INTERNATIONAL ARBITRATION OF INFRASTRUCTURE PROJECT DISPUTES AND THE ENFORCEMENT REGIME UNDER THE NEW YORK CONVENTION

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As traditional hostility towards arbitration has waned in various parts of the world -- including the United States and much of Latin America -- arbitration has increasingly been used as a principal means of resolving infrastructure project disputes.[1] Concurrently, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as the "New York Convention," and herein also simply as the "Convention") has been ratified by over a hundred countries to date, including the United States and many Latin American countries, enhancing the enforcement of arbitration agreements and awards nearly worldwide.[2]

The first part of this paper provides a brief overview of the potential advantages of and disadvantages of arbitration relative to litigation as a means of resolving infrastructure project disputes. The second part of the paper describes the enforcement regime of the New York Convention and examines several issues of particular relevance to arbitration of infrastructure project disputes that may arise, and that U.S. courts have considered, under the Convention. Hopefully, by sharing their respective experiences under the Convention, U.S. and Latin American parties and their counsel, arbitrators, judges and legislators alike will be better able to promote the uniform application of the Convention and to avoid each other's mistakes in interpreting and applying its provisions.

I. ARBITRATION AS A MEANS OF RESOLVING INFRASTRUCTURE PROJECT DISPUTES GENERALLY

Arbitration is the primary adjudicatory method of dispute resolution in the construction industry in the United States and is increasingly used to resolve infrastructure projects in developing markets worldwide.[3] The decision to use arbitration to resolve infrastructure project disputes frequently is not an easy one, however. Infrastructure projects typically involve several different types of contracts, and arbitration may not always be the preferred means of dispute resolution for each of those types of contract.[4] Moreover, the various different participants in infrastructure projects each have their own interests at heart, which often dictate different preferences with respect to dispute resolution procedures.[5] As a result, the various different project contracts frequently contain different choice of law and forum provisions that can give rise to labyrinthine and piecemeal resolution of project disputes.

The general advantages and disadvantages of arbitration relative to national court litigation of international commercial disputes are oft debated.[6] While advice is plentiful on the factors to consider generally in deciding whether and how to arbitrate, certain of those factors assume special importance in the infrastructure project context in particular. Among the potential advantages of arbitration of infrastructure projects disputes are:

(i) Inastructure project disputes often involve technical subject matter that is more suitable for resolution by an arbitrator hand-picked by the parties for his or her specialized competence than by a national court judge or jury with little or no prior knowledge or experience in the field. The arbitrator's specialized competence may enhance not only the quality of decision-making but also the efficiency with which the proceedings are conducted.

(ii) Arbitration offers a potentially more neutral forum to the multi-national participants in infrastructure projects, each of whom may be reluctant to litigate disputes in each other's national courts.

(iii) Arbitration, with its limited discovery and appeals, offers a potentially faster and less expensive means of resolving project disputes than does litigation.

(iv) The confidentiality and relative informality of arbitral procedures (which may include site visits), as well as the flexibility arbitrators have in fashioning appropriate remedies in arbitration, may be better suited to preserve the long-term relationships established in connection with infrastructure projects.

(v) One of the most important advantages of international arbitration generally, and of infrastructure project arbitration in particular, is that arbitral awards are readily enforceable almost worldwide as a result of the New York Convention, whereas the enforceability of national court judgments is not similarly enhanced by any international treaties of comparable scope.[7]

Countervailing considerations exist too, however:

(i) Arbitration generally offers less certainty and predictability than does national court litigation. This is attributable, among other factors, to arbitrators' tendency to decide cases based on perceptions of fairness rather than strict application of contracts or law as well as the extremely limited scope of judicial review of arbitral awards.

(ii) Particularly in large disputes, as infrastructure project disputes frequently are, arbitration may not in fact be faster or less expensive than litigation. Jurisdictional disputes frequently delay arbitral proceedings and party misbehavior and delay is more difficult to control in arbitration than in litigation.

(iii) Arbitration of infrastructure project disputes raises several important issues concerning the scope and efficacy of the relief available, including:

- the arbitrability of certain aspects of the infrastructure project (such as the effect of the local regulatory or tax regime), and hence the enforceability of arbitration agreements and awards encompassing those matters, remains limited and/or uncertain in various parts of the world;

- arbitral relief is generally not available or enforceable against non-parties to the arbitration agreement and proceedings;

- the availability and efficacy of interim relief, which may be vital in infrastructure project disputes, is generally limited in arbitration.

Ultimately, each party's decision as to whether to agree to arbitrate infrastructure project disputes should take into account the particular circumstances of the transaction and that party's anticipated strategic objectives.

II. THE ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS CONCERNING INFRASTRUCTURE PROJECTS UNDER THE NEW YORK CONVENTION

A. Overview Of The New York Convention

The New York Convention was signed in 1958 in New York after lengthy negotiations under United Nations auspices. It has been called "the cornerstone of current international commercial arbitration,"[8] the "most effective instance of international legislation in the entire history of commercial law,"[9] and the "most important convention of modern times in the field of international commercial arbitration."[10]

The New York Convention was designed to encourage and facilitate the enforcement of international commercial arbitration agreements and awards and to unify the standards by which those arbitral agreements and awards are enforced worldwide.[11] In broad outline, the Convention imposes two principal requirements on the courts of signatory countries. First, Article II of the Convention requires courts to refer parties to arbitration whenever actions are brought concerning matters covered by valid arbitration *agreements* subject to the Convention. Second, Articles III-VI of the Convention require courts to enforce foreign or "non-domestic"

arbitral *awards* without reviewing the merits of the arbitrators' decisions, subject only to specific limited exceptions.

Despite its current importance, the New York Convention initially attracted relatively few signatories when it was first promulgated in 1958. As world trade expanded in the 1960s and 1970s and the historical distrust of arbitration waned, however, many countries reconsidered their positions and acceded to the Convention. The United States ratified the New York Convention in 1970 and, over time, several Latin American countries have done the same.[12]

In virtually all countries, the New York Convention has been implemented through national legislation.[13] As a result, application of the Convention depends both on the content of that national legislation and the interpretation given by national courts to the terms of the Convention and the implementing national legislation. In turn, the realization of the twin goals of the New York Convention -- to encourage and to establish a uniform regime for the enforcement of international commercial arbitration agreements and awards -- depends on the willingness and success of national legislatures and courts, in different signatory states, to interpret and apply the Convention in a sensible and uniform manner. The following describes some of the issues arising under the New York Convention with which U.S. courts have struggled and which may be of particular relevance to arbitration of infrastructure project disputes in Latin America.

B. The Scope Of Application Of The New York Convention

As a U.S. professor has recently noted with respect to the application of the New York Convention in American courts:

> One would have thought that we would have a pretty firm grasp by now on the question of just when the New York Convention is supposed to be applied by American courts. After all, we have been living under the Convention for more than a quarter of a century. Yet for a matter of such importance, it is striking that after all this time there is still no real consensus on the issue.[14]

In the United States, whether the provisions of the New York Convention, as opposed to the "domestic" arbitration provisions of the U.S. Federal Arbitration Act (the "FAA"), apply to the enforcement of arbitration agreements and awards, is significant primarily because of several procedural advantages of proceeding under the U.S. legislation implementing the Convention.[15] While the text setting forth the substantive standards for judicial review of arbitration awards also appear to differ between the Convention and the FAA, in practice, they have been applied in virtually identical fashion.[16] Indeed, the provisions of the FAA, and the cases construing it, also apply to cases falling under the Convention, provided they do not conflict with the Convention, its implementing legislation, or the policy favoring arbitration it embodies.[17] Not

all of the signatory countries to the New York Convention, however, provide as hospitable a regime for arbitration as does the U.S. Federal Arbitration Act, such that the applicability of the Convention may assume paramount importance in those countries.

1. The Jurisdictional Requirements of the New York Convention

The New York Convention does not define which arbitration *agreements* are subject to its provisions. As far as the application of the Convention to arbitration *awards* is concerned, Article I states that it applies to arbitral awards made in a country other than the country where recognition or enforcement of those awards are sought as well as to awards "not considered as domestic awards" in the state where enforcement is sought. That Article further authorizes signatory countries to limit application of the Convention to awards made in other signatory states as well as to awards concerning commercial matters. Most countries, including the United States, have asserted both of the "reciprocity" and "commercial" reservations to the scope of application of the Convention.[18]

One of the most interesting jurisdictional issues that U.S. courts have considered under the New York Convention is whether an arbitration agreement or award is sufficiently international or "non-domestic" to call for application of the Convention. The Convention does not define what is meant by "foreign" or "non-domestic." The legislation implementing the Convention in the United States has sought to add some flesh to the bone by providing that:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial ... falls under the Convention. The 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.[19]

U.S. courts have struggled with two questions in particular (and of potential importance to infrastructure project arbitration) under the Convention and the implementing legislation: First, when is an arbitral award rendered in the United States sufficiently "non-domestic" to warrant application of the Convention? Second, when is an award rendered abroad insufficiently "foreign" to apply the Convention?

2. "Non-Domestic" Local Awards

As noted above, the Convention applies to awards rendered locally but nevertheless deemed by the enforcing jurisdiction to be sufficiently "non-domestic" in nature to deserve Convention treatment. As one leading commentator has noted, "[t]he question of what constitutes a non-domestic award within the meaning of the New York Convention is one of the most complicated issues caused by this treaty."[20] The question may assume particular

importance in the infrastructure project context because government entities involved in those projects frequently require the arbitration to take place in the country where the project is based; in addition, foreign participants in the projects frequently act through local subsidiaries.

The United States appears to be one of the only signatory countries that has actually treated awards rendered within its own territory as "non-domestic" for purposes of the New York Convention.[21] In *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983), for example, a U.S. federal appellate court held that the Convention applied to an arbitration conducted in the United States between two foreign parties. More recently, in *Lander Co. v. MMP Investments Inc.*, 107 F.3d 476 (7th Cir.), *cert. denied*, 118 S. Ct. 55 (1997), another federal appellate found that an award rendered in the U.S. between two U.S. parties but involving distribution of products abroad constituted a "non-domestic" award for purposes of application of the Convention.

The U.S. practice of applying the Convention to international awards rendered in the United States has been criticized by some and applauded by others.[22] With respect to Latin American infrastructure projects in particular, a signatory country's application of the Convention to enforcement of local "non-domestic" awards could go far in allaying foreign investor and developer concerns about agreeing to arbitration where the project is based. Applying the Convention to *actions to enforce* "non-domestic" awards, however, does not completely eliminate the potential for application of the forum state's own arbitration law to those awards. That is because the Convention specifically envisions that parties may *move to set aside or vacate* an award in the country where it was rendered without requiring exclusive application of the Convention grounds for non-enforcement in such an action. Indeed, Article V(1)(e) of the Convention -- under which an award may be refused enforcement if it 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" -- has been read by U.S. courts to allow the courts in the country where the award was rendered to apply domestic arbitration law to a motion to vacate the award.[23] While the risk of conflicting results on concurrent motions to enforce and to vacate a non-domestic award rendered in the United States is relatively small because the standards for enforcing and vacating awards under the Convention and the FAA are not significantly different, the same will undoubtedly not be true of all countries (including all Latin American countries) in which infrastructure projects are undertaken.

3. "Non-Foreign" Awards Rendered Abroad

If the New York Convention fails to define which "non-domestic" awards might qualify for Convention treatment, it is perfectly clear that its provisions apply to all "foreign" awards -- in the words of Article I (1), "awards made in a territory of a state other than the state where the recognition and enforcement of such awards are sought." Nevertheless, several U.S. courts have found that awards rendered abroad that involve only U.S. nationals and concern underlying activities occurring only in the United States were not sufficiently "foreign" for the purposes of applying the Convention. Thus, in *Wilson v. Lignotock U.S.A, Inc.*, 709 F. Supp. 797 (E.D. Mich. 1989), the court held that the Convention was not applicable to an agreement to

arbitrate in Switzerland between a U.S. company and its U.S. employee where the parties' underlying contract was to be entirely performed in the United States. Other cases are to the same affect.[24] Those cases have generally relied on Section 202 of the legislation implementing the New York Convention in the United States -- which was intended to define the meaning of "non-domestic" for purposes of the Convention and which requires, in cases involving only U.S. citizens, a "reasonable relation" with the foreign state for the Convention to apply.

If the United States' willingness to apply the Convention to "non-domestic" local awards deserves to be followed by other countries, its refusal to apply the Convention to arguably "non-foreign" arbitrations abroad clearly does not. On its face, the Convention plainly applies to all "foreign" awards, and the application of the additional requirement of a "reasonable relation" to a foreign state in this context appears inconsistent with the Convention.[25] Indeed, the legislative history of the Convention indicates that the drafters of the Convention specifically rejected a proposal to limit application of the Convention to foreign awards having some reasonable connection to the foreign state.[26]

C. The Enforcement Of Arbitration Agreements Under Article II Of The Convention

Article II of the New York Convention obliges courts of contracting states to "recognize" arbitration agreements and to "refer the parties to arbitration," subject only to a limited number of specific exceptions listed in the Convention. U.S. courts have interpreted that Article in a decidedly pro-enforcement fashion, expansively interpreting the Convention's jurisdictional requirements and narrowly interpreting its exceptions to the enforceability of arbitration agreements.[27] Article II of the Convention, however, leaves unresolved several questions concerning the enforcement of arbitration agreements which may be of heightened significance in the context of infrastructure project disputes in particular.

1. Who Determines the Application or Enforceability of the Arbitration Agreement?

The arbitration laws of many countries, including those of most European countries, embrace the doctrine of *kompetenz-kompetenz*, which authorizes arbitrators to decide challenges to their own jurisdiction. In those countries, courts will typically refer a dispute to arbitration once they have found that a written agreement to arbitrate exists. In the United States, by contrast, in actions to compel arbitration or to stay litigation pending arbitration, it has traditionally been the courts which rule, as a preliminary matter, on the issues of whether the parties intended the arbitration agreement to include certain disputes, or whether a particular claim is capable of settlement by arbitration.[28] While recent U.S. case law indicates a greater willingness to accept the *kompetenz-kompetenz* doctrine,[29] the courts' continued willingness to consider challenges to arbitrability have provided recalcitrant parties with an opportunity to delay arbitral proceedings with judicial challenges to the arbitrator's jurisdiction.

The New York Convention does not either forbid or require national courts to apply the *kompetenz-kompetenz* doctrine. National courts, therefore, are left free to decide for themselves whether to determine issues of arbitrability or to refer them to the arbitrators for resolution in the first instance.

The Convention's silence as to the manner in which national courts enforce arbitration agreements is relevant not only to the courts' applications of the doctrine of *kompetenz-kompetenz*, but also to the related practice in most Latin American countries of requiring a court's execution of a *compromiso* before specifically enforcing an arbitration agreement.[30] Just as commentators have urged U.S. courts to embrace the doctrine of *kompetenz-kompetenz*,[31] so have other commentators urged that the requirement of judicial execution of a *compromiso* be eliminated from Latin American arbitration law in order to "diminish the opportunity for chicanery aimed at barring arbitral proceedings" and to remain "more consistent with the idea that an arbitrator should be allowed . . . to decide on its own jurisdiction."[32] While one commentator has suggested that ratification of the New York Convention would preclude or change application of the *compromiso* requirement in Latin American countries since it requires automatic enforcement of all arbitration agreements, nothing in the text of the Convention in fact regulates the manner in which national court may enforce arbitration agreements or prohibits national legislation requiring courts to draw up a *compromiso* in connection with the enforcement of those arbitration agreements.[33]

2. Multi-Contract and Multi-Party Issues

Article II of the Convention is also silent on three recurring issues in arbitration that are particularly important to the arbitration of infrastructure project disputes due to the multi-contract and multi-party nature of many of those disputes: (i) the consolidation of related arbitrations, (ii) related court actions against non-parties to the arbitration agreement, and (iii) concurrent court proceedings concerning non-arbitrable claims. The following describes how U.S. courts have handled these issues in light of the silence of the New York Convention.

Consolidation of Related Arbitrations. A frequent issue in arbitration of infrastructure project disputes is whether the courts have the power to order consolidation of two or more arbitrations arising under separate agreements that involve common issues of law or fact. U.S. courts are divided on the issue. While some courts have relied of the liberal purposes of the Convention and the FAA to order consolidation over the objections of a party, the majority view (and more recent trend) is to find that the courts lack the power to order consolidation in the absence of an express or implied intention in the parties' arbitration clauses to agree to consolidation.[34] The U.S. Supreme Court has yet to rule on the issue.

Non-Parties to the Arbitration Award. Without guidance from the Convention or the FAA, U.S. courts have taken various approaches to the practical problem arising when one party to an arbitration agreement brings a court action against other parties to the agreement as well as third parties not bound by it. Some courts have attempted to have the third party and the two

contracting parties agree to a single multi-party arbitration by granting a stay of the litigation on the condition that all defendants agree to participate in the pending arbitration and be bound by any resulting award.[35] Other courts have simply stayed the court proceedings against the third party until the arbitrators render their decision on the theory that, if the third party was compelled to try the case involving the same operative facts, "the arbitration proceedings would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted." [36]

Concurrent Court Proceedings. Under the U.S. Supreme Court's decision in *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985), U.S. courts in cases involving related arbitrable and non-arbitrable claims arising out of the same project or transaction are required to sever and compel the pending arbitrable claims, even if the result would be the inefficient maintenance of separate proceedings in different fora. Previously, several courts had relied on the "doctrine of intertwining claims" to disallow arbitration of arbitrable claims factually and legally intertwined with non-arbitrable claims and to try all of the claims together in court.[37]

3. The Availability of Provisional Relief

Parties to infrastructure project disputes subject to arbitration, but prior to the appointment of the arbitral tribunal frequently need to obtain provisional relief from the courts, in the form of preliminary injunctions or pre-award attachments of assets, in order to preserve their rights or maintain the *status quo* pending resolution of the merits of the dispute in arbitration. The New York Convention does not address whether a national court may grant such provisional relief in aid of arbitration. Unfortunately, however, a number of U.S. courts have misconstrued Article II(3) of the Convention -- which requires the courts to refer arbitral disputes to arbitration -- to preclude courts from granting such provisional relief, even before the arbitral tribunal has been constituted and is in a position itself to grant that relief.[38] Those are not well-reasoned decisions, and the majority of the U.S. courts have declined to follow them. Requiring a court to refer disputes covered by an arbitration clause to arbitration, as the New York Convention does, does not prohibit the court from granting preliminary relief before the arbitral tribunal is in a position to function. Indeed, allowing the court to grant such relief only promotes arbitration by insuring that the remedies available in arbitration will be as comprehensive as those available in ordinary litigation.[39]

D. Enforcement Of Arbitration Awards Under Articles III - VII Of The Convention

1. Overview of Articles II - VI of the Convention

Article III of the Convention imposes a general requirement on signatory states to enforce arbitral awards. Several aspects of the Convention give special force to Article III's requirement and underscore the Convention's goal of facilitating transnational enforcement of arbitral awards. Most importantly, the Convention presumes the validity of awards and places the burden of proving invalidity on the parties opposing enforcement. Moreover, awards need

not be confirmed in the arbitral situs before enforcement is sought abroad and, under Article IV, signatory states may not impose procedural requirements on foreign awards that are more restrictive than those applicable to domestic awards.

Finally, Articles V and VI of the Convention set forth the exclusive and limited grounds on which an arbitral award can be denied enforcement. Article V provides that an award may be refused enforcement in the event: (i) the arbitration agreement is invalid, (ii) a party was not provided notice of the arbitration or was otherwise unable to present his case, (iii) the arbitrator exceeded his authority, (iv) there were irregularities in the composition of the arbitral tribunal or in the arbitral procedure, (v) the award has not yet become binding or has been suspended or set aside by the courts of the country in which (or under the law of which) the award was made, (vi) the subject matter of the dispute is not arbitrable, or (vii) enforcement of the award would be contrary to public policy. Article VI authorizes the court from which enforcement of the award is sought to adjourn decisions on the enforcement if a motion to set aside or suspend the award has been made to a competent court. U.S. courts have repeatedly emphasized the "general pro-enforcement bias informing the Convention," and have narrowly construed and applied the exceptions to enforcement of awards set forth in Articles V and VI of the Convention.[40]

2. *The Parties' Power to Expand the Scope* of Judicial Review of Arbitral Awards

The limited scope of judicial review of awards prescribed by the Convention -- and national legislation -- coupled with the unpredictability of arbitration, the high stakes frequently involved, and the residual hostility to arbitration in the United States and Latin America -- may tempt parties to infrastructure project contracts to provide in their arbitration agreements for greater judicial review of arbitral awards than that prescribed in the Convention or national legislation. While agreeing to expand the scope of judicial review of awards may entail additional costs and delay in reaching a final resolution of a dispute, it might also go far in overcoming party reluctance to agree to arbitration of infrastructure project disputes. The question remains, however, as to the enforceability of any such agreement to expand the scope of judicial review of arbitral awards.

While the U.S. Supreme Court has yet to consider the issue, the majority of U.S. courts that have considered the issue have upheld the parties' right to expand the bases for judicial review of an award beyond those set forth in the Federal Arbitration Act. In *LaPine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884, 886-89 (9th Cir. 1997), for example, the parties had agreed that "[t]he court shall vacate, modify or correct any award: (i) based upon any of the grounds referred to in the Federal Arbitration Act, (ii) where the arbitrators' findings of fact are not supported by substantial evidence, or (iii) where the arbitrators' conclusions of law are erroneous." While the lower court held that its scope of review was limited by the FAA, the appellate court reversed. It cited the importance of party autonomy and held that the lower

court had "authority, and, indeed, the obligation, to conduct heightened judicial review of an arbitration award in accordance with the parties' agreement."[41]

The wisdom of the prevailing U.S. approach to this issue is debatable. On a conceptual level, allowing the parties to manipulate the scope of judicial review of awards would appear to elevate the doctrine of party autonomy above considerations of legislative and judicial sovereignty over judicial jurisdiction. On a more practical level, it is also questionable whether allowing the parties to expand the scope of judicial review is, in fact, consistent with a policy favoring arbitration. On the one hand, allowing the parties to do so may encourage parties to accept arbitration. On the other hand, however, it also threatens to prolong the arbitral and ancillary judicial process to the detriment of providing a prompt and efficient arbitral remedy. Perhaps the greatest risk is that parties will misuse their authority to expand the scope of judicial review by prescribing inappropriate bases for review of the arbitral awards. In that connection, one of the judges in the *Kyocera* case noted that, while he agreed with the result in the case, he "would call the case differently if the agreement provided that the district judge would review the award by flipping a coin or studying the entrails of a dead fowl." 130 F.3d at 891.

3. *The Standard for Applying the Due Process and Public Policy Grounds for Refusing Enforcement of an Award*

Two of the grounds most frequently invoked to resist enforcement of an award under the Convention are that a party was "unable to present his case" within the meaning of Article V(1)(b) and that enforcement of the award would be contrary to "public policy" under Article V(2)(b). An important issue that arises under both of these grounds for non-enforcement of an award is whether national courts should apply those grounds in light of their own "domestic" or "national" standards of due process and public policy, respectively, or rather whether a more restrictive or "international" standard should be applied. The risk is that application of a purely domestic standard, together with the undefined and general nature of the due process and public policy grounds for non-enforcement, would result in national courts essentially second-guessing arbitrators' conduct of the arbitral proceedings and substantive awards in light of parochial views on procedure and the merits.

U.S. courts have restrictively construed both the due process and public policy grounds for non-enforcement of an award under the Convention. While the courts have observed that Article V(1)(b) "essentially sanctions the application of the forum state's standards of due process," they have not insisted that all requirements of due process under U.S. law be met.[42] Rather, awards have generally been upheld unless the arbitral procedure followed was so fundamentally unfair that the party resisting enforcement was not provided a meaningful opportunity to be heard.[43] Similarly, U.S. courts have narrowly interpreted the public policy defense of Article V(2)(b) to apply only where enforcement of the award would violate the forum state's "most basic notions of morality and justice." [44] In doing so, they have frequently

referred to what they call "international" public policy as distinguished from merely "domestic" public policy.[45]

4. The Enforcement of Previously Vacated Awards

May an arbitration award that has been vacated in its country of origin nevertheless be enforced in other countries in accordance with the New York Convention? The traditional response has been "no" on the theory that arbitral awards derive their force from the legal system of the country in which they are made; accordingly, the nullification of an award by the courts of that country has been thought to deprive the award of force in other countries.[46] Article V(1)(e) of the Convention -- which provides that enforcement of a foreign award may be refused if the award 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 -- is frequently cited in support of that position.

Article V(1)(e), however, provides only that an enforcing court "may" refuse enforcement of previously nullified awards, not that it "must" do so. With a recent case, *Chromalloy Aeroservices v. Arab* Republic *of Egypt,* 939 F. Supp. 907 (D.D.C. 1996), the United States joined France and Belgium as the only jurisdictions reported to have relied on the non-mandatory nature of Article V(1)(e) to permit the enforcement of a foreign arbitral award set aside in its country of origin.[47] In that case, an American company sought to enforce a $16 million arbitral award rendered in Egypt under Egyptian law against the government of Egypt. Shortly after the U.S. enforcement action was commenced, the Egyptian government filed a petition to nullify the award in an Egyptian court under the recently enacted Egyptian Law of Arbitration of 1994. The Egyptian court granted the government's petition, nullifying the award on the grounds that the arbitrators had failed to apply Egyptian administrative law deemed applicable by the court. Notwithstanding the annulment of the award by the Egyptian court, the U.S. court in *Chromalloy* issued an order enforcing the award against the assets of Egypt in the United States.

The reasoning of the U.S. court in *Chromalloy* is noteworthy. First, the court observed that it was *permitted but not required* under Article V of the Convention to refuse enforcement of an award that has been set aside in its country of origin. It then noted that, under Article VII of the Convention, it was *required* to enforce the award if the award was valid under U.S. arbitration law, which the court found it was. Article VII provides that the provisions of the "Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon." Finally, the court concluded that it was not required to give *res judicata* effect to the annulment decision of the Egyptian court -- which it assumed to be proper under Egyptian arbitration law -- because to do so would violate the U.S. public policy favoring enforcement of arbitration agreements and awards.

The *Chromalloy* decision has generally been applauded by commentators for reasons of particular significance to arbitration of infrastructure project disputes in Latin America. It has been suggested, for example, by Chromalloy's counsel that:

> [T]his decision should not be seen simply as a victory for Western corporations against Third World governments. Egypt, like many other developing countries, has been attempting for many years to lure foreign investors to agree to arbitration in their country. While the Egyptian court decision did little to help this cause, the ultimate decision of the U.S. District Court may show foreign investors that arbitration in developing countries will not necessarily lead to unfair results in favor of the host country. Moreover, if courts around the world become aware that arbitrary nullification decisions will not be honored overseas, they may be more likely to make decisions consistent with the prevailing international norms adopted in the New York Convention and UNCITRAL Model Law. Such a development, if it occurs, can only help to encourage parties to agree to arbitration in the host country.[48]

The commentators are not unanimous in their praise, however. As another leading commentator has written:

> Contrary to Chromalloy's counsel, I fear that the more likely consequence of decisions such as *Chromalloy* may be to undercut the efforts of those who have been labouring for years to restore confidence in the international arbitration process in Egypt and elsewhere in the Middle East, where international arbitration has long been viewed with suspicion. In the particular context of Egypt, the adoption of the UNCITRAL Model Law, albeit with regrettable modifications, was in itself a remarkable achievement. Although *Chromalloy* illustrates that there is still room for progress in Egypt, I am not as hopeful as Chromalloy's counsel that the best way to achieve it is through unilateral judicial action that may itself appear contrary to the "prevailing international norms adopted in the New York Convention". Rather, it is for parties to take heed: for as long as they face the risk of decisions such as the one of the Cairo Court of Appeal in *Chromalloy*, Egypt will be a less secure place to arbitrate than many other venues. It is for Egypt also to measure the possible consequences of this and to consider bringing its law into closer alignment with the rules established by the international community of it wishes to encourage the development of international arbitration within its borders.[49]

Whatever lessons are to be drawn from the *Chromalloy* case, one thing is clear: the principal objectives of the New York Convention -- to encourage the enforcement of arbitration agreements and awards and to harmonize the standards by which those agreements and awards are enforced worldwide -- have yet to be fully realized among the signatory nations to the Convention.

Endnotes

1. For a useful overview of dispute resolution techniques used for infrastructure projects, *see* James J. Myers, *Developing Methods for Resolving Disputes in World-Wide Infrastructure Projects,* 13 J. Int'l Arb. 101 (1996).

2. A copy of the text of the New York Convention is appended to this paper. The standard reference source on the New York Convention is Albert Jan van den Berg, The New York Arbitration Convention of 1958 (1981).

3. *See, e.g.*, Myers, *supra* note 1, at 108-109; Philip Le B. Douglas, *Resolving Project Disputes, in* Project Financing: Building Infrastructure Projects in Developing Markets (January 1996) (describing the nature of infrastructure project disputes and various different dispute resolution mechanisms). While pre-arbitration or litigation non-binding dispute resolution techniques are widely used in infrastructure projects, discussion of those non-binding dispute resolution techniques is beyond the scope of this paper. For a discussion of those non-binding dispute resolution techniques *see* Myers, *supra* note 1, at 102-108.

4. Infrastructure projects typically involve the following different types of contracts: site acquisition contracts, construction and completion contracts, fuel and raw materials supply contracts, output or services sales contracts, operation and maintenance contracts, and financing and equity contribution contracts. *See* Douglas, *supra* note 3, at 53-54.

5. For example, while the developers, contractors, sub-contractors, architects and engineers involved in infrastructure projects typically tend to favor arbitration over litigation as a means of dispute resolution, the lenders and insurance carriers traditionally have opposed arbitration clauses in their loan and insurance contracts. *See* Douglas, *supra* note 3, at 54-56. For interesting analyses of the choice of forum option in the infrastructure project context, *see* Otto Sandrock, *Is International Arbitration Inept to Solve Disputes Arising Out of International Loan Agreements?*, 11 J. Int'l Arb. 33 (1994); Kimmo Mettala, *Governing-Law Clauses of Loan Agreements in International Project Financing,* 20 Int'l Law. 219, 236-40 (1986).

6. *See, e.g.*, Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 22-26 (2d ed. 1991); Sir Michael Kerr, *International Arbitration Versus Litigation,* 1980 J. Bus. L. 164 (1980).

7. Arbitration of disputes involving government parties (as infrastructure project disputes often do) also provides an effective means under U.S. law of avoiding defenses based on doctrines of sovereign immunity and act of state. *See generally* Carsten T. Ebenroth & Thomas J. Dillon, Jr., *Arbitration Clauses in International Financial Agreements: Circumventing the Act of State Doctrine*, 10 J. Int'l Arb. 5 (1993).

8. Van den Berg, *supra* note 2, at 1.

9. Michael John Mustill, *Arbitration: History and Background*, 6 J. Int'l Arb. 43 (1989).

10. Redfern & Hunter, *supra* note 6, at 131.

11. *See* van den Berg, *supra* note 2, at 1-3; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 502 n.15 (1974).

12. For discussions of the background of the United States' ratification of the New York Convention, *see* James R. Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* 3 Int'l Law. 320 (1969); Czyzak & Sullivan, *American Arbitration Law and the United Nations Convention*, 13 Arb. J. 197 (1958). For English discussions of the Latin American experience with the Convention, *see* Horacio A. Grigera-Naon, *Latin America: Overcoming Traditional Hostility Towards Arbitration*, 477 PLI/Comm 375 (1988); Alejandro M. Garro, *Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. Int'l Arb. 293 (1984).

13. The Convention was implemented in the United States by means of an amendment to its Federal Arbitration Act (the "FAA"). Chapter One of the Federal Arbitration Act governs "domestic" arbitrations, or arbitrations that otherwise do not arise under the New York Convention (9 U.S.C. §§ 1-16); Chapter Two of the FAA implements the New York Convention and sets forth the procedural regime for cases arising under the Convention (9 U.S.C. §§ 201-208).

14. Alan Scott Rau, *The New York Convention in American Courts*, 7 Am. Rev. Int'l Arb. 213 (1996).

15. The procedural advantages of proceeding under the New York Convention provisions of the FAA include: (i) the Convention provisions provide an independent basis for subject matter jurisdiction in the federal courts, whereas Chapter One of the FAA provides no similar basis for subject matter jurisdiction; (ii) the Convention provisions

provide a three-year statute of limitations for moving to confirm an arbitration award, whereas Chapter One provides only a one-year statute of limitations; and (iii) the Convention provisions contain more liberal removal and venue provisions than does Chapter One of the FAA. *See generally* Rau, *supra* note 14, at 214-18; Gary B. Born, International Commercial Arbitration in the United States 466 (1994).

16. *See* Rau, *supra* note 14, at 236-37; Born, *supra* note 15, at 502-04. The potential difference between the scope of judicial review of awards under the Convention and the FAA that has received the most attention in the United States concerns whether "manifest disregard of the law," which is a generally recognized basis for non-enforcement of awards under the FAA, is also available as a defense to enforcement of an award under the Convention. Few awards, however, have ever been denied enforcement even under the FAA for "manifest disregard of the law." *See* Born, *supra* note 15, at 521-24.

17. *See* 9 U.S.C. § 208. As a result, case law developed under the FAA is generally applicable to cases arising under the Convention. *See* Gerald Aksen & Wendy S. Dorman, *Application of the New York Convention by United States Courts: A Twenty-Year Review (1970-1990)*, 2 Am. Rev. Int'l Arb. 65, 67 (1991).

18. For a discussion and criticism of the "commercial" and "reciprocity" reservations to the New York Convention, *see* Born, *supra* note 15, at 286-91, 486-90. Two observations on the application of those reservations to arbitration agreements and awards concerning infrastructure projects in Latin America are worth noting. First, U.S. courts have construed the Convention's "commercial" requirement in a broad manner so as to include infrastructure project contracts. *See, e.g.*, *Island Territory of Curaçao v. Solatron Devices, Inc.*, 356 F. Supp. 1 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974); Born, *supra* note 15, at 288. Second, some U.S. courts and commentators have suggested that, in applying the reciprocity reservation to awards rendered in countries (including Latin American countries) who are signatories to the New York Convention but have traditionally been hostile to arbitration, it would be appropriate to scrutinize whether those countries in fact dishonor their commitments under the Convention by placing unduly restrictive interpretations on the Convention. *See Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981) (examining the Indian judiciary's faithfulness to the Convention in applying the reciprocity reservation); Born, *supra* note ____, at 489 ("Given the purposes of the reciprocity reservation, why shouldn't U.S. courts engage in at least some scrutiny of how foreign courts actually apply the Convention?").

19. 9 U.S.C. § 202.

20. Albert Jan van den Berg, *When Is an Arbitral Award Non-Domestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 26 (1985). While it is not clear whether and how

the "non-domestic" *award* requirement applies to arbitration *agreements,* the more sensible approach would appear to be to read the obligations of the Convention as congruent for both arbitral agreements and awards. Thus, the Convention should be read as requiring the enforcement only of arbitration *agreements* that would in turn lead to "foreign" or "non-domestic" *awards* that themselves would come within the scope of the treaty. *See* Rau, *supra* note 14, at 233-34; Born, *supra* note 15, at 291-92. The legislative history of the New York Convention suggests that "non-domestic" awards were intended to be those that, while made within a state's territory, were made pursuant to the arbitration law of another country. *See* Born, *supra* note 15, at 477-79.

21. Van den Berg predicted several years ago that the "non-domestic" option of Article I of the Convention was destined to remain a "dead letter." Van den Berg, *supra* note 2, at 28. In fact, it appears to have remained a "dead letter" in the Continental European states originally responsible for inclusion of the "non-domestic" option in the Convention. *See* Rau, *supra* note 14, at 224-25 (describing Continental authorities limiting application of the Convention to awards rendered abroad).

22. For criticism, *see* van den Berg, *supra* note 20. For praise, *see* Hans Smit, *Elements of International Arbitration in the United States*, 1 Am. Rev. Int'l Arb. 64, 75 (1990) (suggesting that "it would have been better if the New York Convention had broadly provided for enforcement of all international awards").

23. In the recent case of *Yusuf Ahmed Alghanim & Sons v. Toys R Us, Inc.*, 126 F.3d 15 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1042 (1998), the court considered a petition to enforce an arbitration award rendered against a U.S. party in New York in favor of a Kuwaiti party as well as a simultaneous cross-motion to vacate the award under the domestic FAA brought by the U.S. party. Following *Bergesen,* the court held that the New York Convention applied to enforcement of the award, and that it could not imply additional grounds for refusing enforcement of an award other than those specifically set forth in the Convention. However, the court also noted that the Convention contemplated that parties could seek to set aside an award in the country where it was rendered, and held that the court in the country where the award was rendered may apply its own domestic law to such a motion. Prior decisions and commentators have advanced the view that only the grounds enumerated in Article V of the Convention were available in actions to vacate non-domestic awards made in the United States. *See*, *e.g.*, *Fiat S.p.A. Ministry of Finance Planning*, No. 88 CIV. 6639 (SWK), 1989 U.S. Dist. LEXIS 11995 (S.D.N.Y. Oct. 11, 1989) ("Since the Convention, as supplemented by the [FAA], applies to arbitration awards rendered in the United States involving foreign interests, Article V(1)(c) shall apply . . . here."); Daniel M. Kolkey, *Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations*, 22 Int'l Law. 693, 699-700 (1988) ("[I]n the case of a "nondomestic award" rendered in the United States, the grounds of "manifest disregard

of the law" to vacate the award would be unavailable by which to challenge the award under the New York Convention.").

24. *See, e.g.*, *Jones v. Sea Tow Services Freeport NY Inc.*, 30 F.3d 360 (2d Cir. 1994); *Reinholtz v. Retriever Marine Towing & Salvage*, No. 92-14141-CIV, 1993 WL 414719 (S.D. Fla. May 21, 1993), *aff'd without op.*, 46 F.3d 71 (11th Cir. 1995); *Brier v. Northstar Marine, Inc.*, No. CIV. A. 91-597 (JFG), 1992 WL 350292 (D.N.J. Apr. 28, 1992).

25. Several commentators have reached just that conclusion. *See* Giorgio Gaga, *Problems of Applicability of International Conventions on Commercial Arbitration*, *in* Commercial Arbitration: Essays in Memorium Eugenio Minoli 191, 214 (1974) (section 202 "does not seem to conform to the Convention"); van den Berg, *supra* note 2, at 17 (section 202 "must, in principle, be deemed to be incompatible with the New York Convention" because it excludes from the Convention awards "made in a foreign country between two United States citizens in respect of a domestic (U.S.) matter").

26. The relevant legislative history is described in Rau, *supra* note 14, at 249-51.

27. *See generally* Born, *supra* note 15, at 284-318.

28. *See, e.g.*, *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 649 (1986) ("[T]he question of arbitrability -- whether [an agreement to arbitrate] creates a duty for the parties to arbitrate [a] particular grievance -- is undeniably an issue for judicial determination."). In cases involving international commercial disputes, U.S. courts generally are liberal in determining both the scope of an arbitration agreement and the arbitrability of a particular claim. *See e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler - Plymouth, Inc.*, 473 U.S. 614 (1985).

29. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (holding that questions of arbitrability should be referred by the courts to arbitrators where the parties have specifically contracted to submit such jurisdictional issues to the arbitrators).

30. For the discussion of the *compromiso* requirement in Latin America arbitration law, *see* Grigera-Naon, *supra* note 12, at 387-94.

31. *See* Hans Smit, *The Arbitration Clause: Who Determines Its Validity and Its Personal and Subject Matter Reach?*, 3 Am. Rev. Int'l Arb. 395, 396-97 (1995).

32. Grigera-Naon, *supra* note 12, at 391-92. Grigera-Naon describes the relationship between the *kompetenz-kompetenz* doctrine and the *compromiso* requirement as follows: "if it is understood that the court has to determine, before making the "compromiso" despite the unwillingness of one of the parties, whether there is a dispute falling within the

scope of the arbitral agreement, it is also obviously implied that the court is deciding for the arbitrators if the dispute arises within the boundaries of their jurisdiction." *Id*.

33. *Compare* Albert Jan van den Berg, *L'arbitrage Commercial en Amerique Latine,* 2 Rev. Arb. 123, 137-41 (1979) (suggesting that the enforcement regime of the New York Convention is inconsistent with the *compromiso* requirement in Latin American countries) *with* Grigera-Naon, *supra* note 12, at 392-93 ("[A]rticle II of the New York Convention grants imperative or mandatory force to the arbitral agreement understood both as "clause conpromissoire" (submission of future disputes) and as "compromiso" (submission of existing disputes); but it does not regulate the way in which local legislation will endow arbitral agreements with compulsory effects . . . , which may provide that the parties must draw first a "compromiso" or submission, and that if any of them fails to do so, a court will do it in lieu and on behalf of the recalcitrant party and thereafter will refer the dispute to the arbitral tribunal.").

34. *See* Michael F. Hoellering, *Consolidated Arbitration,* AAA Dispute Resolution Journal 41, 45 (January 1997) (discussing the split in the federal appellate courts); Peter C. Thomas & Edmond C. Burns, *Consolidation of International Arbitrations in the United States in the Wake of Boeing*, 4 Am. Rev. Int'l Arb. 349 (1993).

35. *See, e.g. Dale Metals Corp. v. Kiwa Chemical Industry Co.*, 442 F. Supp. 78, 82 (S.D.N.Y. 1997).

36. *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro,* 555 F. Supp. 481, 486 (D.V.I. 1982), *aff'd*, 712 F.2d 50 (3d Cir. 1983) (citation omitted).

37. *Cf. Tai Ping Insurance Co. v. M/V Warschau*, 731 F.2d 1141 (5th Cir. 1984); *see generally* Aksen & Dorman, *supra* note 17, at 77.

38. *See, e.g.*, *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2.d 408 (1982); *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032 (3d Cir. 1974).

39. *See* H. Smit, *supra* note 22, at 68-69.

40. *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 973-74 (2d Cir. 1974); *Management & Technical Consultants S.A. v. Parsons-Jurden International Corp.* 820 F.2d, 1531, 1533 (9th Cir. 1987).

41. Other courts had previously reached the same conclusion. *See Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995); *Fils et Cables D'Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240 (S.D.N.Y. 1984); *but see Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1504-05 (7th Cir. 1991) ("if the

parties want, they can contract for an appellate arbitration panel to review the arbitrator's award. But they cannot contract for judicial review of that award; federal jurisdiction cannot be created by contract.").

42. *See, e.g., Parsons & Whittemore Overseas Co. v. Societe Generale de l'industire du Papier*, 508 F.2d 969, 975 (2d Cir. 1972).

43. *See, e.g., Intercarbon Bermuda, Ltd. v. Caltex Trading & Transport Corp.*, 146 F.R.D. 64 (S.D.N.Y. 1993); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992).

44. *See Parsons & Whittemore*, 508 F.2d at 974.

45. *See id.; Ledee v. Ceramicha Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982). Notwithstanding the reference to "international public policy" in *Parsons & Whittemore*, 508 F.2d at 974, however, other U.S. courts have invoked *national* public policy in actions under the Convention. *See, e.g., Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-15 (2d Cir. 1987); *see generally*, Born *supra* note 15, at 538-40.

46. For opposing views on the issue and citations to the relevant case law, *see* Gary H. Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin,* 11 Mealey's Int'l Arb. Rep. 22 (1996) *and* Eric A. Schwartz, *A Comment on* Chromalloy*: Hilmarton a l'Americaine*, 14 J. Int'l Arb. 125 (1997).

47. For a discussion of the French and British case law, *see* Schwartz, *supra* note 46.

48. Sampliner, *supra* note 46, at 28-29.

49. Schwartz, *supra* note 46, at 135.