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**'Domesticating' the New York Convention: the Impact of the Federal Arbitration Act**

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Abstract

International arbitration is a world of multiple interfaces among legal orders, marked by significant tensions at specific pressure points. It is the purpose of much, if not most scholarship in international arbitration to seek to resolve such tensions. In this article the author deals with a set of pressure points that has recently been brought to the surface in a particularly comprehensive and systemic manner, in the context of the Restatement of the US Law of International Commercial Arbitration: the clash between, on the one hand, the New York Convention and thus the international model of international arbitration and, on the other hand, the basic US federal legislation on international commercial arbitration and thus the US model on international arbitration. This clash, the author shows, becomes manifest with regard to issues including: awards made in the United States but whose enforcement is nevertheless governed by the New York Convention; the preclusive effects for other courts of a court's decision on the scope of an arbitration agreement; the common law notion of collateral estoppel (issue preclusion—preclusive effects for other courts and tribunals of factual and legal findings) as opposed to the Convention's focus on *res judicata* (claim preclusion); the application of *forum non conveniens* in actions to enforce an award; treating interim measures as awards; and the role of state public policy as opposed to federal public policy.

1. Introduction

Much as one may try to universalize and even 'de-nationalize' international commercial arbitration—whether through Conventions, uniform or model laws, or soft law—the phenomenon remains profoundly affected by national law and policy. The incongruities—big and small—between domestic and international arbitration regimes typically present themselves on a purely ad hoc basis, that is to say, in specific and often isolated contexts, as when a particular case in national court produces a result that looks anomalous from the point of view of a major international instrument such as the New York Convention.<sup>1</sup> The current American Law Institute's (ALI) Restatement of the US Law of International Commercial Arbitration<sup>2</sup> provides a very different and indeed unprecedented lens through which to observe the discontinuities that may affect the application of the New York Convention in national law.

This is so for three basic reasons. First, few commercially significant countries can compete with the United States for the world title of international law exceptionalism. If any State were poised to disrupt the simple and sleek view of international arbitration held dear in many international arbitration circles, it is the United States.

Second, a Restatement of US law in any given field comes around only rarely, and it has only just now come around—for the first time—for international commercial arbitration. (Two of the Restatement's six chapters have at this time been finalized and approved.) By its nature, a Restatement reexamines a field in a fashion that is both comprehensive, on the one hand, and detailed and focused, on the other. A Restatement of the US Law of International Commercial Arbitration can thus reveal on a large scale, but at the same time with great specificity, the tensions between international arbitration as viewed nationally and internationally. It is helpful to recall that Restatements began over 80 years ago in the United States for the purpose of fostering clarity, consistency and coherence in the fields of law most apparently in need of them.<sup>3</sup> Unsurprisingly, the initial fields subject to Restatement were ones not only of state rather than federal law, but also ones characteristically taking common law rather than statutory form. Against that background, when a federal law subject (like international commercial arbitration) that is governed by federal statute (again like international commercial arbitration) becomes the subject of a Restatement, that is a sure sign that help is needed.

This circumstance may in turn be explained by the combination of legal sources on which this particular Restatement draws: viz., a domestic statute that long predates the New York Convention and a vast case law interpreting the Convention chiefly on the basis of interstate rather than international cases. The United States stands in a position very different from the many jurisdictions having modern international commercial arbitration legislation, particularly those that have adopted UNCITRAL's own Model Law on International Commercial Arbitration,<sup>4</sup> which aimed to minimize, if not eliminate, all contradictions between the New York Convention and the local *lex arbitri*.

Third, this moment is further apt for gauging the 'fit' between US and international models of international commercial arbitration, since the New York Convention is itself the subject both of proposals for comprehensive reform<sup>5</sup> and of what may fairly be called 'Restatement'-type activity. As regards the latter, UNCITRAL has recently commissioned an 'UNCITRAL Guide to the New York Convention', whose purpose is to expose and, hopefully, mitigate divergent interpretations of the Convention by national courts around the world.<sup>6</sup> This is a problem that all international treaty regimes face if they lack their own designated international tribunal charged with establishing the treaty's authoritative interpretation, and it prevents a risk that UNCITRAL is seeking to mitigate.

## 2. A Taxonomy of Tensions

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Because the Restatement project is still young, it would ordinarily be too early to reach conclusions about the tensions between the US law of international commercial arbitration, on the one hand, and the New York Convention and UNCITRAL Model Law, on the other. However, for completely unrelated reasons, work on this Restatement began with the chapter on recognition and enforcement of international arbitral awards, which is of course the prime subject of the New York Convention.<sup>7</sup> This circumstance has enabled us to identify the discontinuities much earlier in the life of the project than one might have imagined.

The tensions that have thus far emerged fall into four main categories: (i)

tensions due to the age and character of the Federal Arbitration Act (FAA), (ii) tensions created by certain procedural features of US law that affect international commercial arbitration, much as they do any other field of American law, (iii) tensions generated by the US courts' efforts to promote international arbitration's efficiency and economy and (iv) tensions traceable quite simply to aspects of American federalism.

**A. The FAA**

A first set of tensions stem from peculiarities embedded in the now quite old FAA, even as amended pursuant to the legislation implementing the New York Convention.<sup>8</sup>

*(i) Non-convention awards*

The Convention, it will be recalled, permits ratifying States to declare themselves bound to recognize and enforce only those foreign awards rendered on the territory of another Contracting State.<sup>9</sup> Like many other States, the United States has made this reciprocity declaration.<sup>10</sup> This means that awards made on the territory of States (such as Taiwan or Liechtenstein) that have not become parties to the Convention—ie, 'foreign non-Convention awards'—are not entitled to presumptive recognition and enforcement in the United States pursuant to the Convention.

Unfortunately, these awards—admittedly few in number—do not fall within the scope of any of the three current chapters of the FAA. FAA Chapter One—the original chapter—contemplates awards in interstate commerce, which could possibly by extension include foreign commerce, except for the fact that the chapter is replete with references to the vacatur of such awards by US courts.<sup>11</sup> Clearly, when Congress enacted FAA Chapter One, it had in mind only awards made on the territory of the United States. For their part, FAA Chapters Two and Three do not cover such awards either, as those chapters apply to Convention awards only. It would not be acceptable to apply the FAA chapters governing Convention awards analogically to those awards from which the United States has expressly withheld the promise of recognition and enforcement under the Conventions.

The drafters of the Restatement identified three remaining possibilities. The first was to subject non-Convention awards to a judge-made general federal common law rule on recognition and enforcement of foreign awards. However, the subject—recognition and enforcement of foreign awards—does not present the obvious overriding federal interest generally required in order to justify creation of a federal common law. The second was to subject them to the award recognition and enforcement law of the relevant US state. But state law on the subject, which might take either statutory or common law form, varies from state to state. This solution would comport poorly with the fundamental purpose of the FAA, which was to adopt a single broadly pro-arbitration set of principles at the federal level. In the end, the Restatement opted for foreign non-Convention awards to be governed by the same principles and rules established by FAA Chapter One for recognition and enforcement of arbitral awards in interstate commerce (as well as state arbitration law to the extent consistent with FAA Chapter One).<sup>12</sup>

*(ii) Convention awards made in the United States*

The United States not only imposed a reciprocity requirement under the Convention; it also, acting very much alone among Contracting States, accepted the Convention's invitation to ratifying States to declare unilaterally that they will consider as Convention awards those awards that, while rendered on national territory, bear a reasonable relationship with a foreign country and might therefore be regarded as 'non-domestic'.<sup>13</sup> The FAA implementing legislation accordingly provides

for the Convention to govern recognition and enforcement of awards arising out of a relationship that involves a party that is not a citizen of the United States or that 'involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States.'<sup>14</sup> We may call these 'Convention awards made in the United States', or simply 'US Convention awards'.

This seemingly harmless, even generous, act of the United States has given rise to problems and most notably a problem concerning the annulment of such awards. On the one hand, the Convention does not govern the annulment (or vacatur, as it is called in US parlance) of awards made locally. Accordingly, annulment of these US Convention awards should be governed by purely domestic grounds for annulment. On the other hand, once the US declared by statute that these awards would be treated as foreign Convention awards, they should be subject to annulment only on the Convention's grounds for denying recognition and enforcement to foreign Convention awards.

The situation would be unproblematic if the United States grounds for annulling domestic awards perfectly paralleled the United States grounds for denying recognition and enforcement to foreign Convention awards. But they do not; the grounds are not textually congruent. More controversially, domestic awards may apparently be vacated on grounds of 'manifest disregard of the law'<sup>15</sup>—a concept whose contours remain unclear and which seems at variance, in letter and spirit, with the notion that international arbitral awards are not subject to merits review by national courts. The lower federal courts remain divided on this issue,<sup>16</sup> and the Restatement has not yet, as of this time, taken a definitive position.

Clearly, the language and structure of the FAA are inadequate for dealing convincingly with two of the Convention's basic categories of awards: awards rendered on the territory of non-Convention States ('non-Convention awards') and Convention awards made on domestic territory ('US Convention awards').

**B. Procedural Aspects of US Law**

A second and larger category of tensions between US arbitration law and the New York Convention reflect the fact that actions to recognize or enforce Convention awards, though contemplated and even compelled by the Convention, are processed through the usual rules governing civil actions in the United States. Some of these procedural rules sit uncomfortably with the requirements of the Convention. Several examples are worth mentioning.

(i) *'Parallel entitlement'*

American law generally accepts the notion that parties to litigation may have alternative avenues of relief. In that spirit, the Restatement—like the preexisting case law<sup>17</sup>—gives prevailing parties in international arbitration the option of either (i) bringing a foreign award as such directly to the United States for enforcement or (ii) seeking confirmation of the award in the courts of the place of rendition and then bringing the resulting judgment to the United States for enforcement. This is widely known as 'parallel entitlement'.<sup>18</sup> Although parties almost invariably prefer the award enforcement over the judgment enforcement route, they have the choice. This approach may well offend those in arbitration circles who believe that making the Convention merely an option (albeit an option that parties will practically always elect), rather than the exclusive means, diminishes the Convention and unduly complicates the enforcement of foreign awards. However, the Restatement solution has the merit of widening the options for award enforcement in the United States.

*(ii) Waiver*

American law traditionally gives wide scope to the notion of waiver. Absent compelling circumstances, parties are free to waive the rights that they otherwise enjoy, and may do so either expressly or impliedly, as through conduct. Accordingly, courts are generally quick to find that parties have waived their procedural objections to the way an arbitration is conducted if they fail to raise the objection on a timely basis before the arbitral tribunal.<sup>19</sup> Similarly, parties waive most of the Convention grounds for defeating recognition or enforcement by failing to raise them by way of defense on a timely basis in the enforcement action.<sup>20</sup> This does not mean that waiver knows no limits under US law. For example, the Restatement does not consider that a party has waived the Convention's grounds for defeating recognition or enforcement on account of its failure—deliberate or otherwise—to bring a local annulment action against the award. On the other hand, if a party does bring an annulment action, and fails to raise a particular ground in support of its action to annul, it may be barred from raising that ground in the context of a later enforcement action.<sup>21</sup>

*(iii) Preclusion*

Third, and more generally, US law recognizes that many objections to the recognition or enforcement of awards may plausibly be raised at earlier stages in the life-cycle of an arbitration. For example, a party may at the outset resist a court's compelling arbitration, on the ground that the dispute does not fall within the scope of the agreement to arbitrate. If the court disagrees, arbitration then takes place and an award is rendered, that same party may seek annulment of the award, again on the ground that the dispute falls outside the scope of the agreement to arbitrate.<sup>22</sup> This attempt will in principle be made before a court of the place of arbitration, often a court other than the one that compelled arbitration in the first place. If that attempt too is unsuccessful, the award may then be brought for enforcement to a court of a third jurisdiction (a jurisdiction where assets of the respondent may be found) and the respondent may now seek to defeat enforcement on essentially the same ground, namely that the dispute falls outside the scope of the agreement to arbitrate.<sup>23</sup>

The question arises whether a court's judgment on the 'scope of arbitration' issue should be deemed to bind another court before which essentially the same question is raised at a later point in time? Considerations of judicial economy suggest a positive answer to that question. On the other hand, it may be thought that the scope issue is so fundamental to the legitimacy of the arbitration and the award that each of these courts should determine the question independently. The same situation may arise in connection with certain other grounds for non-recognition and non-enforcement under the Convention.<sup>24</sup>

Strong arguments may be made in favour of authorizing, and even requiring, courts at each of these stages to examine and decide the issue independently. Effectiveness of the Convention's grounds for denying recognition and enforcement would clearly be enhanced by authorizing de novo consideration at each stage. But preclusion is deeply embedded in the practice of US litigation. The Restatement takes the position that judgments on these issues, whether rendered by a local or a foreign court, should be given the same preclusive effect that prior judgments generally enjoy under the forum's judgment recognition policies. This practice not only exemplifies the influence of domestic procedure on the enforcement of Convention rights and obligations. It also exemplifies a larger US emphasis on economy in litigation that is the subject of the third category of tensions described in Section C below.

*(iv) Collateral estoppel*

A related problem in applying the New York Convention in US litigation relates to the preclusive effect of awards themselves. The common law has traditionally viewed the notion of recognition as encompassing not only *res judicata* (or 'claim preclusion'), but also collateral estoppel (or 'issue preclusion'). Giving the effect of claim preclusion to awards is not controversial; barring a party from re-litigating a legal claim that was finally adjudicated in an arbitration in the form of an award goes to the essence of recognition.<sup>25</sup> Collateral estoppel is something else. The notion that parties should be bound by a court's factual or legal findings in subsequent litigation in the same or a different court, even if the two actions are unrelated, is a well-established principle of the law of judgments in common law countries, but not elsewhere.

Nothing in the negotiating history of the Convention suggests that its drafters intended by recognition to make awards binding not only as to the 'claims' actually arbitrated, but also as to 'issues' actually determined by the arbitral tribunal in the course of deciding the dispute. But even if the Convention cannot be said to *compel* US courts to give collateral estoppel effect to Convention awards, does it nevertheless *permit* them to do so? One possibility open to the Restatement would be to deny collateral estoppel effect to arbitral findings altogether. The Restatement follows a different path, allowing courts to give collateral estoppel effect to Convention awards, but only if two conditions are satisfied: first, the award itself must be entitled to recognition (ie claim preclusion) under the terms of the Convention; second, the award must meet all the requirements that forum law generally imposes before giving judgments collateral estoppel or issue preclusion effect.<sup>26</sup> Satisfying the latter condition may be difficult, since US courts have laid down various requirements that must be met before a judgment receives issue preclusive effect.<sup>27</sup> These requirements, whose purpose is basically to ensure that a party's reasonable expectations concerning the binding effect of judgments in other cases will be met and that there will not be, for any reason, unfair surprise,<sup>28</sup> would apply equally to awards, and may even be more difficult to meet. The Restatement's attempt to accommodate the Convention to peculiarities of US procedure on this subject was among its most challenging and controversial.

(v) *Grounds for declining jurisdiction*

Article III of the New York Convention directs States to accord recognition and enforcement to Convention awards 'in accordance with the rules of procedure of the territory where the award is relied upon'. The Convention's embrace of domestic civil procedure in recognition and enforcement actions is generally unproblematic. Courts in Convention States may freely apply to such actions the same pleading, hearing and evidentiary regimes that govern the conduct of civil and commercial litigation generally. They may also freely determine the limitations period applicable to such actions, provided it is not unreasonably short.<sup>29</sup> However, application of other broadly procedural ground rules has the potential to complicate and possibly adversely affect enforcement of Convention awards in the United States. Among the most contentious are rules allowing courts to decline jurisdiction.

Virtually all States place general limitations on the right of its courts to exercise personal jurisdiction over non-domiciliaries. Unless one reads the Convention as impliedly doing away with any such discipline on the exercise of personal jurisdiction by domestic courts over non-nationals, the personal jurisdiction rules of the place where recognition or enforcement is sought should continue to apply as usual. That seems to be a common assumption.

More problematic is the applicability of domestic law limitations on the *exercise* of jurisdiction, such as *lis pendens* and *forum non conveniens*.

The former rarely presents a problem in the United States, since US courts, unlike courts in the European Union,<sup>30</sup> do not regard themselves as obligated to decline jurisdiction on *lis pendens* grounds. By contrast, dismissals or stays on *forum non conveniens* grounds are highly common in international litigation. Although actions to enforce foreign arbitral awards seldom present the degree of inconvenience generally required for application of the *forum non conveniens* doctrine, US courts do entertain such motions<sup>31</sup> and have on occasion granted them.<sup>32</sup>

It has been suggested that *forum non conveniens* is just another domestic procedural rule that Article III of the Convention invites courts to apply in actions to enforce Convention awards. Under that view, a court may in its discretion refuse to hear a case that it is competent to hear. However, staying or dismissing an action to enforce a Convention award on convenience grounds stands in obvious tension with the international obligations that the New York Convention sought to impose. The Restatement accordingly excludes all application of *forum non conveniens* to arbitral awards that are subject to the Convention.<sup>33</sup>

**C. Economy and Efficacy Interests**

Several of the procedural features discussed in the previous section—such as waiver and preclusion—have as their basic purpose promoting economy and efficiency in dispute resolution, be it litigation or arbitration. To that extent they represent more than neutral procedural ‘overlays’. They could just as easily be included in a third category of American law features, namely those specifically driven by economy and efficiency concerns. The Restatement, though still in its early stages, already reveals a significant number of such provisions.

*(i) Interim measures by the arbitrators*

Among the most controversial is the Restatement’s decision to treat the grant of interim measures by arbitral tribunals as arbitral awards for purposes of recognition and enforcement.<sup>34</sup> (Reference here is made to interim *measures*, not interim or partial *awards*.<sup>35</sup>) This decision may seem counterintuitive inasmuch as interim measures are in a sense by their nature non-final. However, they may be considered as final insofar as they determine conclusively the justification for interim measures at the precise time and under the precise circumstances in which they were sought.

However, the real reason for treating arbitral interim measures as awards is not a conceptual but rather a practical one, viz. to strengthen the enforceability of such measures, and thereby the efficacy of arbitration. (US law does not offer a firm basis for the immediate enforcement of interim measures—as opposed to judgments—issued by foreign courts.) Doing so will of course impose certain costs. One of them is the difficulty of drawing the line between arbitral procedural orders (which are not awards) and interim orders (which would be).<sup>36</sup> Another is the opportunity that treating arbitral interim measures as awards opens up for parties to seek their annulment, thereby complicating and delaying progress of the arbitration. Still, the benefits of enabling interim measures to be immediately enforced have prevailed.

*(ii) Weight of arbitral findings*

Work on the Restatement chapter on recognition and enforcement of awards also raised a question about the weight properly to be given to arbitral findings of fact when those findings relate directly to the presence or absence of a ground for denying recognition or enforcement of an award under the Convention. Under the Convention, courts in principle determine independently whether any such ground is established. But whether a ground is established may turn on a pure finding of fact that a tribunal had occasion to make in the course of the

arbitration and that the tribunal may well have been better placed to make than a reviewing court would be. For example, if, in deciding whether a party received adequate notice of proceedings, a court must determine the moment at which notice was given, the court may consider it appropriate to give weight to an arbitral finding on that issue, particularly if the tribunal heard conflicting live witness testimony on the matter. The availability or unavailability of a Convention defense to recognition and enforcement will not often depend on such testimony-based factual conclusions. But if and when they do, it may serve economy and efficiency for the arbitral finding of fact to be shown a measure of deference.

*(iii) Determining the scope of the agreement to arbitrate*

Relatedly, the parties may have expressly given the arbitrators final authority to determine whether a given dispute falls within the scope of a pre-dispute arbitration agreement. Again, US courts in principle determine independently whether a party seeking to defeat recognition or enforcement of an award has established the circumstances necessary for such a defense.<sup>37</sup> However, this particular ground for non-recognition or non-enforcement squarely entails contract interpretation, an exercise on which arbitral tribunals are generally meant to have the final word, and it may be more efficient for courts to give weight to the arbitrators' determination of the scope and breadth of the agreement to arbitrate. Consequently, the Restatement, much like the case law generally,<sup>38</sup> permits the parties to shift ultimate authority on the 'scope' question to the arbitral tribunal, provided the parties do so clearly and unmistakably.<sup>39</sup>

*(iv) Anti-suit injunctions*

Considerations of economy and efficiency will undoubtedly figure even more prominently in the chapters of the Restatement that lie ahead. For example, the Restatement is bound to give serious consideration to the availability of judicial anti-suit injunctions in support of orders referring the parties to arbitration, which will be among the subjects treated in Chapter Two of the Restatement. Though objectionable in some respects, their availability would enhance the effectiveness of a court order that merely refers parties to arbitration. Considerations of economy and efficiency are also likely to influence the Restatement's positions on various aspects of the arbitral process, the subject of Restatement Chapter Three.

**D. American Federalism**

There remains as a source of tensions the quintessentially US law problem of federalism. This should occasion no surprise, given the fundamental role of state courts in the administration of justice in the United States. But the significance of state law, as shown further below, is sometimes a great deal more than jurisdictional.

*(i) State and Federal Court Jurisdiction*

In the US judicial system, state courts have jurisdiction over many, indeed most, claims arising under federal law. Actions for the enforcement of Convention awards may therefore be brought in state court,<sup>40</sup> presumably under state rather than federal rules of jurisdiction and procedure. Such is the case with actions arising under Chapters Two and Three of the FAA,<sup>41</sup> though such actions may be removed by the defendant to federal court. Strangely perhaps, federal courts in some instances lack subject matter jurisdiction to entertain claims even though they arise under federal law. This is the case with actions arising under Chapter One of the FAA.<sup>42</sup> Such claims may be brought in federal court only if some independent basis for federal court jurisdiction, such as diversity of citizenship, exists.<sup>43</sup> All in all, cases arising under the FAA

may well proceed in state court.

Under these circumstances, the question arises as to whether the state court is entirely free to follow its usual practices on matters of procedure, even in actions to enforce Convention awards. The presumption must be that these actions, having been brought in state court, remain subject to state court procedural norms. It could happen, though, that application of state procedural law would undermine federal policy on interstate and international arbitration or the FAA more specifically. Discussion of this matter in the drafting of the Restatement resulted in treating the statute of limitations provided for in the FAA as so closely intertwined with the substantive rights and claims created by the statute as to apply even to actions brought in state rather than federal court.<sup>44</sup> By contrast, rights of appeal within the state court system from state decisions granting or denying enforcement of awards were left, out of consideration for state sovereignty, to be governed by state law,<sup>45</sup> as was the determination whether actions to enforce Convention awards should follow summary or expedited, rather than ordinary, judicial procedures.<sup>46</sup>

(ii) *State Arbitration Law*

State law may, however, have a more substantial impact on the enforcement of Convention awards. Although the FAA is considered to establish the federal government's paramount interest in arbitration in interstate and foreign commerce,<sup>47</sup> and to carry with it a powerful pro-arbitration bias,<sup>48</sup> the fact remains that many US states have also enacted legislation governing arbitration in both interstate and foreign commerce. Moreover, this legislation differs in many important respects both from the FAA and indeed from state to state.<sup>49</sup> While the FAA enjoys supremacy over state arbitration law in the event of conflict between them, it does not preempt the field.<sup>50</sup> Unfortunately, it remains to this day unclear when exactly state law that is *different from* federal law is also *in conflict with* federal law.

The question is an important one. The US Supreme Court recently ruled that the FAA does not permit parties to heighten the scrutiny to be exercised by courts in actions for the annulment of awards.<sup>51</sup> In other words, parties are not permitted by contract to add grounds for annulment to those specified by the FAA. One would have thought that if a state arbitration law allows parties to accomplish what the FAA forbids, that law is not only different from but also in conflict with federal law. Yet in that same decision, the Supreme Court raised in dictum the possibility that parties may subject their arbitration and award to a state arbitration law that permits the very contractual enhancement of judicial review that the FAA disallows.<sup>52</sup> This surprising result illustrates the unfortunately high degree of tolerance that US law shows, even in a federal statutory field like arbitration, for federalism complications resulting from discrepant state law. Since the New York Convention does not govern vacatur of awards as such, the differences in grounds for vacatur among state laws should not adversely affect application of the Convention in the United States, except as regards enforcement of Convention awards made in the United States.<sup>53</sup>

(iii) *Public policy*

American federalism can have an even more direct impact on recognition and enforcement claims under the New York Convention. The Convention permits courts of Contracting States to deny recognition or enforcement of a Convention award insofar as granting recognition or enforcement would violate the public policy of the place where recognition or enforcement is sought.<sup>54</sup> But, due to the United States' profoundly federal character, it cannot be said that public policy within the United States is a unitary concept determined exclusively at the federal level. In

principle, the US states are entitled to have and to enforce their own public policy insofar as it is not inconsistent with federal law or policy. It is true that restricting public policy within the meaning of the Convention to policy articulated at the federal level would narrow the scope of the exception, while enhancing uniformity and predictability in the recognition and enforcement of awards. However, that benefit would come at a significant cost to maintaining the federalism balance within the United States. Precisely for that reason the Restatement allows state public policy to occupy a place in the analysis,<sup>55</sup> though only under very restricted circumstances.<sup>56</sup>

### 3. Conclusion

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International agreements never translate perfectly into the national legal orders of States, and agreements on an inherently international law subject such as international commercial arbitration are no exception. The current elaboration of a Restatement of the US Law of International Commercial Arbitration is providing a rare opportunity to observe such discontinuities comprehensively and in detail. These discontinuities, which stem from a wide range of national peculiarities, differ considerably in the extent to which they affect the workings of the New York Convention in the United States. It is possible, however, to discern certain patterns and thereby identify what may be the underlying sources of tension.

A factor of capital importance is the FAA itself, notwithstanding the fact that it was amended specifically in order to give effect to the New York as well as Panama Conventions. The fact remains that the basic federal legislation on international commercial arbitration precedes the New York Convention by some 45 years. The resulting divergences have only been heightened by discrepancies among the courts in their interpretation of the FAA.

A second, more predictable set of issues, stems from the reality that every legal system translates international law through its own complex of procedural rules and assumptions. Each of these, in ways large and small, affects a treaty's operation within the domestic legal order. *Forum non conveniens* as a basis for staying or dismissing enforcement actions is only one of many such procedural features of American law. It has received particular attention in the international arbitration cases and literature because its practice arguably places the United States in violation of its Convention obligations. Procedures do not of course develop in a vacuum. Rather, they reflect priorities and orientations of the legal systems in which they develop. Although US legal practice surely entails costs and inefficiencies, the fact remains that economy and efficiency figure prominently among the stated values of American litigation. US law pursues these goals in a variety of ways, from treating interim measures as awards to, within limits, embracing issue preclusion in international arbitration. It thereby is leaving its distinctive practical imprint on the New York Convention regime in practice.

Finally, despite the presence of a federal statute and the inherently international character of international commercial arbitration, federalism remains an important factor in the Convention's application in the United States. This is due only in part to the dual court structure in the United States, whereby state courts are available even for the vindication of federal, including treaty-based, claims. Federalism may also leave a substantive imprint, if only because there remains a state law dimension to public policy within a federal system.

Few if any of the divergences identified in this chapter can be said to seriously impair the functioning of the New York Convention, much less place the United States in breach of its international treaty obligations.

That, however, is not the point. The point, rather, is to appreciate how much room there is for differential application at the national level even of a treaty as widely ratified and as apparently successful as the New York Convention. These disparities matter all the more, given the interdependence among legal systems that international commercial arbitration entails and the very high expectations that the New York Convention itself has created.

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#### Footnotes

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[↵](#)<sup>1</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, reprinted at 9 USC s 201.

[↵](#)<sup>2</sup> American Law Institute, Restatement of the Law (Third) of the US Law of International Commercial Arbitration, Council Draft No. 2, approved, 20 October 2010 [hereinafter 'Restatement'].

[↵](#)<sup>3</sup> George A Bermann, 'Restating The U.S. Law of International Commercial Arbitration' (2009) 42 NYU J Int'l L Pol 175; George A Bermann, 'The American Law Institute Goes Global: The Restatement of International Commercial Arbitration' (2008) 16 Willamette J Int'l L & Dispute Res 300.

[↵](#)<sup>4</sup> UNCITRAL Model Law on International Commercial Arbitration (adopted by the United Nations Commission on International Trade Law, 21 June 1985, as amended).

[↵](#)<sup>5</sup> Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitral Agreements and Awards*, AJB/Rev06/29–May–2008; Albert Jan van den Berg, *Fifty Years of the New York Convention* (Kluwer 2009).

[↵](#)<sup>6</sup> See <[http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html)> accessed 30 May 2011.

[↵](#)<sup>7</sup> The Restatement chapter titles, as currently contemplated are:

Ch 1 Scope and Definitions.

Ch 2 The Agreement to Arbitrate and its Enforcement.

Ch 3 Judicial Involvement in the International Arbitral Process.

Ch 4 Confirmation and vacatur of International Arbitral Award.

Ch 5 Recognition and Enforcement of International Arbitral Awards.

Ch 6 Investor–State Arbitration.

[↵](#)<sup>8</sup> FAA, 9 USC ss 1ff.

[↵](#)<sup>9</sup> New York Convention, (n 1) above, art I (3): 'When signing, ratifying or acceding to this Convention, ... any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and Enforcement of awards made only in the territory of another Contracting State.'

[↵](#)<sup>10</sup> United States Reservation, reprinted at 9 USCA s 201.

[↵](#)<sup>11</sup> See FAA, 9 USC s 10(a): 'In any of the following cases the United States court in and for *the district wherein the award was made* may make an order vacating the award upon application of any party to the

arbitration' (emphasis added).

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[↵](#) <sup>12</sup> Restatement, s 5-3(d): 'A party may seek recognition or enforcement of a non-Convention award by proceeding under Chapter One of the Federal Arbitration Act or under applicable state law to the extent that it does not conflict with Chapter One of the Federal Arbitration Act.'

[↵](#) <sup>13</sup> New York Convention, (n 1) above, art I(1): 'This Convention ... shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.'

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[↵](#) <sup>14</sup> FAA, 9 USC s 202.

[↵](#) <sup>15</sup> See, eg *Marcy Lee Mfg Co v Cortley Fabrics Co.*, 354 F.2d 42 (2d Cir 1965).

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[↵](#) <sup>16</sup> See generally, *I/S Stavborg v National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir 1974).

[↵](#) <sup>17</sup> See, eg *Seetransport Wiking Trader Schiffahrtsgesellschaft mbH & Co. v Navimpez Centrala Navala*, 29 F.3d 79 (2d Cir 1994).

[↵](#) <sup>18</sup> Restatement, s 5-3(e): 'If an international arbitral award has been confirmed and recognized by a foreign court in the arbitral seat, a party may seek to have it recognized or enforced either as an award in conformity with the provisions of this Chapter or as a foreign judgment. Recognition or enforcement of a confirmed arbitral award as a foreign judgment is governed by the applicable standards of the forum in which recognition and enforcement are sought.'

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[↵](#) <sup>19</sup> See, eg *International Standard Elec Corp v Bridas Sociedad Anonima Petrolera*, 745 F. Supp 172 (SD NY 1990).

[↵](#) <sup>20</sup> Restatement, s 5-17(a): 'Except as provided in secs. 5-13 and 5-14, a party may waive its right to invoke an objection that would justify a court denying recognition or enforcement of a Convention award at any time after the basis for such objection is known or should have been known. Such waiver may be the result of either express consent or failure to raise an objection in a clear and timely manner. 'The only unwaivable grounds are those found in Articles V(2)(a) (non-arbitrability) and V(2)(b) (violation of public policy).'

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[↵](#) <sup>21</sup> Restatement, s 5-17 (c): 'A party ordinarily does not waive a particular objection merely by failing to bring a timely action in a competent court to stay the arbitration or by failing to seek set aside of the award in a competent court. However, to the extent that the relevant facts underlying an objection were known or should have been known to a party at the time that judicial proceedings related to the arbitration were actually brought and conducted, the party waives that objection if it fails to raise it in any such proceedings'.

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[↵](#) <sup>22</sup> 9 USC s 10(a) authorizing vacatur '(4) where the arbitrators exceeded their powers...': UNCITRAL Model Law, (n 4) above, art 34(2)(a)(iii), authorizing set aside if 'The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration...'

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[↩](#)<sup>23</sup> New York Convention, (n 1) above, art V(1)(c), authorizing denial of recognition or enforcement if '[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...'.  

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[↩](#)<sup>24</sup> For example, a person may deny being a party to the arbitration agreement at the time a court is asked to compel arbitration, to annul an award, or deny the award recognition or enforcement.  

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[↩](#)<sup>25</sup> See, eg, *Rudell v. Comprehensive Accounting Corp.*, 802 F.2d 926 (7th Cir 1986).  

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[↩](#)<sup>26</sup> Restatement, s 5-3 (f): 'A party seeking recognition of an international arbitral award for the purpose of barring relitigation of an issue, as distinct from a claim, decided in the award must satisfy both the requirements for recognition under the law designated in this Section and the requirements for issue preclusion prescribed by the law of the court in which such recognition is sought.'  

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[↩](#)<sup>27</sup> See generally Restatement (Second) of Judgments, s 84(1).  

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[↩](#)<sup>28</sup> Restatement, s 5-3, comment i, providing that a court asked to give issue preclusive effect to an arbitral award may, in addition to requiring satisfaction of the forum's usual conditions for the preclusive effect to foreign court judgments, consider the following factors: '(a) the extent to which the law of the seat of arbitration has an established policy on issue preclusion and the parties may fairly be deemed to have consented to that policy in selecting the arbitral situs, (b) the standards and practices regarding issue preclusion in the place where the party against whom preclusion is sought is domiciled or does business, (c) any indications from the arbitral record or the tribunal's decision regarding the parties' expectations regarding the issue, insofar as the confidentiality of the arbitral proceedings allows, (d) any other factor properly taken into account to avoid unfair surprise, injustice, or denial of due process to the party against whom issue preclusion is asserted'.  

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[↩](#)<sup>29</sup> The FAA, s 207, prescribes a 3-year statute of limitations running from the date of issuance of the award.  

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[↩](#)<sup>30</sup> Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJL 12 (16 January 2001), art 27.  

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[↩](#)<sup>31</sup> See Restatement, s 5-21, reporters' note a, and cases cited therein.  

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[↩](#)<sup>32</sup> See, eg *Monegasque de Reassurances S.A.M. v Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir 2002); *CHS Europe S.A. v El Attal*, 2010 US Dist LEXIS 76619 (SD NY, 22 July 2010).  

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[↵](#) <sup>33</sup> Restatement, s 5-21(a): 'An action to enforce a Convention award is not subject to a stay or dismissal on forum non conveniens grounds.' However, the Restatement leaves open the possibility, rare in practice, of a forum non conveniens stay or dismissal of an action to enforce a non-Convention award. See (n 9-12) above and the accompanying text.

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[↵](#) <sup>34</sup> Restatement, s 1-1(a): 'An "arbitral award" is a decision in writing by an arbitral tribunal that sets forth the final and binding determination on the merits of a claim, defense, or issue, whether or not that decision resolves the entire controversy before the tribunal. Such a decision may consist of a grant of interim relief.'

[↵](#) <sup>35</sup> To avoid terminological confusion, the Restatement avoids use of the term 'interim award', recognizing only 'interim measures' and 'partial awards'.

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[↵](#) <sup>36</sup> Restatement, s 1-1, comment p: 'Interim measures are to be distinguished from routine scheduling, procedural, or evidentiary rulings relating to the proceedings. Such rulings serve organizational as opposed to remedial purposes, and for that reason do not ordinarily warrant judicial enforcement'.

[↵](#) <sup>37</sup> Restatement, s 5-10(c).

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[↵](#) <sup>38</sup> *Corp. v WAK Orient Power & Light, Ltd.*, 168 F. Supp 2d 403, 411 (ED Pa 2001). See also *Rent-a-Center, W., Inc. v Jackson*, 130 S Ct 2772, 177 LE2d 403, 2010 US LEXIS 4981 (21 June 2010).

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[↵](#) <sup>39</sup> Restatement, s 5-10(c): 'A court determines de novo whether a Convention award deals with matters that were not submitted to arbitration, unless the parties clearly and unmistakably submitted that issue to arbitration.'

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[↵](#) <sup>40</sup> *Southland Corp. v Keating*, 465 US 1 (1984).

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[↵](#) <sup>41</sup> Restatement, s 5-18(c): 'An action to enforce an international arbitral award may also be brought in any competent state court.'

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[↵](#) <sup>42</sup> *Moses H. Cone Mem. Hosp. v Mercury Constr. Corp.*, 460 US 1, 24 (1983).

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[↵](#) <sup>43</sup> Restatement, s 5-18, comment c.

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[↵](#) <sup>44</sup> Restatement, s 5-24(b): 'The limitations period applicable to an action in state court to enforce a Convention award and the rules pertaining to its application are governed by federal law.'

[↵](#) <sup>45</sup> Restatement, s 5-26(b): 'The availability of a right of appeal from an order of a state court either granting or denying enforcement of an international arbitral award is governed by the law of the forum to the extent it does not conflict with federal law.'

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[↵](#) <sup>46</sup> Restatement, s 5-25, reporters' notes a (iii).

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[↵](#) 47 See, eg *Prima Paint Corp. v. Floor & Conklin Mfg. Co.*, 388 US 395 (1967).

[↵](#) 48 See, eg *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969 (2d Cir 1974).

[↵](#) 49 For a discussion, see Gary B Born, *International Commercial Arbitration* (2d edn Transnational Publishers, Ardsley NY 2001) 39.

[↵](#) 50 *Volt Information Sciences, Inc. v Board of Trustees*, 489 US 468, 477 (1989).

[↵](#) 51 *Hall Street Associates, L.L.C. v Mattel, Inc.*, 552 US 576, 586 (2008).

[↵](#) 52 *Hall Street Associates*, (n 52) above, 590: 'In holding that [FAA sections 9 and 10] provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under [the FAA], deciding nothing about other possible avenues for judicial enforcement of arbitration awards.'

is Dr Fouad Zarbiev for his article,  
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A Conceptual Fram

circumstances, a court may deny recognition or enforcement of a Convention award based on its repugnance to the policy of a state if that state has a sufficiently compelling and predominant interest in the matter, and provided that the state policy is not inconsistent with federal policy.'

[↵](#) 56 Restatement, s 5-14, comment e: 'Courts look principally to federal law to determine the existence and application of public policy. However, their judgments in this regard are properly informed by the policies of the several states and, in a rare case, may be determined

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