Fault Lines in International Commercial Arbitration

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On March 23, in Washington, DC, the Institute for Transnational Arbitration and the American Society of International Law will co-host a conference on "Fault Lines in International Commercial Arbitration."

Building on the American Law Institute's draft Restatement of the U.S. Law on International Commercial Arbitration, Gary Born, Jan Paulsson, J. William Rowley, QC, Linda Silberman, and Judge Diane P. Wood will discuss controversial themes that have emerged in the course of the drafting process. These include: (1) How National Is *International* Arbitration?; and (2) The Limits of Party Autonomy.

Although the themes for the conference may have an abstract tone, they encompass a host of issues relevant to anyone practicing in the field. Take the first theme, which one could easily reframe as "How International Is *National* Arbitration?"

Assuming that one drafts a national Restatement on an international topic, should the process aim to record the existing specificities of national practice, or to facilitate their subordination to international norms? To the extent that one aims to bridge gaps between national and international norms, should one focus on elimination of the most unusual local practices, which the draft Restatement does by rejecting (1) the application of forum non conveniens to enforcement proceedings, and (2) the use of "manifest disregard of the law" as a judicially created ground for vacating awards under § 10 of the Federal Arbitration Act (FAA)? *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 5-21(a) (Council Draft No. 2, 2010) ("An action to enforce a Convention award is not subject to . . . dismissal on forum non conveniens grounds."); RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-11E, ALTERNATIVE C (Preliminary Draft No. 4, 2010) ("A court may not vacate a U.S. Convention award for manifest disregard of the law.").

Alternatively, instead of just pruning the outliers, should one aim for virtual congruence between national and international standards? If so, should the Restatement promote greater harmony between those formally distinct sources of law, or should it abolish the formal distinctions through direct incorporation of international norms into domestic law?

As a concrete example of the questions just posed, one may cite the draft Restatement's treatment of the grounds for vacatur of New York Convention awards rendered in the United States (U.S. Convention awards). In its current form, the draft Restatement proposes (but will have to choose between) two alternatives: (1) vacatur in accordance with the grounds set forth in § 10 of the FAA

(which generally governs the vacatur of domestic awards), or (2) vacatur in accordance with the grounds for refusal to enforce awards under Article V of the New York Convention. *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-7, ALTERNATIVES A & B (Preliminary Draft No. 4, 2010).

In one sense, the choice of vacatur grounds for U.S. Convention awards is not simple. As a purely textual matter, one can defend either of the alternatives mentioned above. For example, § 10 of the FAA might be the appropriate vehicle because (1) the Convention does not regulate the standards for vacatur of awards at the place of arbitration, but contemplates that the curial courts will continue to apply national standards in vacating awards (Article V(1)(e)); (2) in implementing the Convention by statute (9 U.S.C. § 208), Congress provided for the continued application of the FAA's domestic provisions to the extent that they do not conflict with the Convention or any part of its implementing legislation; and (3) in implementing the Convention by statute (9 U.S.C. § 207), Congress also required confirmation of awards unless a court finds any of the grounds for refusal "specified" in the Convention. Because those grounds include vacatur by a court applying national standards at the place of arbitration (Art. V(1)(e)), recourse to § 10 of the FAA does not conflict with the Convention or its implementing legislation. *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-7 reporters' note b (Preliminary Draft No. 4, 2010). On the other hand, one could take the position that the same provisions permit vacatur only for the grounds "specified" in the New York Convention itself because the application of any other standard would "conflict" with § 207, which requires U.S. courts to confirm awards absent one of grounds "specified" in the Convention. *Id.*

Although selection of the proper grounds for vacatur may not be easy as a textual matter, the stakes are surprisingly low because the draft Restatement considers § 10 of the FAA to be "largely congruent" with Article V of the New York Convention. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-7 reporters' note a (Preliminary Draft No. 4, 2010). As a result, selection of either source "presumably would not have any importance as a matter of substance." *Id*. Both approaches should, thus, generally yield the same outcomes on petitions to vacate Convention awards.

If both options remain defensible and produce identical outcomes, why agonize over the method that the Restatement adopts for striking a balance between national and international norms? *See id*. ("An initial question is whether a choice among the alternatives even matters."). As in so many cases, the question is not "what" one chooses, but "how" one chooses—an issue that may have cascading effects for the entire Restatement.

If the Restatement were to let courts decide through the accumulation of judicial precedent, it would favor the application of § 10 of the FAA by a three-to-one margin among United States Courts of Appeal. RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-7 reporters' note c (Preliminary Draft No. 4, 2010). However, the reporters have rejected this approach on the grounds that the Restatement is not a popularity contest.

If the Restatement were to let its advisors and members of its consultative group decide through the accumulation of comments, it would overwhelmingly favor the application of Article V grounds. However, one wonders if that represents a different kind of popularity contest involving practitioners driven to promote New York as a venue for international arbitration, and academics eager to bring the FAA into line with the UNCITRAL Model Law, which offers a "pleasing symmetry" between (1) the grounds for refusing enforcement, and (2) the grounds for vacating awards. *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-7 reporters' note d (Preliminary Draft No. 4, 2010) (examining the policy considerations, and emphasizing that the unification of grounds for non-enforcement and for vacatur may "enhance the attractiveness of the

U.S. as an arbitral forum"). *See also* United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, arts. 34, 36, 40 U.N. GAOR Supp. (No. 17) at 89, U.N. Doc. A/40/17 (1985) (adopting the substance of New York Convention Article V as the grounds both for refusing enforcement and for setting aside awards); NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 595 (5th ed. 2009) (emphasizing the "pleasing symmetry" between the grounds for non-enforcement and for setting awards aside under the UNCITRAL Model Law).

If the Restatement were to follow the intent of Congress, the question becomes whether to focus on (1) what Congress would do if presented with the options today, or (2) what Congress probably had in mind when adopting the Convention's implementing legislation in 1970. *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-7 reporters' note d (Preliminary Draft No. 4, 2010) ("The issue . . . is what Congress intended in enacting Section 207.").

If approached as a forward-looking judgment about policy, it makes sense to limit the grounds for vacatur of U.S. Convention awards to the grounds actually specified in Article V of the Convention. As explained above, that would not change the substantive outcome of actions to vacate awards, but it would send a clear signal that United States adheres to universally accepted standards for vacating awards, thereby increasing New York's appeal as a venue for international arbitration. *Id.*

If approached as a backwards-looking inquiry into the likely intent of Congress during 1970, the picture changes dramatically. As a matter of historical record, the United States did not sign the New York Convention in 1958 because the U.S. delegation concluded that "certain provisions were in conflict with some of our domestic laws." H.R. Rep. 91-1181, at 1, *reprinted in* 1970 U.S.C.C.A.N. 3601, 3601-02. *See also Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 576 (7th Cir. 2007).

In addition, some contemporaneous observers expressed concerns about the use of multilateral treaties to regulate a topic for which the 50 states had at least a degree of concurrent jurisdiction. *See* Martin Domke, *The United Nations Conference on International Commercial Arbitration*, 53 AM. J. INT'L L. 414, 417 & n.27, 419 & n.41 (1959).

Still concerned about unintended changes to U.S. law in 1970, the State Department proposed to implement the New York Convention not by general amendments to the FAA's existing provisions, but through a separate chapter that would "deal *exclusively* with *recognition and enforcement* of awards falling under the Convention." H.R. Rep. 91-1181, at 2, *reprinted in* 1970 U.S.C.C.A.N. 3601, 3603 (emphasis added). In doing so, the State Department assured Congress that "[t]his approach would leave *unchanged* the largely settled interpretation of the Federal Arbitration Act." *Id.* (emphasis added).

Given the history of concern about unintended changes to domestic law, one might regard it as perilous to assume that the Convention's implementing legislation reflects enthusiasm for abolishing the use of national standards for vacatur of U.S. Convention awards. To the contrary, the historical context arguably reflects a sense of caution aimed at preservation of a national character for arbitration.

Perhaps the same sense of caution should militate against the consideration of foreign standards as a dimension of public policy for purposes of refusal to enforce awards under Article V(2)(b) of the Convention. *See* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 5-14 cmt. e (Council Draft No. 2, 2010) (indicating that "a court may take into account public policies recognized at the arbitral seat or in other jurisdictions having a connection to the dispute"). But that remains a topic for discussion on March 23.

For more information about the conference, please visit the ITA’s website (http://www.cailaw.org/ita/ASIL_11.html).