is to provide “the sole and exclusive standards to be used in resolving questions of

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1904 *Id.* at 553.
1906 Gary BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 221 (4th ed. 2006).
sovereign immunity raised by foreign states before federal and state courts in the United States.”

1. The FSIA Is a Jurisdictional Statute

As originally enacted, the FSIA was exclusively a jurisdictional statute that neither created new causes of action nor affected the substantive character of existing causes of action. In 1996, Congress amended the Act to provide a new cause of action against state sponsors of terrorism, which will be discussed below. With this exception, however, the Act remains fundamentally a jurisdictional statute that defines the circumstances under which a foreign sovereign may be hailed into United States courts.

a. Subject Matter Jurisdiction

The FSIA adopts the default rule that foreign sovereigns are presumptively jurisdictionally immune from suit, unless one of its listed exceptions (in 28 U.S.C. §§ 1605-1607) applies. The statute also affirmatively grants subject matter jurisdiction to federal courts over actions where these exceptions do apply.

For actions in federal court, the FSIA provides the exclusive basis of jurisdiction over foreign sovereigns. While the FSIA does not create jurisdiction over foreign sovereigns in state courts, litigation against foreign sovereigns in state court must also meet the requirements of the FSIA.

There is no amount in controversy requirement for subject matter jurisdiction in federal court under the FSIA. The Act’s legislative history states that such a requirement was intentionally omitted to encourage claims to be brought in federal, rather than state courts.

b. Personal Jurisdiction

While a court’s exercise of jurisdiction over a defendant generally requires satisfaction of both statutory and Constitutional requirements, the Supreme Court has never decided whether the Due Process Clause applies to jurisdiction over foreign sovereigns. The Court has, in fact,
raised the possibility that foreign sovereigns are not “persons” within the meaning of that Clause.\textsuperscript{1915} Several lower courts subsequently have held expressly that the Due Process Clause does not apply to foreign sovereigns.\textsuperscript{1916} Moreover, because the exceptions to sovereign immunity delineated in sections 1605-1607 require a certain degree of contact with the United States (as discussed below), lower courts increasingly have concluded that the Due Process Clause’s minimum-contacts test for personal jurisdiction is \textit{ipso facto} met where they apply.\textsuperscript{1917} Other lower courts, however, have held that a court’s exercise of personal jurisdiction under the FSIA must satisfy the Due Process Clause independently.\textsuperscript{1918}

A related issue that has been considered by lower courts is whether 28 U.S.C. § 1605(a)(2), the “commercial activity” exception to sovereign immunity, permits the exercise of general personal jurisdiction over foreign sovereign entities.\textsuperscript{1919} The majority approach finds that the statute authorizes only specific jurisdiction.\textsuperscript{1920}

2. Who Is Protected by the FSIA?

The FSIA’s presumptive grant of immunity applies to any “foreign state.”\textsuperscript{1921} Courts generally hold that a “foreign state” proper is any nation recognized by the executive branch in its diplomatic relations.\textsuperscript{1922} In addition, the statute defines the term “foreign state” broadly to include any political subdivision and any “instrumentalities” of a state, a category that includes a corporation a majority of whose shares are owned by a foreign state.\textsuperscript{1923} If the foreign state is not the majority owner, however, the fact that it “controls” a corporate entity does not confer immunity to that entity.\textsuperscript{1924} Moreover, where a foreign state wholly owns a subsidiary, which itself is the majority owner of a second-level subsidiary, that latter subsidiary is not entitled to

\textsuperscript{1915} Republic of Argentina \textit{v.} Weltover, Inc., 504 U.S. 607, 619 (1992) (“We assume, without deciding, that a foreign state is a ’person’ for purposes of the Due Process Clause”).

\textsuperscript{1916} Frontera Resources Azerbaijan Corp. \textit{v.} State Oil Co. of Azerbaijan Republic, 582 F.3d 393, 398 (2d Cir. 2009); Price \textit{v.} Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82 (D.C. Cir. 2002).

\textsuperscript{1917} International Ins. Co. \textit{v.} Caja Nacional de Ahorro y Seguro, 293 F.3d 392, 397 (7th Cir. 2002) (“the exceptions…provide the minimum contacts with the United States required by due process”); Corzo \textit{v.} Banco Cent. de Reserva del Peru, 243 F.3d 519 (9th Cir. 2001).

\textsuperscript{1918} See BORN \& RUTLEDGE, supra note 1906, at 259.

\textsuperscript{1919} Compare Theo H. Davies \& Co. \textit{v.} Republic of Marshall Islands, 174 F.3d 969, 976 (9th Cir. 1998) (“General personal jurisdiction over a foreign entity that engages in substantial commercial activity in the United States is authorized by the first clause of 28 U.S.C. 1605(a)(2)” with Sun \textit{v.} Taiwan, 201 F.3d 1105 (9th Cir. 2000) (concluding that an action had to be based on the foreign sovereign’s forum contacts).

\textsuperscript{1920} See Santos \textit{v.} Compagnie Nationale Air France, 934 F.2d 890, 892 (7th Cir. 1991) (requiring an “identifiable nexus” between plaintiff’s cause of action and the defendant’s forum contacts).

\textsuperscript{1921} 28 U.S.C. § 1604.

\textsuperscript{1922} See BORN \& RUTLEDGE, supra note 1906, at 239; Klinghoffer \textit{v.} S.N.C. Achille Lauro, 937 F.2d 44 (2d Cir. 1991) (holding that the Palestinian Liberation Organization is not a foreign state under the FSIA).

\textsuperscript{1923} 28 U.S.C. § 1603(b)(1)-(2).

\textsuperscript{1924} Dole Food Co. \textit{v.} Patrickson, 538 U.S. 468, 476 (“Majority ownership by a foreign state, not control, is the benchmark of instrumentality status.”).
The Supreme Court has emphasized that “[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation’s shares.”

For several years, courts were divided over whether the FSIA provides immunity to foreign heads of state and other senior government officials. The Seventh Circuit reflected the majority position, concluding that “[i]f Congress meant to include individuals acting in their official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms.” In late 2010, the Supreme Court affirmed this position, holding that the term “foreign state” does not encompass “foreign officials.”

3. Exceptions to FSIA

A foreign sovereign is presumed to be immune from suit unless its activities fall under one of six listed exceptions. Below this outline addresses the exceptions for waiver, commercial activity, expropriation, and terrorism.

a. Waiver

28 U.S.C. §1605(a)(1) provides that a foreign state may waive its immunity. While this exception seems straightforward, in practice courts have had to wrestle with difficult interpretational problems. In Verlinden BV v. Central Bank of Nigeria, a judge in the Southern District of New York was faced with the question whether the fact that a Nigerian agency had contractually consented to jurisdiction in France was an implicit waiver of its immunity in United States courts. In this case, the Nigerian agency had allegedly defaulted on a contract to purchase cement from a Dutch corporation. The court noted that other jurisdictions had found waivers “where a foreign state has agreed to arbitration in another country or where a foreign state has agreed that the law of a particular country should govern a contract.” The court here held, however, that there was no implicit waiver because Nigeria itself had never implicitly accepted the jurisdiction of American courts. The court stated: “It may be reasonable to suggest that a sovereign state which agrees to be governed by the laws of the United States…has implicitly waived its ability to assert the defense of sovereign immunity when sued in an American court. But it is quite another matter to suggest… that a sovereign state which agrees to

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1925 Id.
1926 Id. at 477.
1927 Enahoro v. Abubakar, 408 F.3d 877 (7th Cir. 2005).
1930 Id. § 1605(a)(1).
1931 Id. § 1605(a)(2).
1932 Id. § 1605(a)(3).
1933 Id. § 1605A.
1935 Id. at 1300.
be governed by the laws of a third-party country...is thereby precluded from asserting its immunity in an American court."1936

On the other hand, where a foreign state has agreed to a choice of law clause selecting United States law, courts have generally found an implicit waiver of sovereign immunity.1937 In Eckert Intern., Inc. v. Government of Sovereign Democratic Republic of Fiji, the Fourth Circuit held that the fact that Fiji had consented to a choice-of-law clause selecting Virginia law to govern any disputes was an implicit waiver of sovereign immunity in the United States.1938 The Court cited portions of the FSIA’s legislative history approving of cases finding an implicit waiver “where a foreign state has agreed that the law of a particular country should govern a contract.”1939

The FSIA also expressly exempts claims for immunity against actions brought to enforce an arbitration agreement or confirm an arbitration award where the arbitration takes place in the United States or the agreement is governed by a treaty calling for the state parties to mutually enforce arbitral awards.1940 The most relevant such treaty is the New York Convention, which has been ratified by approximately 130 countries.1941

b. Commercial Activity

28 U.S.C. § 1605(a)(2) provides an exception to immunity for any case in which an action is based upon (1) a commercial activity carried on in the United States by the foreign state; (2) an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or (3) an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere where that act causes a direct effect in the United States.

1) Definition of Commercial Activity

The Supreme Court has held that a foreign sovereign’s actions fall within the definition of commercial activity where it “exercises only those powers that can also be exercised by private citizens.”1942 Thus, in Republic of Argentina v. Weltover, the Supreme Court held that Argentina’s sale of bonds was commercial activity since it was something a private actor could do, despite the fact that the bonds were not issued to earn a profit, nor were they capable of issuance by a private party.1943

1936 Id. at 1301.
1937 BORN & RUTLEDGE, supra note 1906, at 327.
1941 BORN & RUTLEDGE, supra note 1906, at 329.
1942 Id. at 360 (citing Weltover, 504 U.S. 607 (1992)).
1943 Republic of Argentina, 504 U.S. at 619.
In *Saudi Arabia v. Nelson*, the Supreme Court held that the use of state police to commit torture was not commercial conduct, even where the torture was alleged to have been retaliation for complaints raised by the employee of a state-run hospital.\textsuperscript{1944} The Court distinguished the hospital’s commercial actions of recruiting and hiring Nelson from their tortious conduct, finding that the latter was not “based upon” commercial activity within the meaning of the statute.\textsuperscript{1945}

Lower court cases generally find that breach of contract cases satisfy the commercial activity exception. Thus, in *McDonnell Douglas Corp. v. Islamic Republic of Iran*, the Seventh Circuit held that Iran was subject to jurisdiction with respect to a claim that it had breached a contract to purchase military goods.\textsuperscript{1946} The Court relied on a statement from the legislative history that contracts may be considered commercial contracts, “even if their ultimate object is to further a public function.”\textsuperscript{1947}

The FSIA’s legislative history suggests that the fact that an activity is carried on for profit weighs heavily in favor of fitting under the exception.\textsuperscript{1948}

2) **Definition of Direct Effect**

Under the geographically broadest prong of the commercial activity exception, a foreign sovereign is subject to suit based on acts outside the territory of the United States that nevertheless cause a “direct effect” in the United States.\textsuperscript{1949} In *Republic of Argentina v. Weltover*, the Supreme Court rejected the proposition that a direct effect must be one that is substantial and foreseeable, holding rather that it must be an “immediate consequence of the defendant’s activity.”\textsuperscript{1950} In this case, Argentina’s central bank rescheduled its obligations under bonds it had sold to the plaintiff. The Supreme Court held that because the plaintiffs had designated their accounts in New York as the place at which payments on the bonds should be made, “New York was thus the place of performance for Argentina’s ultimate contractual obligations [and] the rescheduling of those obligations had a ‘direct effect’ in the United States.”\textsuperscript{1951}

The D.C. Circuit distinguished *Weltover* in *Peterson v. Royal Kingdom of Saudi Arabia*.\textsuperscript{1952} In that case, a plaintiff who had been employed by Saudi Arabia sued to recover Saudi Arabia’s contributions to his retirement plan, after the country rescinded its agreement to make the contributions. The Court found that Saudi Arabia was immune from suit because the

\textsuperscript{1945} Id.
\textsuperscript{1946} *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985).
\textsuperscript{1947} Id. at 348, citing H.R. REP. NO. 94-1487.
\textsuperscript{1948} H.R. REP. NO. 94-1487 (1976) (“Certainly, if an activity is customarily carried on for profit, its commercial nature could be readily assumed”).
\textsuperscript{1949} Id.
\textsuperscript{1950} *Republic of Argentina*, 504 U.S. at 617.
\textsuperscript{1951} Id. at 619.
\textsuperscript{1952} *Peterson v. Royal Kingdom of Saudi Arabia*, 416 F.3d 83 (D.C. Cir. 2005).
plaintiff “fail[ed] to demonstrate that Saudi Arabia was ‘supposed to’ refund his [] contribution to him in the United States.”

In Virtual Countries, Inc. v. Republic of South Africa, the Second Circuit held that a press release issued by the Republic of South Africa stating that it might attempt to acquire the rights to the domain name “www.southafrica.com” did not have a direct effect on the current holder of that domain in the United States. The Court rejected the claim that the release’s alleged dissuading effect on potential business partners of the company, created via news reports, was immediate or probable enough to satisfy the direct effect element.

Lower courts generally have not held that they have jurisdiction over foreign sovereigns for damages suffered by tortious acts abroad, even where the damages cause injury and economic loss to United States citizens.

c. Expropriation

28 U.S.C. § 1605(a)(3) denies foreign sovereigns immunity against claims relating to “property taken in violation of international law” where “that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.”

Courts generally recognize that takings are in violation of international law where they fall under one of the following three categories: (1) they do not serve a public purpose; (2) they discriminate against aliens; (3) they do not involve a provision for just compensation. This exception does not apply where the plaintiff is a citizen of the defendant country at the time of the expropriation, because “[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.”

The Ninth Circuit case Siderman de Blake v. Republic of Argentina is an instructive example. In this case, soldiers under the Argentine military junta that deposed President Isabel Peron violently had attacked and exiled an Argentinean Jewish family, the Sidermans, forcing them to sell their property. The Sidermans and their daughter, an American citizen, sought to hold Argentina accountable under 28 U.S.C. § 1605(a)(3). The Court held that it did not have jurisdiction over the Sidermans' claims since Argentina’s taking of the property of its own

1953 Id. at 90.
1955 Id. at 238.
1956 See, e.g., Coyle v. PT Garuda Indonesia, 363 F.3d 979, 993-94 (9th Cir. 2004) (concluding that jurisdiction did not exist over a foreign sovereign based on the crash of a plan flying within Indonesia where the plaintiffs purchased tickets in Indonesia).
1959 965 F.2d at 704.
citizens did not violate international law.\textsuperscript{1960} The Court held, however, that it did have jurisdiction over their daughter’s claim since the junta’s actions discriminated against Jews – aliens of a particular ethnicity – and were done for their own personal profit.\textsuperscript{1961}

Some courts have held that “rights in property” under section 1605(a)(3) includes rights in intangible property.\textsuperscript{1962} Other lower courts have construed the provision more narrowly.\textsuperscript{1963}

d. **Terrorism**

The FSIA as originally did enacted did not create a new right of action against foreign governments. In 1996, however, Congress added a cause of action to the FSIA by passing the “Flatow Amendment,” which provided that “[a]n official, employee, or agent of a foreign state designated as a state sponsor of terrorism … while acting within the scope of his or her office, employment, or agency shall be liable to a United States national … for personal injury or death caused by acts of that official, employee, or agent…”\textsuperscript{1964} The Flatow Amendment did not speak to the liability of a foreign government, but only to the liability of its officers or agents. In 2008, Congress amended this provision to clarify that it meant to create a cause of action against foreign governments, as well.\textsuperscript{1965} This provision is now codified at 28 U.S.C.§ 1605A.

This statute is intended to protect American victims of state-sponsored terrorism, and therefore only United States citizens and nationals may rely on its grant of subject matter jurisdiction.\textsuperscript{1966} The statute permits punitive damages awards.\textsuperscript{1967}

28 U.S.C. §1605A(a)(2) provides that a foreign state is not immune for acts it takes where it had been designated a state sponsor of terrorism at the time the act occurred or where it “was so designated as a result of such act.” Thus, for instance, a judge in the District of Columbia held that victims of the Iranian hostage taking at the United States Embassy in Tehran in 1979 could not bring suit since Iran was not named a state sponsor of terrorism as a result of that attack.\textsuperscript{1968}

\begin{footnotes}
\item[1960] Id. at 711.
\item[1961] Id. at 712.
\item[1963] *Canadian Overseas Ores Ltd. v. Cia De Acero del Pacifico*, 528 F. Supp. 1337, 1346 (S.D.N.Y. 1982) (holding that a contractual right to payment is not a “right in property”).
\item[1967] 28 U.S.C. §1605A(c); *Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52 (D.D.C. 2010) (upholding $1 billion punitive damage award against Iran for providing material support to an organization that bombed a Marine barracks).
\end{footnotes}
B. The Act of State Doctrine

The act of state doctrine is an affirmative defense that can be interposed by either foreign sovereigns or private parties. Under this doctrine, courts in the United States will “presume the validity of acts of foreign sovereigns taken within their own jurisdictions.”\(^{169}\) Unlike the doctrine of sovereign immunity, which renders an entire claim nonjusticiable, the act of state doctrine prevents courts from deciding issues that require an inquiry into the validity of the actions of a foreign government. Thus, as a procedural matter, a court should not consider an act of state defense until it has rejected a sovereign immunity defense.\(^{170}\)

The act of state doctrine is not a creature of statute or international treaties or custom, but rather developed as part of federal common law after *Erie R.R. Co. v. Tompkins*.\(^{171}\) The doctrine is based on interests of national sovereignty, comity, and the separation of powers, as well as the conflicts rule that the law of the territorial situs should apply to a challenged act.\(^{172}\)

The act of state doctrine is predicated on the existence of a “public” sovereign act. Thus, in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, the Supreme Court held that the Cuban government’s refusal to return certain funds after expropriating cigar manufacturers’ property was not a public act because it was unsupported by a “statute, decree, order, or resolution of the Cuban Government itself.”\(^{173}\) Similarly, in *Galu v. Swissair*, the Second Circuit remanded a case to determine whether an individual had been deported at the command of the Swiss government or merely based on the ad hoc decision of a local police department.\(^{174}\)

The act of state doctrine applies only to acts of a foreign state “within its own territory.”\(^{175}\) Thus, the D.C. Circuit held that the act of state doctrine did not prevent imposing liability on the Soviet Army for taking Jewish documents after World War II because the documents were taken from Poland as opposed to Soviet territory.\(^{176}\) Where an intangible debt is owed, several courts have held that a foreign sovereign’s acts occur in the place where payment is to be made.\(^{177}\)

In *W.S. Kirkpatrick and Co. v. Environmental Tectonics Corp.*, the Supreme Court held that the threshold test for the act of state doctrine is “whether a court must decide – that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When


\(^{170}\) *In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998).


\(^{172}\) See Koh, supra note 1971, at 87.


\(^{174}\) *Galu v. Swissair*, 873 F.2d 650, 655 (2d Cir. 1989).


\(^{176}\) *Agudas Cahsidei Chabad v. Russian Federation*, 528 F.3d 934, 952 (D.C. Cir. 2008).

that question is not in the case, neither is the act of state doctrine.” The Court also stated that the act of state doctrine “applies only when the validity, not the facts, of a foreign act of state are at issue.” The Court held that a claim brought by one private company against another after the defendant company had won a bid contest with the Nigerian government allegedly through a bribe did not involve an act of state, since the validity of the actions of the Nigerian government were not in issue.

One prominent exception to the applicability of the act of state doctrine exists when the Executive Branch files so-called ‘Bernstein letters’ indicating that such application would be contrary to United States foreign policy. This exception arose from Bernstein v. N.V. Nederlandsche-Amerikaansche Stoomvaaart, in which the Legal Adviser of the Department of State sent a letter urging the court to adjudicate an action by an individual to recover assets expropriated by the Nazis. In First National City Bank v. Banco Nacional de Cuba, a plurality of the Supreme Court approved of the exception.

Another important exception applied in some courts is the “commercial activity exception.” This exception won four votes from the Supreme Court in 1976. Some lower courts, however, have suggested that the exception may not be viable.

Some courts have also found an exception from the doctrine if a statute expressly allows them to decide the legality of acts of state.

C. Procedural Issues

1. Service of Process

Fed. R. Civ. Proc. 4(j) provides that “a foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608. This statute sets forth a preferred order in which service should be attempted. First, service may be made “in accordance with any special arrangement for service,” if such exists. If no special arrangement exists, service may be made in accordance with an applicable international convention, such as the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents. Third, if service cannot be made in either of the former ways, it can be made “by sending a copy of the summons and complaint and a notice of suit, together with a translation of each...to the head of the

1979 Id.
1983 E.g. Kalamazoo Spice Extraction Co. v. Provisional Military Gov’t of Ethiopia, 729 F.2d 422, 425 n. 3 (6th Cir. 1984). (noting that Dunhill “seems to be of doubtful precedential value”).
1986 Id. § 1608(a)(2).
ministry of foreign affairs of the foreign state concerned.”

Finally, if no other option is available, service can be made by conveying process through the United States Secretary of State, whom the statute directs to transmit a copy through diplomatic channels.

28 U.S.C. § 1608(b) provides a similar structure for effecting service on an agency or instrumentality of a foreign state.

2. **Enforcing a Judgment**

Sections 1609 through 1611 of the FSIA govern the enforcement of judgments against foreign sovereigns. Section 1609 provides the general rule that the property of a foreign state in the United States is immune from attachment except as provided in sections 1610 and 1611.

Section 1610 provides that the property of a foreign state may be attached where the foreign state has waived its immunity from attachment, where the property was used for the commercial activity upon which a claim is based, the property was taken in violation of international law, or the party was acquired by succession or gift, among others.

**XXVII. CHAPTER 27: INTERNATIONAL CLASS ACTIONS**

The class action, though initially an American device met with suspicion abroad, is becoming increasingly international in character. Domestically, class action law has had to adjust to the increasing presence of foreign claimants seeking relief in U.S. courts. More recently, and with international implications, the Supreme Court has been extremely active in granting certiorari to resolve complex issues arising from the competing mechanisms of class arbitration and class litigation. A brief survey of class action regimes developing around the world indicates that the stereotypical international aversion to class actions is waning. Most countries abroad, however, continue to rely on state-approved organizations to act as intermediaries rather than upon a class of private individuals.

**A. Class Actions Filed in the U.S. Involving Foreign Class Members**

Rule 23 of the Federal Rules of Civil Procedure is silent on the matter of certifying a class containing foreign claimants. Domestic class actions containing foreign claimants are on the rise, however, due to a well-funded plaintiff’s bar and the fact that many countries outside the U.S do not allow class actions. Indeed, some scholars have argued that certifying classes

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1987 *Id.* § 1608(a)(3).
1988 *Id.* § 1608(a)(4).
1989 *Id.* §1610(a)(1)-(4).
containing foreign claimants is now more than ever an essential step to “deterring corporate wrongdoing and promoting confidence in the U.S. financial markets among foreign investors.” But despite the increased importance and growing number of certified classes containing foreign claimants, many American judges remain “unsure how to treat foreign claimants when they seek to join class actions.” This has led to a great deal of uncertainty for foreign plaintiffs attempting to become members of a class and defendants seeking to avoid increased exposure to U.S.-based class actions. The long-dominant “ad hoc approach to certification” of classes containing foreign claimants, however, is gradually giving way to clearer regimes in the contexts of securities, antitrust, consumer protection, products liability, and mass torts.

1. Securities Class Actions Involving Foreign Claimants

In *Morrison v. National Australia Bank, Ltd.*, the United States Supreme Court held that a class of foreign investors could only bring an action for fraud pursuant to § 10(b) of the Securities Exchange Act of 1934 where “a manipulative or deceptive device or contrivance… [was used] in connection with the purchase or sale of a security listed on the American stock exchange, and the purchase or sale of any other security in the United States.” In *Morrison*, the plaintiffs were Australian citizens who had purchased shares in National Australia Bank Limited. The bank’s shares were not traded in the U.S., but only on the Australian Stock Exchange and other foreign exchanges. The plaintiffs sued the bank as a class pursuant to § 10(b) after stocks plummeted due to losses reported by a bank-owned mortgage company in Florida that plaintiffs alleged had been fraudulently over-valued. Relying on the “longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,” the Court ruled that the stock transactions under the facts of the case did not entitle the foreign claimants to bring the class action. None of the securities were listed on a domestic exchange, and “all aspects of the purchases complained of… occurred outside the United States.” The Court’s decision was monumental in that it “roundly buried the venerable ‘conduct or effect’ test the Second Circuit had devised,” which for years had allowed the “enforcement of American Securities laws against foreign frauds… provided that some nexus with the United States could be established.”

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1994 Id. at 1568.
1995 Id. at 1569.
1997 Id.
1998 Id. at 2876.
1999 Id. at 2877.
2000 Id. at 2888.
With its new rule, the Supreme Court appeared to make a clean break from “judicial-speculation-made-law-divining,” but there are still lingering ambiguities. For example, what happens when a “security [is] cross-listed on a domestic and foreign exchange?” The scope of what constitutes a domestic transaction is also unclear. Regardless how these questions eventually play out, in the absence of future Congressional action, foreign claimants who buy foreign stocks on foreign exchanges will no longer be able to become members of a class alleging securities fraud pursuant to § 10(b). For the time being then, foreign issuers of stock traded only on foreign exchanges are far less vulnerable to class action law suits brought by private foreign claimants alleging securities fraud. Despite the unanswered questions surrounding the reach of *Morrison*, the holding “does nothing to curtail the enforcement power of the SEC.”

2. **Antitrust Class Actions Involving Foreign Claimants**

The Foreign Trade Antitrust Improvements Act of 1982 states that the Sherman Act “shall not apply to conduct involving trade or commerce… with foreign nations.” However, the FTAIA also provides an exception in the event that the conduct has a “direct, substantial and reasonably foreseeable effect’ on domestic commerce that ‘gives rise to a [Sherman Act] claim.’” In *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.*, the Supreme Court held that the FTAIA’s exception to the Sherman Act’s general inapplicability to “conduct involving trade or commerce with foreign nations” does not apply to foreign claimants bringing a class action based on allegations of price-fixing when the “adverse foreign effect is independent of any adverse domestic effect.” On remand, in *Empagran S.A. v. F. Hoffmann-LaRoche Ltd.*, the D.C. Circuit interpreted the phrase “gives rise to” to mean that only a “direct casual relationship, that is, proximate causation,” and not but-for causation, is required before a foreign claimant may join a class action pursuant to the Sherman Act. In the D.C. Circuit’s opinion, however, price fixing schemes intended to “maintain[] super-competitive prices in the U.S” simply did not rise to the requisite level of causation. But counsel for the United States and the D.C. Circuit agreed that where a “reciprocal tying agreement effected the exclusion of the American rival of

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2003 *Morrison*, 130 S. Ct. at 2881.
2005 Id.
2007 Id.
2008 Id. at 22.
2011 Id.
2013 Id.
one defendant,” the foreign injury was proximately caused by domestic restraints on trade, such that foreign claimants could form a certifiable class.  

While proximate cause has since been “generally embraced” as the requisite degree of causation, it remains to be determined what a “‘proximate cause’ or ‘direct link is,’” and some have complained that the doctrine may not respect congressional intent and “has done little to alleviate the uncertainty over the reach of the FTAIA.”

3. Consumer Protection, Products Liability and Mass Tort Class Actions Involving Foreign Claimants

In the areas of consumer protection, products liability, and mass tort class actions involving foreign claimants, “federal courts may have subject matter jurisdiction based on the diversity of parties” under 28 U.S.C. § 1332. The federal court must, however, find the following: (1) that the amount in controversy exceeds 75,000; (2) and that the controversy is either between “citizens of a State and citizens or subjects of a foreign state” or between “citizens of different States and in which citizens or subjects of a foreign state are additional parties.” However, diversity jurisdiction is destroyed “where there are foreign parties on each side of the dispute” as “[d]iversity jurisdiction does not encompass foreign plaintiffs suing foreign defendants.”

4. Barriers to Certification of a Class Containing Foreign Claimants

Class actions containing foreign claimants most often fail by reason of the doctrine of forum non conveniens. In Gilstrap v. Radianz Ltd., a combination of former British and U.S. employees unsuccessfully attempted to bring a securities class action against their British employer in New York, alleging improper denial of stock option benefits. The Southern District of New York granted defendant’s motion to dismiss on grounds of forum non conveniens. While the British company had its headquarters in New York, only 40 percent of the class members resided in the U.S., and only 16 percent of those members resided in New York. Further, none of the stock options at issue were registered on a U.S. exchange, and the “vast

2014 Id. at 1270 (citing Industria Siciliana Asfalti, Bitumi, S.P.A. v. Exxon Research & Eng’g Co., No. 75 Civ. 5828-CSH, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977)).
2016 Youngwood, supra note 2004, at 73.
2018 U.S. Motors v. Gen’l Motors Eur., 551 F.3d 420, 423 (6th Cir. 2009) (“[D]iversity jurisdiction does not extend to a suit in which there is a U.S. citizen on only one side of the suit and foreign parties on both sides.”) Abad v. Bayer Corp., 563 F.3d 663, 665 (7th Cir. 2009) (class of Argentine residents filed products liability action against pharmaceutical companies in federal district court based on diversity jurisdiction, but were not allowed to proceed on other grounds).
2021 Id. at 491.
2022 Id. at 476.
majority of the key witnesses and documents… [were] located in England. Evidence that England did not allow class actions or contingent fees did not undermine the adequacy of the Court of England as a forum; the evidence did, however, serve as “indicia of forum-shopping.”

Antitrust class actions involving foreign claimants are just as vulnerable to dismissal on grounds of forum non conveniens, especially when they require the application of foreign antitrust provisions. In In re Air Cargo Shipping Services Antitrust Litigation, the Eastern District of New York dismissed an action alleging price-fixing on grounds of forum non conveniens when plaintiffs attempted to argue EU-based antitrust claims against defendants who had allegedly conspired to fix airline prices. The court reasoned that most of the plaintiffs were foreign, that the “likelihood… a forum [would] grant the damages” the parties sought was not relevant to the adequacy of the forum, and that the claim’s basis in EU law “indicate[d] that a foreign forum ‘[would] be the most convenient and [would] best serve the ends of justice.’”

Defenses based upon forum non conveniens are “particularly powerful in cases – such as consumer and personal injury claims – where the alleged injuries occurred outside the U.S.” For instance, in In re Vioxx Products Liability Litigation, the Eastern District of Louisiana dismissed a class action brought by French and Italian plaintiffs alleging products liability against an American pharmaceutical maker on the basis of forum non conveniens. Because the foreign claimants were injured in Italy and France, the case involved “localized Italian and French controversies in which Italy and France [had] a strong interest[] in deciding at home.” Furthermore, if an American court were to decide the case, the “United States [would] risk[] disrupting the judgments of Italian and French regulatory bodies.”

But forum non conveniens is not the only barrier to a foreign claimant’s participation in a class action brought in U.S. courts. In addition to forum non conveniens, the three other main barriers are Rules 23(b)(3)(C), 23(b)(3)(D) and Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure. These rules help a court to decide whether a “class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” To this end, Rule 23(b)(3)(C) urges the court to consider “the desirability of concentrating the litigation of the claims in the particular forum.” The desirability factor usually comes down to a question whether a foreign court will give “res judicata effect to a judgment entered in a U.S. class action.” Rule 23(b)(3)(D) urges the court to consider “the likely difficulties in managing

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2023 Id.
2024 Id. at 481.
2026 Id. at * 24-30.
2027 Mayer, supra note 1992, at 335.
2029 Id. at 748.
2030 Id.
2031 Youngwood, supra note 2004, at 76.
2033 Youngwood, supra note 2004, at 76; see also In re Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 95 (S.D.N.Y. 2007).
a class action,” and Rule 23(c)(2)(B) excludes foreign claimants from the class when notice requirements are deemed to be too burdensome.2034

B. Class Actions Subject to Arbitration Agreements

The Supreme Court has held that imposing class arbitration on parties whose arbitration clauses are ‘silent’ on the issue is inconsistent with the Federal Arbitration Act.2035 In Stolt-Nielsen S.A. v. AnimalFeeds Int’l, the Court held that: “where the parties stipulated that there was ‘no agreement’ on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.”2036 Respondents – suppliers of raw ingredients for the production of animal-feed – brought a putative class action against petitioners after the Department of Justice discovered in 2003 that various shipping companies had engaged in a price-fixing conspiracy.2037 After the cases were consolidated by the Judicial Panel on Multi-district litigation in the District of Connecticut, the parties agreed that they were required to go to arbitration.2038

The parties then selected a panel of arbitrators for a resolution of the conflict in New York City.2039 At that time, each party stipulated to the fact that the arbitration clause in the relevant contract was silent on the matter of class arbitration, and “agree[d] that when a contract is silent on an issue there’s been no agreement that has been reached on that issue.”2040 Despite these facts, the panel of arbitrators concluded that the contract imposed class arbitration, and petitioners filed a motion to vacate the award in the Southern District of New York.2041 The District Court vacated the award on the basis that the decision was “made in ‘manifest disregard’ of the law insofar as the arbitrators failed to conduct a choice-of-law analysis.”2042 Respondents appealed and the Court of Appeals held that the “arbitrators’ decision was not in manifest disregard of federal maritime law.”2043

The Supreme Court granted certiorari and stated that the arbitrators’ decision was “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent,” because despite the sophistication of the parties, and the absence of “class arbitration under maritime law,” the arbitrators regarded the contract’s silence as an agreement to class arbitration.2044 The Court reasoned that an agreement to class-arbitration is “not a term that the

2034 In re DaimlerChrysler AG Sec. Litig., 216 F.R.D. 291, 301 (D. Del. 2003) (excluding foreign members of a class under both Rule 23(c)(2)(B) and Rule 23(b)(3)(D) when there were difficulties involved in giving those members proper notification because of the “geographic and linguistic diversity of the potential class” and plaintiffs failed to address the issue).
2036 Id. at 1776.
2037 Id. at 1765.
2038 Id.
2039 Id.
2040 Id. at 1766.
2041 Id.
2042 Id.
2043 Id.
2044 Id. at 1775.
arbitrator may infer solely from the fact of the parties’ agreement to arbitrate.” The differences between bilateral and class arbitration are simply too great. The “lower costs, greater efficiency and speed” of bilateral arbitration are jeopardized in class arbitration where there is “reason to doubt the parties’ mutual consent to resolve disputes.” There is also the problem that the “presumption of privacy and confidentiality that applies in many bilateral arbitrations” does not equally apply to class arbitrations. Finally, class arbitration raises the “commercial stake[s]” while affecting the rights of absent parties.

The full ramifications of the Supreme Court’s decision in Stolt-Nielsen were not immediately apparent, but some argued that it provided “corporations with a blank check to immunize their arbitration agreements from being construed as permitting class arbitration.”

It is also important to note that the decision left the following loose ends: (1) nowhere in the opinion did the Court spell out what is required to actually prove consent to class arbitration; (2) the Court declined to “decide whether ‘manifest disregard’ survives… as an independent ground for review” of an arbitrator’s decision; and finally, (3) the contract in Stolt-Nielsen was between “two sophisticated business entities,” and thus it remained unclear whether its standard applied to “contracts involving parties of unequal bargaining power or contracts of adhesion.” The final question has been addressed – at least to the extent that the arbitration clause is not silent on class arbitration – in AT&T Mobility, LCC v. Concepcion.

In Concepcion, the Court held that contracts of adhesion may forbid class arbitration by requiring all disputes to go through arbitration in an individual capacity. The plaintiffs in Concepcion alleged that AT&T had engaged in false advertising when it charged thirty dollars in sales tax on “free” phones. The Southern District of California and the Ninth Circuit denied AT&T’s motion to compel arbitration based on the arbitration clause’s unconscionability. In California, an arbitration clause may be deemed unconscionable if it disallows class procedures, which is precisely what the AT&T contract did. But in the opinion authored by Justice Scalia, the Court held that California law was preempted by the FAA: “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a

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2045 Id.
2046 Id.
2047 Id. at 1776.
2048 Id.
2049 Philip J. Loree Jr., Stolt-Nielsen Delivers A New FAA Rule – And Then Federalizes The Law of Contracts, 28 ALTERNATIVES TO HIGH COST LITIG. 121, 122 (2010).
2051 Stolt-Nielsen, 130 S.Ct. at 1768.
2052 Brody & Lawrence, supra note 2050.
2054 Id. at 1742.
2055 Id. at 1744.
2056 Id. at 1746.
scheme inconsistent with the FAA. The Court then outlined three basic reasons for its
decision: (1) class arbitration is more expensive; (2) requires procedural formality; and (3)
increases risks to defendants. Justice Breyer dissented, noting that the majority’s reasoning
compared class arbitration to individual arbitration, when it should have compared class
arbitration to class actions.

More recently, the Supreme Court reversed the Ninth Circuit again in favor of the
enforceability of pre-dispute arbitration agreements in CompuCredit Corp. v. Greenwood. Plaintiffs brought a class action against marketers and issuers of “harvester” credit cards,
alleging that the terms of the cards violated the Credit Repair Organization Act (the “CROA”).
Harvester credit cards “typically come with a low credit limit and high up-front fees,” and are
usually advertised as a means of rebuilding poor credit. All of the plaintiffs had signed credit
agreements providing that claims must be resolved by binding arbitration. The Ninth Circuit
upheld the District Court’s denial of defendant’s motion to compel arbitration on grounds that
the arbitration clause was in violation of the CROA. The CROA’s disclosure provision requires
credit repair organizations to provide card users with a statement including the following: “You
have a right to sue a credit repair organization that violates the [Act].” The Nine Circuit
interpreted the disclosure provision to provide consumers with a right to bring an action in a
court of law.  

In an opinion written by Justice Scalia, the Supreme Court held that the CROA is silent
on whether claims under the Act are subject to arbitration; thus, the FAA requires that an
arbitration agreement subject to the CROA must be enforced according to its terms. The
CROA’s disclosure provision was deemed to be a “colloquial” abstract of the CROA insufficient
to create a consumer right to sue in court. Justice Ginsburg dissented, arguing that the
audience to which the credit card agreement was offered was “not composed of lawyers and
judges accustomed to nuanced readings of statutory texts,” but laypersons to whom the “right to
sue” would most clearly mean the “right to litigate in court.”

It is clear from the above decisions that both class actions and class arbitration are
disfavored when an arbitration agreement is silent on class procedures or requires all disputes to
be brought in an individual capacity. Indeed, even in the event that an adhesion contract’s
prohibition of the right to litigate as a class would seem to violate the plain language of a statute
intended to protect a vulnerable class of consumers, arbitration wins. Current FFA jurisprudence

2057 Id. at 1748.
2058 Id. at 1751.
2060 Ronald Mann, Opinion Analysis: Court rebukes Ninth Circuit (again) in reaffirming arbitration
agreements, SCOTUSBLOG, (Jan. 11, 2012), http://www.scotusblog.com/2012/01/opinion-analysis-
2061 Id.
2062 CompuCredit Corp. 132 S. Ct. at 669.
2063 Id.
2064 Id. at 673.
2065 Id. at 672.
2066 Id. at 678.
suggests that pre-dispute arbitration agreements are highly likely to be enforced between both equal and unequal parties.

C. Survey of Class Action Law Abroad

While U.S-style class actions are generally opposed abroad – mostly due to punitive money damages and the due process issues arising from the requirement that potential plaintiffs opt-out rather than opt-in to a class – various forms of collective litigation are taking firmer root in countries around the world. Some burgeoning regimes more closely approximate U.S. class actions than others, but most developments abroad are in line with what scholars have interpreted as the typical European preference to “entrust the public interest to public institutions rather than to private law enforcers.” For example, while some countries are beginning to open the door to classes of private litigants, most rely on consumer representative actions in which a state-approved organization stands in for injured consumers.

1. Europe

a. Great Britain

The most significant rule adopted in Great Britain for managing multiple claims is the Group Litigation Order. This mechanism was codified in the Civil Procedure Rules of 1999, and allows a court to permit group litigation when a “number of similar claims give rise to common or related issues of fact or law.” The decision as to which cases will fall into the group is made by a single judge, and such groups are most often formed in the case of “product liability, abuse in child care homes, holiday disasters, [and] transport crashes.” Trade associations may also instigate group litigation to enforce intellectual property rights via a Group Litigation Order.

Plaintiffs wishing to join the group must “register and may be permitted to serve a general statement of their case.” The judge has “considerable discretion,” and may call as many “management conferences as necessary to keep effective managerial control on the litigation and its speed of progress.” The general civil litigation rules remain in force for a Group Litigation Order, such that the “loser pays winner’s costs.” The litigation is generally

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2069 Hodges, supra note 1990.
2071 Id.
2072 Id. at 110.
2073 Id. at 108.
2074 Id. at 109.
2075 Id.
2076 Id.
2077 Id.
funded by public institutions, lawyers who contract on a contingency fee basis, or else by other investors who think there is a good chance the group will succeed. The Group Litigation Order most often fails on grounds that either a “more cost-effective means of resolving the dispute” exists, or that the claimants “fail[ed] to identify a group litigation issue.” As with many jurisdictions outside of the United States, “[e]xemplary or aggravated (punitive) damages are almost unknown” in Great Britain.

b. France

While “French legal literature on class actions started appearing at the beginning of the seventies,” France has yet to adopt a procedure for class actions despite multiple legislative efforts led by both President Jacques Chirac and President Nicolas Sarkozy. The main roadblocks to legislation have arisen from the following controversies: “lawyers’ ethical standards regarding fees and publicity, punitive damages, the domain of action, and access to evidence.” In place of class actions, the French Consumer Code provides several mechanisms by which wrongs to a group of individuals can be litigated by state-approved associations acting in a representative capacity. Under Article L. 421-1, for instance, a consumer organization may bring an action intended to “defend the collective interest.” Under Article L. 422-1, a group of two or more consumers may urge a consumer organization to initiate a legal action on their behalf in the event that they have “suffered personal prejudice having a common origin through the actions of the same person.” Similarly, under Article L.452-2, a provision that mirrors the previous article, a group of investors may bring an action for collective injury via a consumer organization. The first type of representative claim does not allow a benefit to accrue to individual claimants, but the second two devices do so as long as the individual claimant can prove “personal and direct harm.”

c. Germany

Much like France, Germany has no “U.S.-style class action;” it does, however, have a number of provisions allowing “complaints by interest groups or associations.” In 1896, the Act Against Unfair Competition allowed an association to “bring a claim for relief for injunction in relation to deceptive advertising.” This right was broadened to allow for suits by

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2077 Id. at 110.
2078 Id.
2079 Id. at 106.
2081 Id. at 120.
2082 Id. at 116.
2083 Id.
2084 Id. at 117.
2085 Id. at 118.
2086 Id.
2088 Id.
“consumer associations” in 1965. Actions arising from “unfair business terms” were similarly allowed to proceed in 1977 by the Law Regulating the Use of Standard Contract Terms. The scope of issues addressed by the initial rules for interest groups and associations continues to grow to this day.

In addition to the above type of collective litigation, there is an emerging use of third parties to pursue the claims of a class, as well as joinder provisions under Germany’s Code of Civil Procedure. The legality of the former remains to be seen, while the latter is undermined by the fact that joinder of parties does not mean that all parties are bound by the judgment, and “there is no possibility of consolidating law suits pending before different courts.”

But perhaps more interesting is the fairly recent use of test/model cases made binding on the parties by contract and permitted by the Capital Markets Model Case Act. The Act only applies to “claims in which compensation of damages due to false, misleading, or omitted public capital markets information is asserted.” There are three steps: (1) there must be an application to the State District Court for the establishment of a model case by at least ten claimants; (2) the model case proceeds and a judgment is entered; and finally (3), each case is then decided in reference to the model decision. It is believed that the Act will have limited effect, however, because of the difficulties involved in convincing parties to enter into the contract making the model judgment binding.

d. Italy

As of January 1, 2010, Italian law allows “individual consumers to start a class action… for the violation of the[ir] rights… originating from mass contracts, product liability, torts… unfair commercial practices, [and] unfair competition.” As such, it may well be the closest a European country has come to enacting a “full-blown, American-style class action system,” in that it allows individuals, rather than representative consumer organizations, to bring the action. It is also unique in that it allows for compensatory damages, but still prohibits punitive damages.

Under the new provisions, the court first inquires into the admissibility of the class action, ensuring that the claims are not “ill-grounded,” and dismissing it in the event that “the

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2089 Id.
2090 Id.
2091 Id.
2092 Id. at 128.
2093 Id.
2094 Id.
2095 Id. at 129.
2096 Id.
2097 Id. at 128.
2098 Riccardo Buizza, Amended Italy Class Action Law, And A New ADR Law, Finally (Appear) Ready, 27 ALTERNATIVES TO HIGH COST LITIGATION 187 (2009).
2099 Roald Nashi, Note, Italy’s Class Action Experiment, 43 CORNELL INT’L L.J. 147, 150 (2010).
2100 Buizza, supra note 2098.
objectives of the action’s participants are not of identical nature."2101 After its admissibility is judicially determined, the court determines the publicity necessary to inform potential participants of the pending action, what qualifies a claimant to become a member of the class, and “fixes a term not exceeding 120 days for the filing of the opt-in declarations.”2102 After the 120 days pass, “[f]urther class actions in respect of the same rights and against the same company cannot be brought,” but individual actions may still be brought by claimants who did not participate in the original class.2103

2. Canada

In Canada, “[m]ost of the provinces and the Federal Court have adopted class action procedures influenced by the U.S. model, with certification and opt out.”2104 The elements required for certifying a class vary, but generally include the following five factors: (1) “the pleadings must disclose a cause of action;” (2) “there must be an identifiable class;” (3) “the proposed representative must be appropriate;” (4) “there must be common issues;” and (5) “the class action must be the preferable procedure.”2105 Some limited government funds are set aside for funding class actions, but for the most part, “private lawyers… fund the bulk of class actions in Canada.”2106 Like the U.S., but unlike most other jurisdictions, “[t]here are no limits as to the kinds of remedies available in [Canadian] class actions.”2107

3. Asia

a. Japan

Japan has “no special class action system;” collective litigation must be grounded in “procedural methods for normal litigation, namely, joinder of claims and representative actions.”2108 Joinder of claims is available in the event that “rights or liabilities are common to more than one person, are based on the same facts or laws, or are the same kind and based on the same facts and laws.”2109 This mechanism, however, is severely limited, as it depends upon the discretion of the court, and the number of litigants must not be too large.2110 Representative actions allow a group to appoint a claimant and then “withdraw from the proceeding,” being

2101 Id.
2102 Id.
2103 Id.
2105 Id. at 43.
2106 Id. at 44.
2107 Id. at 45.
2109 Id.
2110 Id.
bound by the judgment eventually entered against the representative.\footnote{Id.} Unlike joinder, representative actions allow for large classes of claimants to bring a collective action.\footnote{Id.}

Finally, pursuant to the Consumer Act of 1996, which only recently came into force in 2007, “approved consumer groups may bring injunctive actions to prevent the occurrence or expansion of damage to the interest of consumers caused by inappropriate solicitation or contract clauses in breach of the consumer contract law.”\footnote{Id. at 282.} The consumer protection group must be approved by the state, and to date, only two such groups exist: (1) Consumers Organization of Japan, and (2) Kansai Consumer’s Support Organization.\footnote{Id.} Under the Act, claimants are limited to injunctive relief; there are no punitive damages in Japanese civil cases.\footnote{Id. at 280.}

b. China

In China, collective litigation is covered by Articles 54 and 55 of the Civil Procedure Law.\footnote{Michael Palmer & Chao Xi, The Globalization of Class Actions: China, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 270, 271 (2009).} While the first provision is based upon Japanese law allowing for limited representational group litigation, the second is “based heavily upon the U.S. model of class action.”\footnote{Id. at 272.} Together, these two articles provide for the following three types of collective litigation: (1) “nonrepresentative joint litigation,” (2) “representative group litigation in which the number of litigants is fixed,” and (3) “representative (group) litigation in which the number of litigants is not fixed.”\footnote{Id. at 273.} There are four elements that must be satisfied before collective litigation can proceed: (1) there must be more than one claimant, (2) the claimants must have the “same interest or similar claims,” (3) the court has to agree that the controversy should be decided by group litigation, and (4) all parties must “consent to the use of group litigation.”\footnote{Id. at 271.} In 2004 alone, there were 538,941 collective actions brought before Chinese courts.\footnote{Id. at 280.}

c. India

In India, much of the road towards allowing class actions has been paved by the availability of Public Interest Litigation (“PIL”). The PIL mechanism was developed over time by the Supreme Court of India. It permits “any individual or organization concerned with ongoing human rights violations… [to] bring an action directly in the country’s highest court against the national and state governments of India.”\footnote{Avani Mehta Sood, Gender Justice Through Public Interest Litigation: Case Studies From India, 41 VAND. J. TRANSNAT’L L. 833, 835 (2008).} PILs are based upon “Article 32 of the Constitution of India, which guarantees ‘the right to move the Supreme Court by appropriate
proceedings’ for the enforcement of fundamental constitutional rights.” 2122 While PILs can be “filed only against the state or public authorities in the High Court and Supreme Court,” the mechanism’s development may prove to have important ramifications for the future of class actions against private actors in India. 2123

To cut down on the procedural hurdles to PIL actions, the Supreme Court liberalized the “traditional rule[s],” such that the law no longer requires representative members of the injured class to actually have experienced injury: “if such person or determinate class of persons is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order, or writ.” 2124 In perhaps the most surprising relaxation of traditional rules of Indian civil procedure, the Court has even created “epistolary jurisdiction,” such that Indian courts may certify a PIL action based upon “letters or postcards alerting them to constitutional rights violations.” 2125

Class actions outside of the PIL context, however, seem to be developing somewhat slower despite basic provisions in the Code of Order 1, Rule VIII, due to the absence in India of the “incentives that trigger class actions.” 2126 For example, India does not have a plaintiff’s bar like the one found in the U.S. because Indian law prohibits lawyers from proceeding on a contingency fee basis. 2127 India also “tends to follow the British rule whereby courts can award costs in favor of the successful party, which have to be paid by the losing party.” 2128

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Class action law is developing domestically as well as internationally. Rule 23 of the Federal Rules of Civil Procedure is silent on certifying classes containing foreign claimants, but the ad hoc approach is giving way to clearer regimes in certain types of litigation. Still, the doctrine of forum non conveniens, as well as Rules 23(b)(3)(C), 23(b)(3)(D), and 23(c)(2)(B) of the Federal Rules of Civil Procedure, remain as major barriers to class certification when foreign claimants are involved. The Supreme Court’s recent decisions regarding the FAA have helped to immunize businesses from class actions and class arbitration even in the case of adhesion contracts. Finally, collective litigation is gaining ground in diverse countries around the globe. While most countries, such as Great Britain, France, Japan, and Germany, continue to rely mostly on representative class litigation via state-approved intermediaries, other countries such

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2122 Id. at 838.
2124 Sood, supra note 2121, at 839.
2125 Id.
2126 Surpure, supra note 2123.
2127 Id.
2128 Id.
as China, Canada, Italy, and India have made varying provisions for private litigants to join together in class litigation.

XXVIII. CHAPTER 28: FOREIGN CRIMINAL PROCEEDINGS ARISING FROM CIVIL DISPUTES

A. Overview

A primary (but often overlooked) concern for U.S. commercial entities that do business internationally is the risk that a foreign party improperly may escalate a civil dispute into foreign criminal proceedings. This tactic typically arises from the foreign party’s desire to delay or hinder a U.S.-based party or to improve its own position in settlement negotiations.

A foreign prosecutor (and the party pressing the matter) face a number of significant obstacles to prosecuting a criminal matter against a U.S. defendant. Nonetheless, foreign criminal proceedings have the potential to cause tremendous inconvenience and harm to a U.S.-based defendant.

It is important that a U.S. party facing potential criminal charges in a foreign court understand key issues relating to the prosecution of foreign criminal proceedings. One key consideration is how the foreign prosecution can collect evidence and testimony, which will depend heavily on whether a mutual legal assistance treaty (a “MLAT”) exists between the U.S. and the other country (though the lack of an MLAT will not entirely foreclose the prosecutor from gathering evidence, and the presence of an MLAT, thanks largely to the treaties’ common “dual criminality” requirement, does not automatically give them an unfettered right to do so). Another issue is whether Interpol has issued or will issue a “Red Notice” for the defendant on behalf of the prosecuting nation. A Red Notice serves essentially international arrest warrant that has the potential greatly to inconvenience a U.S. defendant. Finally, it is important to know whether the foreign country will be able to secure extradition of the U.S. defendant from the U.S. or while traveling to other nations.

B. Evidence-Gathering

Collecting evidence and testimony in a transnational criminal matter is no simple task, as the potential defendant and often much of the evidence will be outside the prosecutor’s subpoena or other evidence-collecting powers. International evidence gathering has become considerably easier over the past few decades, however, as technology has made distance less important and, especially, as MLATs between nations have come into vogue.

1. Mutual Legal Assistance Treaties

a. In General

MLATs are a relatively recent phenomena, arising in the mid-1970s as a way to permit evidence-gathering between nations, primarily in criminal matters. The United States currently
has MLATs in force with approximately fifty other nations. In an MLAT, each nation designates a “Central Authority” – the office of the United States Attorney General or the Department of Justice and, usually, a counterpart office in the counterpart nation – to whom all requests for assistance under the MLAT are addressed. The effect of an MLAT between the United States and another nation is to make obtaining documents, depositions, and other evidence and locating information or potential witnesses between those two nations dramatically easier than it would be otherwise.

Under most MLATs, the designated Central Authority for either country has no discretion over whether to follow a request, but must do everything in its power to comply with requests for evidence or information in connection with a criminal matter in the other country, with certain exceptions. For example, crimes relating to tax matters in the requesting country, or crimes the responding country determines the prosecution of which would run counter to its public interest, are often exempted from the requirements of the treaty. Notably, many MLATs require, at least within certain limits, what is sometimes called “dual criminality”: the country from whom assistance is requested is required to fulfill the request only if the offense being investigated or prosecuted constitutes a criminal offense in both countries.

If the country in which criminal proceedings against a United States defendant are instituted has executed an MLAT with the United States, prosecutors in that action have the easiest possible avenue to obtain documents, testimony, and other evidence from the U.S. Moreover, MLATs tend not to have any reciprocal evidence gathering obligations; a U.S. criminal defendant generally cannot use the MLAT to obtain exculpatory evidence located in the other country.

2131 See U.S.-Panama MLAT, art. 1.
2132 See id. at art. 2 sec. 2 (excluding tax matters from the definition of “offense”); U.S.-Canada MLAT, art. 5 secs. 1(b), 2 (providing that the parties may deny assistance if the request violates their country’s public policy or would interfere with an ongoing investigation in the requested country itself); Treaty on Mutual Assistance in Criminal Matters, U.S.-Netherlands, art. 10, Sept. 15, 1983, 35 U.S.T. 1361 (the “U.S.-Netherlands MLAT”).
2133 See, e.g., U.S.-Panama MLAT, art. 1(a) (requiring dual criminality unless the crime is punishable in the requesting country by imprisonment of one year or more and falls into one of a set of specified categories); U.S.-Netherlands MLAT, art. 6 sec. 1 (requiring compliance with a request for search and seizure only if the offense being investigated is a crime in both countries). By contrast, the MLAT with Canada explicitly requires compliance regardless of whether dual criminality exists. U.S.-Canada MLAT, art. 2 sec. 3.
2134 See, e.g., U.S.-Canada MLAT, art. 2 sec. 4.
b. The U.S.-Panama MLAT

It may be instructive to consider one particular MLAT as an example. The MLAT between U.S. and Panama signed in 1991 states that the two nations “agree, in accordance with the provisions of this Treaty, to provide mutual assistance in the investigation, prosecution and suppression of offenses and in proceedings connected therewith.”\(^\text{2135}\) The MLAT defines the parameters of the required assistance, which includes:

(a) taking the testimony or statements of persons; (b) providing documents, records, and articles of evidence; (c) executing requests for searches and seizures; (d) transferring persons in custody for testimonial purposes; (e) serving documents; (f) locating persons; (g) exchanging information in relation to the investigation, prosecution and suppression of offenses; (h) immobilizing forfeitable assets; and (i) any other matter mutually agreed upon by” the nations.\(^\text{2136}\)

Finally, Article 1 explicitly states that the treaty applies only to criminal matters and the nations’ law enforcement authorities, and was not intended to provide for “assistance to private parties or other third parties.”\(^\text{2137}\)

Article 2 then lays out the definitions of “offense” and “proceeding.” An offense qualifying for assistance under the MLAT is conduct that either (a) qualifies as a crime under the laws of both countries or (b) qualifies as a crime punishable by imprisonment of at least one year in the requesting country and relates to illegal narcotics, theft, a crime of violence, fraud, or currency or other financial transactions.\(^\text{2138}\) However, “offense” does not extend to activity involving the regulation of taxes.\(^\text{2139}\) The article defines the “proceedings” for which assistance must be provided broadly, to include any criminal trial (including pre-trial motions), any grand jury or preliminary investigation, “any court or administrative agency in a hearing which could result in an order imposing forfeiture of fruits or instrumentalities of narcotics trafficking,” and other courts or administrative agency which, in the discretion of the Central Authority\(^\text{2140}\) from which assistance is requested, involves certain punishment similar to those in a criminal case.\(^\text{2141}\)

The Central Authority of either the U.S. or Panama may deny a request for assistance under the MLAT to the extent that:

(a) execution of the request would prejudice the security or essential public interests of the Requested State; (b) the request relates to a political offense;

\(^{2135}\) U.S.-Panama MLAT, art. 1 sec. 1.
\(^{2136}\) Id. at art. 1 sec. 2.
\(^{2137}\) Id. at art. 1 sec. 3.
\(^{2138}\) Id. at art. 2 sec. 1.
\(^{2139}\) Id. at art. 2 sec. 2.
\(^{2140}\) The Central Authorities in the U.S.-Panama MLAT are defined as the U.S. Attorney General and Panama’s Minister of Government and Justice, or persons designated by those individuals. Id. at art. 4.
\(^{2141}\) Id. at art. 2 sec. 3.
(c) the evidence requested is to be used for the purpose of trial of a person on a charge for which that person has been previously convicted or acquitted at a trial in the Requesting State, or was in jeopardy, under the laws of the Requesting State, of being convicted at that trial; (d) there are substantial grounds leading the Central Authority of the Requested State to believe that compliance would facilitate the prosecution or punishment of the person to whom the request refers on account of his race, religion, nationality or political opinions; (e) the request does not establish that there are reasonable grounds for believing: (i) that the criminal offense specified in the request has been committed; and (ii) that the information sought relates to the offense and is located in the territory of the Requested State; or (f) the request is not in conformity with the provisions of this Treaty.\textsuperscript{2142}

The MLAT requires the nation that finds it cannot comply with a request for one of the foregoing reasons to “determine whether assistance can be given subject to such conditions as it deems necessary,” and permits the requested nation to postpone complying with a request if doing so would interfere with its own investigation.\textsuperscript{2143}

Once one Central Authority has received a request from the other, the one from whom assistance is requested must “promptly comply with the request or, when appropriate, shall transmit it to the authority having jurisdiction to do so.”\textsuperscript{2144} That authority then “shall use all legal means within its power to execute the request, and “[t]he courts of the Requested State shall have jurisdiction in accordance with its laws to issue subpoenas, search warrants, or other process necessary in the execution of the request.”\textsuperscript{2145} The nation making the request must use the information it receives only for the purposes outlined in the request, without the prior consent of the requested nation, and must keep all information confidential.\textsuperscript{2146} The MLAT also permits the requesting nation to procure documentary evidence or testimony in the requested nation, within the laws of the requested nation,\textsuperscript{2147} and permits persons in custody in one nation to be transferred to the other under the treaty for testimonial purposes if the person to be transferred consents.\textsuperscript{2148} In the event a person is transferred from the requested nation to the requesting nation to testify pursuant to a request under the MLAT, he or she is guaranteed safe conduct.\textsuperscript{2149}

Article 15 requires that a request for search and seizure for the delivery of any article to the requesting nation “shall be executed if it includes the information justifying such action under the laws of the Requested State,” as long as the requesting nation has agreed to whatever conditions are necessary to preserve third parties’ rights in the items seized.\textsuperscript{2150}

\textsuperscript{2142} Id. at art. 3 sec. 1.
\textsuperscript{2143} Id. at art. 3 secs. 2-3.
\textsuperscript{2144} Id. at art. 6 sec. 1.
\textsuperscript{2145} Id.
\textsuperscript{2146} Id. at art. 8.
\textsuperscript{2147} Id. at art. 9.
\textsuperscript{2148} Id. at art. 10-11.
\textsuperscript{2149} Id. at art. 12.
\textsuperscript{2150} Id. at art. 15.
Many other provisions and articles of the MLAT deal with communications between the Central Authorities or governments and are not directly relevant to a potential private defendant. In short, as with most or all MLATs, the U.S.-Panama MLAT gives the Central Authority very little discretion as to whether to follow a request, as long as the offense described falls within the fairly broad definition provided in the MLAT and compliance with the request is not barred for certain public policy reasons.

2. 28 U.S.C. § 1782

The absence of an MLAT between the U.S. and a foreign country, however, does not necessarily preclude a prosecuting authority in that foreign country from obtaining evidence or testimony from a defendant or other sources within the U.S. A federal statute, 28 U.S.C. § 1782, provides that a federal district judge may order a person found in that judge’s district to give testimony or other evidence “for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusations.”

Although the access provided to the foreign authority by the statute is placed in the district judge’s discretion, it is an extraordinarily broad and open-ended statute. Upon “a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person,” the court may order depositions and document production and may essentially do anything that the court would be empowered to do in a U.S. domestic case. Neither the statute nor appellate courts prescribe any standard or provide any direction as to how and when the district court’s discretion is to be exercised: “Whether, and to what extent, to honor a request for assistance pursuant to § 1782 has been committed by Congress to the sound discretion of the district court,” and the circuit court’s review of that decision “is extremely limited and highly deferential.” A foreign prosecutor (or, potentially, the party interested in bringing criminal charges against the domestic defendant) can thus obtain evidence from the U.S. defendant or other parties simply by convincing a district judge to issue an order, even if the foreign country in question does not have an MLAT with the U.S. (or even, potentially, if an MLAT is in force, but the country’s Central Authority chooses not to take action).

C. Extradition and Red Notices

1. Extradition

In most cases, under 18 U.S.C. § 3184, extradition of a suspect in a criminal proceeding from the United States to another country is possible only pursuant to a treaty with

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2151 See, e.g., id. at art. 7 (regarding which Central Authority is responsible for the costs incurred in fulfilling requests); id. at art. 13 (regarding the nations’ obligation to provide each other with certain governmental records upon request).


2154 The only exception permitting extradition absent a treaty occurs when the suspect, who is not a citizen, national or permanent resident of the U.S., is charged with committing a violent crime against U.S. nationals while in a foreign country. See 18 U.S.C. § 3181(b).
that country. Under that statute, where there is a treaty in place or any of a small selection of other conditions justifying extradition have been met, any judge or justice of the United States, any magistrate judge authorized to do so by a United States judge, or any judge of a state court of general jurisdiction may hear a complaint charging a person within that judge or justice’s jurisdiction with a crime in a foreign country.\footnote{18 U.S.C. § 3184.} The judge is to hold a hearing to determine the sufficiency of the evidence of criminality against the suspect, and if the judge deems the evidence sufficient, he or she is to certify the charge, providing a transcript of the hearing testimony, to the U.S. Secretary of State, so that the extradition can be arranged as specified under the treaty.\footnote{Id.}

The United States currently has extradition treaties with at least 109 other nations.\footnote{See notes to 18 U.S.C. § 3181 (listing countries).} Modern extradition treaties, like most MLATs, have a “dual criminality” requirement; even if the evidence is sufficient to charge that a crime has been committed under the laws of the foreign country, then, the same conduct must constitute a crime in the United States as well.\footnote{See e.g., Extradition Treaty, U.S.-U.K., art. III.1, June 8, 1972, 28 U.S.T. 227.}

The formal extradition process thus provides some further protection for U.S. civil litigants who find themselves the subjects of harassing criminal proceedings in other countries. While the judge holding an extradition hearing may view issuance of a Red Notice or action taken under an MLAT to be some evidence that the charges have merit, the judge still must conduct a hearing and weigh the sufficiency of the evidence against the suspect.

2. Interpol Red Notices

While there is no existing mechanism for obtaining an arrest warrant across national borders, the Red Notices issued by the International Criminal Police Organization (the “Interpol”) often have the same practical effect. Red Notices are often used as an aid to the extradition process, putting out notice to Interpol member countries that the subject individual is wanted and requesting his or her arrest with a view toward eventual extradition.

Interpol is “the world’s largest international police organization, with 188 member countries.”\footnote{See Interpol, http://www.Interpol.int/public/icpo/default.asp (last visited Nov. 16, 2012).} One of its chief means of assisting member nations is the issuance of Red Notices. Once an arrest warrant is issued in the member country (or international criminal tribunal) seeking to prosecute an individual who cannot be found within that country’s borders, the prosecuting authority in that country can issue a request for a Red Notice to that country’s national central bureau for Interpol, and if approved, is then sent on to the Interpol General Secretariat at Interpol headquarters in Lyon, France, for further review and approval. If issued, the Red Notice notifies all member countries that the requesting country is seeking that individual and will request the individual’s arrest, for eventual extradition, wherever he or she is found.\footnote{See Interpol, Notices, http://www.interpol.int/en/INTERPOL-expertise/Notices (last visited Nov. 16, 2012); see also USAM § 9-15.635; U.S. Dept. of Justice, Office of the Inspector General, \textit{The U.S. Department of Justice’s Interpol Program}, 2006.} A Red Notice also essentially has the effect of restraining its subject from traveling...
internationally, since travel into any Interpol member country would increase the possibility of being detained and extradited to the requesting country.2161

According to the U.S. National Central Bureau of Interpol, approximately one third of Interpol’s member countries simply treat Red Notices as international arrest warrants, but the U.S. is not one of them.2162 Rather, the U.S. follows the following procedure:

If the subject of another member country’s Red Notice is located in the United States, federal officials will notify the member country of the individual’s possible location. Once the foreign country provides sufficient documentation, a provisional arrest warrant is issued, the subject of the Red Notice is detained, and extradition through diplomatic channels is arranged.2163

Thus, even though a Red Notice does not technically serve as a provisional arrest warrant in the U.S., a U.S. resident who becomes the subject of a Red Notice nonetheless faces possible (or even likely) arrest or extradition.

A Red Notice thus has the potential to pose a significant risk to a U.S. civil litigant threatened with harassing criminal proceedings abroad. If it is abundantly clear that the criminal allegations are fabricated for purposes of harassment, it seems unlikely that the U.S. would allow an arrest warrant to be issued. However, it may be too much to expect the U.S. authorities to reliably judge the merits of an extraterritorial criminal charge, and a heavy amount of deference to Interpol and the other nation can be expected. The best hope in such a situation appears to be that Interpol, or the source country’s national central bureau, will refuse to grant the request for the Red Notice in the first instance. Interpol states that all applications for notices, and especially applications for a Red Notice, ”should be reviewed by the originating member country for accuracy, completeness, legal sufficiency, and compliance with Interpol regulations.”2164 There do not appear to be any further restrictions or qualifications on the scope of that review (nor, in fact, does any review at all appear to be strictly required), and it appears to be entirely up to the discretion of the relevant individual or governmental body processing the request for a Red Notice in the originating country whether and how to conduct a review of its sufficiency. The U.K. Ministry of Justice, for example, appears to have no publicly available policies or procedures revolving Red Notices requested by a U.K. authority, while the U.S. Department of

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2162 The U.S. National Central Bureau of Interpol, supra note 2160, at 10.
2163 *Id.* at 11 n.42.
2164 *Id.* at 11.
Justice notes only that is responsible for seeking the issuance of Red Notices on behalf of U.S. authorities -- it makes no mention of reviewing the sufficiency of those requests.\footnote{2165}{See http://www.justice.gov/usncb/programs/international_notice.php (last visited Nov. 16, 2012).}

The applications then receive “additional review and approval” from Interpol headquarters, but Interpol’s review appears to be very limited. The only type of review that is specifically mandated is a “quality assurance review” by members of the Interpol staff “to ensure that the Red Notice application is not based on a prohibited matter, including acts of a racial, military, political, or religious nature.”\footnote{2166}{Id. at 10-11.} It is unclear exactly how thorough these reviews are and what criteria are used, and the initial review is likely to vary a great deal from one source country to the next. One would hope that a spurious and suspect criminal charge against a party involved in civil litigation against a resident of that country would raise a red flag in either or both of those reviews, but while Interpol certainly has the authority to refuse to issue Red Notices in that situation, it is not at all clear that the type of thorough substantive review necessary to make that determination is routinely exercised. Accordingly, the issuance of a Red Notice remains a significant threat for an individual facing possible nuisance litigation abroad, making extradition more likely and significantly limiting the individual’s ability to travel out of the U.S.

The inconsistency and uncertainty of operating under another country’s laws make foreign criminal proceedings a frightening and dangerous thing, and instituting foreign criminal proceedings against a domestic civil litigant is a potentially powerful, if ethically deplorable, negotiation tactic. However, while recent developments such as the proliferation of MLATs and extradition treaties have made access to evidence and the suspects themselves considerably easier than it had been, it is still a difficult process for the foreign prosecutor, with some safeguards in place to protect the suspect from frivolous criminal charges whose only purpose is to harass and damage the suspect’s position in civil settlement negotiations.