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Restating the U.S. Law of International Commercial Arbitration

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I. Introduction

In December 2007, the American Law Institute ("ALI") approved the development of a new Restatement, Third, of the U.S. Law of International Commercial Arbitration (the "Restatement"). On February 23, 2009, the Restaters and authors of this Essay presented a Preliminary Draft of a chapter of the Restatement (the "Draft") at an invitational meeting in New York. The Draft addresses Recognition and Enforcement of Arbitral Awards. This brief Essay provides some reflections of the Reporters from the process of producing and presenting the Draft.

II. The Need for and Purpose of the Restatement

The United States occupies a unique place in the modern international arbitration system and in its historic evolution. On the one hand, in the early decades of the Republic the United States was one of the leading proponents of state-to-state arbitration as a means for resolving international disputes. More recently, American lawyers, arbitrators and arbitration specialists have

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been important contributors to the growth and development of the international commercial arbitration system from its very inception and within its most venerable institutions. Over the years, a number of U.S. judicial decisions have become seminal reference points for international tribunals, commentators and even foreign courts in the development of international arbitration precedents.[1]

On the other hand, U.S. parties and lawyers have sometimes taken atypical approaches towards arbitral procedures, particularly when contrasted to some European counterparts, on matters as diverse as arbitrator independence, discovery and the role of lawyers. In this latter respect, some suggest that international arbitration has become "Americanized," meaning that it is transforming from a flexible and informal procedural mechanism into a more adversarial and complex process.[2]

In addition, the legal regime governing international arbitration in the United States is complex and difficult for newcomers to navigate. The United States has ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), as well as the Inter-American Convention on International Commercial Arbitration (the "Panama Convention," collectively the "Conventions"). U.S. law has a now long-established history of providing strong support to both party autonomy in arbitration and the enforceability of arbitral agreements and awards. Despite these clear commitments to the Conventions, the American law on international arbitration is not always fully accessible to those who consult it. Foreign lawyers and foreign parties, as well as many U.S. judges and lawyers, understandably find it challenging to assess the sometimes intricate

[1] The most obvious example of a case cited abroad is the U.S. Supreme Court's decision in *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614 (1985). Many foreign courts have cited it and other U.S. cases. *See, e.g.*, *Fiona Trust & Holding Corp. v. Privalov* [2007] 1 All E.R. (Comm.) 891 (English Court of Appeal), aff'd, [2007] UKHL 40 (House of Lords); *Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co.*, XXIVa Y.B. Comm. Arb. 652, 668 (H.K. Court of Final Appeal, High Court 1999) (1999); *Gas Auth. of India, Ltd v. SPIE-CAPAG SA*, XXIII Y.B. Comm. Arb. 688, 694 (Delhi High Court 1993) (1998).

[2] *See, e.g.*, Lucy Reed & Jonathan Sutcliffe, *The "Americanization" of International Arbitration?*, MEALEY'S INT'L ARB. REP., April 2001, at 11; Elena V. Helmer, *International Commercial Arbitration: Americanize, "Civilized," or Harmonized?*, 19 OHIO ST. J. ON DISP. RESOL. 35 (2003).

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relationships between international and domestic arbitration; therefore, the choice among potentially applicable laws and precedents is not always clear.

To some extent, this confusion finds its source in the federal statute governing interstate and international arbitration, the Federal Arbitration Act of 1925 (the "FAA"). The FAA was enacted well before the New York Convention, and indeed well before the modern growth of arbitration as a viable and popular means of resolving commercial disputes. It is, accordingly, more skeletal than many other national arbitration laws that govern international arbitration, which were enacted much later. Chapters 2 and 3 of the FAA include the implementing legislation for the Conventions, though the interrelationship between the two is not always clear.

Adding to the complexity, there are numerous different forms of state legislation, including the Uniform Arbitration Act, the Revised Uniform Arbitration Act ("RUAA") and other statutes that pertain directly to international arbitration and are often based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law ("UNCITRAL"). The direct application of these multiple state and federal laws can be difficult to understand, but this mix is rendered even more complex by the uncertainties surrounding the preemptive effect of the FAA. The FAA has not been held to "occupy the field," and thus preclude all state law on the subject. The full extent of its preclusive effect, however, remains uncertain in both the caselaw and the commentary.

In any particular arbitration, these various statutory sources can be supplemented further by the arbitral rules selected by the parties, as well as by the *lex arbitri* (the law of the place where the arbitral award is made for those awards made abroad) or the parties' choice of substantive law. The plethora, density and overlap among these different sources have created both ambiguities and gaps. The resulting complexity and incompleteness of the system has produced a great many questions that the Restatement will attempt to address with respect to United States arbitration law.

III. The Scope of the Restatement

The Restatement addresses arbitration that is "international" and "commercial," as defined in the Conventions. The primary audience for the Restatement, therefore, will be U.S. courts and those counsel and parties who are conducting international arbitrations that may be subject, at some stage, to the arbitration law of the U.S. That basic observation, however, does not fully determine the scope of the Restatement.

First, there is a question of how systematically domestic arbitration precedents extend into the international context. Some of the leading cases that shape U.S. international arbitration law, such as *Mastrobuono*[3] and *First Options*,[4] arose out of distinctly domestic cases. While many of these precedents and their reasoning would apply directly in international arbitrations as a result of applicable choice of law principles, there remain questions of whether and to what extent they apply as well to international arbitration, particularly when their reasoning turns on specific provisions of the FAA that relate to domestic arbitration. One such question that has persisted is the extent to which domestic precedents that expand the grounds for review, such as those that permit review for "manifest disregard" of the law, would also apply to international arbitration.[5] While the Supreme Court's decision in *Hall Street*[6] arguably concluded that the "manifest disregard of law" doctrine is no longer available under the FAA, it remains to be determined how far the *Hall Street* decision, which was based on Chapter 1 of the FAA, extends to international arbitration.

While there are questions about the place of domestic arbitration precedents in the Restatement, there are also separate questions about the role of foreign and international decisions in a restatement of U.S. law. Foreign and international law are undoubtedly essential to the functioning of the international arbitration system, both as a whole and in individual cases. The direct exposition or analysis of substantive foreign law, however, would not

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[3] Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995);

[4] First Options of Chicago, Inc. v. Kaplan, 514 U.S. 939 (1995).

[5] *See, .e.g.*, Isabella de la Houssaye, *Manifest Disregard of the Law in International Commercial Arbitrations*, 28 COLUM. J. TRANSNAT'L L. 449 (1990); Stephan Wilske & Mackay, *The Myth of the 'Manifest Disregard of the Law' Doctrine: Is This Challenge to the Finality of Arbitral Awards Confined to U.S. Domestic Arbitration or Should International Arbitration Practitioners be Concerned?*, 24 ASA BULL. 216 (2006).

[6] Hall Street Assoc., LLC v. Mattel, Inc., 128 S.Ct. 1396 (2008).

only be unwieldy, but would also transgress the primary purpose of the Restatement.

This is a Restatement of the U.S. law of international arbitration. Consequently, international and foreign sources will be consulted, but they will not be systematically relied on in drafting. These sources will be most directly relevant to, and cited for, questions of interpretation of specific provisions of the Conventions. They may also be relevant, either as support for or as a basis for contrast with, U.S. treatment of certain issues for which other systems also have a developed body of law. Particularly in this latter respect, foreign and international sources will be treated primarily in the Reporters' Notes.

Another scope issue relates to the increasing presence in international commercial arbitration of "investment disputes," a term that denotes disputes between a State and an investor in that State having a foreign nationality. Where such disputes arise out of or relate to contracts (either between States and foreign nationals or between enterprises of two countries), and there is no provision for arbitration under a bilateral investment treaty ("BIT") or a regional arrangement such as NAFTA, they clearly fall within the scope of the Restatement. However, matters become more complicated where arbitration disputes fall within the scope of a BIT or a regional investment dispute regime.

The Restatement will include investment arbitration. To exclude this category would be to ignore the fact that both conventional contract-based arbitrations and investment treaty-based arbitrations arise from underlying economic transactions that are essentially indistinguishable. Moreover, a single arbitration may entail both contract- and treaty-based claims.

Although the Restatement will take up investment arbitration, there are two important points to be noted. First, investment arbitrations whose jurisdiction is predicated on an investment treaty, as opposed to a contract, and/or covered by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the "ICSID Convention"), involve procedural issues and treatment under U.S. law that are distinct from their conventional international commercial arbitration counterparts. To this extent, investment arbitration will be treated in the Restatement separately

from commercial arbitration arising out of contractual arrangements. Second, the Restatement will not address any of the substantive standards, such as "fair and equitable treatment" or the definition of expropriation, that are raised by these treaty-based international arbitral regimes. Such substantive liability-related issues properly remain outside the scope of the Restatement.

IV. The Drafting Process

The initial topic taken up in the drafting process, which will ultimately be Chapter 5 of the Restatement, is the law of "The Recognition and Enforcement of Awards." The first Preliminary Draft, comprised of twenty-seven Articles, was initially presented at an invitational meeting in New York on February 23, 2009. Given the nature of the meeting, only the Blackletter provisions and Comments were distributed and presented. The broad topics addressed include the obligation to recognize and enforce international awards, the grounds for denying recognition and enforcement of awards, and actions to enforce awards.

Although each of the Reporters has taught and published in the international arbitration field for many years, the drafting process has revealed numerous new and intriguing questions not previously encountered or, in some cases, even contemplated. Some of these issues still have not been resolved, even after extensive research and debate. As a result, the first Preliminary Draft contained several bracketed options that were designed to promote focused discussion and feedback.

One of the questions that eventually proved to be the most enduring, and fascinating, is what law governs foreign awards that are not subject to either the New York or the Panama Conventions. Because historically there have been relatively few cases of this type, it is an area in which there is little guidance from courts or commentators. Further exploration, however, reveals that the subject cannot be discarded as an esoteric or unimportant issue, even if it arises in a limited number of actual cases each year.

There are two principal categories of cases to which the Conventions do not apply: those cases that are not "commercial" and those that do not satisfy the Conventions' reciprocity requirements. There are important categories of

disputes, arguably including, for example, some forms of sports arbitration, that may be outside the "commercial" limitation of the Conventions. There are also approximately forty jurisdictions, such as Lichtenstein and Taiwan, that are highly relevant for international arbitration but are still not signatories to either Convention. These jurisdictions continue to produce non-Convention awards, including in some historically important cases. The award in the *Bechtel* case, for example, was rendered in a non-Convention country.[7]

The question of what law applies to this delimited, but potentially important, set of "non-Convention" awards is elusive. Some courts have held, without much analysis, that Chapter 1 of the FAA (the set of provisions governing domestic arbitral awards) applies, while the Restatement on the Law of Foreign Relations concludes that the applicable law is state law. Still other commentators and sources suggest that the governing law should be federal common law.

Answering this seemingly mundane question of what law applies to a non-Convention award would seem to depend on questions about the purpose of the relevant limitations on application of the Conventions. For some cases that do not involve commercial disputes, such as those involving family law claims, the commercial limitation may be intended to preclude (or reduce the likelihood of) the enforcement of the award. For other cases arguably outside the definition of "commercial," such as sports arbitration decisions, the same reasoning does not seem to hold. Similarly, the Conventions' reciprocity requirements would seem to be aimed at making awards made in non-Convention countries less readily enforceable, perhaps to give those countries an incentive to sign on to the Convention. It is a fair question whether FAA Chapter 1 should be applied to non-Convention awards.

Another area in which questions of great practical importance persist, but for which existing cases or commentary offer little guidance, is the degree to which courts are bound by prior determinations in the same dispute. Consider the following hypothetical. At Time I, Court A is asked to refer the parties to arbitration and, in doing so, makes certain determinations about the meaning, scope, validity and enforceability of the arbitration agreement, as well as a

[7] Int'l Bechtel Co. v. Dep't of Civil Aviation of Dubai, 360 F. Supp. 2d 136 (D.D.C. 2005).

determination about which parties are bound by it. At Time II, if the arbitration goes forward, the arbitral tribunal may be called upon to revisit some or all of the same questions. At Time III, the losing party seeks to have Court B in the place of arbitration set aside the award on grounds that are recognized by that jurisdiction. Some of the issues raised in this proceeding will likely relate to or even overlap with the challenges to the arbitration agreement that were raised in Court A and before the arbitral tribunal. Now, assume that Court B refuses to set aside the award, and at Time IV, the party presents the award for recognition or enforcement in Court C. Once again, very similar if not identical grounds may be advanced for denying recognition and enforcement.

These scenarios, which are not particularly unusual in cases when there are challenges that relate to the arbitration agreement, raise a host of questions. What, if any, relationship is there among the various decisions? Should later decision-makers show any deference to previous decisions? Or are these the kind of issues that every court or tribunal in the chain of courts should, if asked, answer for itself? These scenarios raise questions not only about the preclusive effect of various determinations concerning the arbitration agreement, the arbitral procedure or the arbitral award, but also about the possibility of waiver. If the disappointed party has failed to contest the arbitration agreement or award at the time that arbitration was compelled or underway or that the award was subject to set aside proceedings, is it too late to do so at a later point in time? Unfortunately, international arbitrations sometimes lead long and intricate lives, with numerous points of intersection with the courts of various jurisdictions, and numerous opportunities for parties to challenge the validity and enforceability of the arbitration agreement and award. Courts and commentators have yet to determine exactly what effect decisions at various points in an arbitration process should have on subsequent decisions by the same or different decision-makers.

Other important questions lurk in areas that seem relatively straightforward. For example, when a matter is deemed to be non-arbitrable, does that prohibition extend only to the cause of action arising out of a specific statute based on U.S. law, such as the Sherman Act (before *Mitsubishi* declared such claims arbitrable)? Or does it refer to the general subject area, irrespective of what national law is asserted, such as antitrust claims generally, even if raised under foreign law? Supreme Court analysis appears to center on

Congressional intent as expressed in statutory language. But the Court faced the issue in deciding whether to enforce an arbitration agreement rather than an arbitration agreement. Moreover, adopting the narrower approach could lead to awkward results in cases in which U.S. courts are required to refuse enforcement of an arbitral award if it applies a non-arbitral domestic law, but enforce that award if it deals with the same issues but applies foreign law, even if foreign law was applied intentionally to avoid the non-arbitrability under U.S. law.

Finally, there are also a number of questions on which there is unclear or divided authority, but the Restatement will ultimately have to take a definitive position. For example, the text of Article XIV of the New York Convention, quizzically states:

> A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

At a literal level, this text seems to refer to the rights of Contracting States against each other under international law. This language has been interpreted by a number commentators, however, as extending the reciprocity reservation beyond the signatory status of the jurisdiction where the award was rendered to some substantive measure of that State's commitment under the Convention, and thus affecting the outcome of cases arising under the Convention. While provisions in the drafting history of Article XIV may be read to support both possible interpretations, the Restatement will ultimately have to take a position about which of the two interpretations should prevail under U.S. law.

V. Logistical Challenges and Innovations

The Restatement presents several logistical challenges that have prompted efforts at innovating on the traditional procedures of past ALI projects. Traditionally, Advisory Committees on Restatements are limited to approximately 30 members. With this Restatement the ALI has received record numbers of inquiries from those interested in participating, through the Advisory Committee or otherwise, in commenting on drafts of the Restatement. This increased interest is probably a result of the fact that the international arbitration community is a uniquely sophisticated, academic

and professionally active group. Many of its practitioner members have their own treatises and regularly write and speak on the subject, and a number have published their own treatises. The field of international arbitration is also populated by institutions around the world, whose rules, practices and experiences could prove highly useful and relevant. Limiting the Advisory Committee to the traditional 30-person size would necessarily preclude many qualified and interested arbitration specialists from contributing.

Moreover, while the Restatement is decidedly a Restatement of the U.S. law of international arbitration, it will be both relied on and critiqued by constituencies outside the United States, including foreign arbitrators, lawyers and parties, as well as foreign courts and arbitral institutions. Indeed, one of the salient features of the international arbitration system is that some of the most prominent American scholars and practitioners reside overseas and participate regularly in overseas arbitrations.

For these reasons, while most other Restatements have traditionally drawn their Advisory Committees from domestic practitioners, academics and judges, this Project will necessarily have to open up its commentary and advisory processes to a more geographically diverse, and presumably more numerous, group. ALI is still considering exactly how it will accomplish that goal. A number of innovations, including technological innovations that would allow virtual meetings and electronically submitted feedback, are being considered. It may even be said that adopting for the Restatement drafting process an internationally inclusive approach and technological innovations mirrors the international arbitration system itself, which brings together numerous diverse parties through flexible and innovative procedures.

VI. Conclusion

The purpose of the Restatement is not to promote the United States as a seat of international arbitration, or to export U.S. arbitration law to other jurisdictions. However, clarifying aspects of U.S. arbitration law or judicial precedents can remove obstacles that may currently hinder parties or foreign courts in their use of U.S. law and U.S. courts.

Parties choose international arbitration primarily because they fear being subject to the potentially biased decisions of the national courts of their business-partner-turned-adversary. Through international arbitration, parties can choose a neutral procedure and setting in which to resolve their disputes. To plan effectively, however, parties also need the law and judicial decisions that provide the framework for the system to be conceptually accessible and predictable. Clarifying the U.S. law of international arbitration will aid parties in this endeavor.

States, on the other hand, support the international arbitration system because they recognize that effective dispute resolution is essential to international trade. In more recent years, non-arbitrability barriers have been brought down as a sign of States' growing confidence in the system, resulting in more and more regulatory issues, such as antitrust and securities fraud, being channeled into international arbitration. International arbitration can provide a uniquely effective means for enforcing such claims when they are properly implicated in international disputes. Clarifying the U.S. law of international arbitration will better ensure that the international arbitration system can achieve this aim.