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INTERNATIONAL ARBITRATION

Expert Analysis

Restatement: International Commercial And Investor-State Arbitration

A Restatement of the Law is something of a misnomer. Restatements of Law are neither law nor state-sanctioned. They are the work of a private, independent organization—the American Law Institute. Moreover, Restatements of Law do not literally "restate" the current law. Rather, there may be issues on which a Restatement might deliberately depart from the view of the law taken by a majority of the courts. Despite this, Restatements are routinely relied upon by both courts and lawyers as a guide to the law of their subject matter, and can carry substantial persuasive weight.

The authority of Restatements lies in their comprehensiveness, highly quality and neutrality. They are typically the product of years of meticulous research, thorough and thoughtful consideration, and careful and precise drafting by experts in the field (called "Reporters"). And they are prepared in consultation with practitioners, academics, judges and others also involved in that field (either "advisers" or part of the "members consultative group").

By **John Fellas**

The Restatement of the U.S. Law of International Commercial and Investor-State Arbitration is a landmark in the field of U.S. international arbitration law that displays all the characteristics of the exemplary Restatement. It was 12 years in the making, with the project commencing in 2007 and the final draft, which is over 1000 pages, receiving approval at the 2019 Annual Meeting of the American Law Institute. It was prepared by four highly-distinguished Reporters: Chief Reporter, Professor George A. Bermann of Columbia Law School, and Associate Reporters, Professor Jack J. Coe, Jr., of Pepperdine University Law School, Professor Christopher R. Drahozal of the University of Kansas School of Law and Professor Catherine A. Rogers of both Penn State Law at University Park and Queen Mary, University of London. Currently, it is undergoing one last read over (with no substantive changes contemplated) before it will be released in its final form. (In the interests of full disclosure, I was a member of the Members Consultative Group for the Restatement.)

> Those who practice in the field of international arbitration owe an enormous debt to the Reporters who worked diligently to prepare the Restatement. They have produced a majestic, comprehensive, and clear account of the U.S. law of international and investor-state arbitration that belongs on the shelf of everyone involved those fields.

Background

It was apparent in advance that preparing a Restatement of U.S. international arbitration law would not be an easy task. For a start, the major federal statute governing arbitrations involving interstate and international commerce—the Federal Arbitration

JOHN FELLAS *is a partner at Hughes Hubbard & Reed.*

Act (FAA)—is almost 100 years old, having been enacted in 1925. The only amendments since are implementing legislation for the New York and the Panama Conventions, Chapters 2 and 3 of the FAA respectively, and some minor changes to the original Chapter 1, for example, in 1988, to make it clear that the Act of State doctrine cannot be raised as a defense to the enforcement of an arbitration agreement or award. In an ideal world, the FAA would have been amended by Congress in response to issues that have arisen from the growth of international trade since it was first enacted. But there has been no political impetus for this. The United States is one of the few popular seats for international arbitration not to have meaningfully revised its arbitration law in the last 25 years.

But not only is the FAA old, but also it is relatively short. It has only 31 sections—including Chapters 2 and 3 implementing the two Conventions, which contain parallel provisions. The English Arbitration Act of 1996, by contrast, is over three times as long—with 110 sections. Moreover, U.S. international arbitration law is complicated by the fact that the FAA does not occupy the entire field, and that, therefore, state arbitration statutes can, in some circumstances, come into play.

Because of all these factors, and, in particular, the age and brevity of the FAA, much U.S. arbitration law is judge-made, with the inevitable result that sometimes it is contradictory, contains gaps, and is unclear. For example, in many countries the authority of courts to issue interim relief in aid of international arbitration is provided for by statute. See, e.g., English Arbitration Act, (§44); UNCITRAL Model Law (Article 17J). In the United States, by contrast, with the exception of admiralty cases (FAA, §8), the FAA does not provide courts with such authority. And the courts have themselves not been consistent on whether they possess such authority. *Compare Merrill Lynch, Pierce Fenner & Smith v. Hovey*, 726 F.2d 1286 (8th Cir. 1984) (court-ordered interim relief in aid of arbitration impermissible absent parties' agreement) *with Teradyne v. Mostek*, 797 F.2d 43 (1st Cir. 1986) (courts have authority to issue interim relief in aid of arbitration).

Moreover, in light of the brevity of the FAA, core principles of arbitration law that, in other countries, are embodied in statute, are, in the United States, the product of evolving court decisions. For example, the separability doctrine—a universal principle of arbitration law—is set forth in section 7 of the English Arbitration Act and Article 16 of the UNCITRAL Model Law. In the United States, by contrast, that doctrine is part of U.S. law largely as a result of the Supreme Court's decision in *Prima Paint v. Conklin Manufacturing*, 388 U.S. 395 (1967). Similarly, the law governing an arbitrator's jurisdiction to rule on her jurisdiction (competence-competence) in set forth in section 30 of the English Arbitration Act and Article 16 of the UNCITRAL Model Law.

In the United States, that issue has been addressed by the Supreme Court in a series of cases that embody evolving and complicated layers of judge-made distinctions and exceptions: a distinction between gateway matters (which are for courts to decide) and non-gateway matters (which are for arbitrators); a distinction between challenges directed to the underlying contract a whole (for arbitrators) and those directed to the arbitration clause specifically (for courts); a distinction between issues that go to the existence of a contract (for courts) and those that go to its validity (for arbitrators); and an exception where the parties have clearly and unmistakably delegated a gateway matter to the arbitrators. See, e.g., *Prima Paint*, 388 U.S. 395; *Howsam v. Dean Witter Reynolds*, 537 U.S. 79 (2002); *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440 (2006); *Rent-a-Ctr., W. v. Jackson*, 130 S. Ct. 2772 (2010).

Thus, the preparation of the Restatement could never have been a mechanical task. It required judgment: in imposing coherence on a mass of judicial decisions; in identifying a prevailing approach by the courts; in deciding whether there is a recent trend that might displace that approach; in resolving conflicts among different approaches; in deciding how to fill in gaps in the law; and in determining whether a particular approach, even if that of the majority of the courts, is sound and coheres with the body of law as a whole. It is a testament to the diligence of the Reporters who prepared the Restatement that they have produced such a clear, comprehensive and coherent work. Thus, to return to the examples noted above, the Restatement has

clear provisions recognizing a court's authority to issue interim relief in aid of arbitration (§3.3), the separability doctrine (§2.7), and the competence of an arbitral tribunal to determine its own jurisdiction (§2.8).

Subject Matter Of the Restatement

It is important to be clear about the area of arbitration practice addressed by the Restatement. Other than incidentally, the Restatement does not address the procedures that govern the conduct of arbitration proceedings. This is hardly a surprise. A central feature of international arbitration is party autonomy; the freedom of the parties to select the procedures and rules by which their dispute is to be resolved. As a result, like the international arbitration laws of most countries, the Restatement neither prescribes nor proscribes procedures for the conduct of arbitration proceedings, such as, for example, whether there should be document exchange, whether summary dispositions are appropriate, whether cross-examination can go beyond the scope of a witness's testimony in her witness statement, and so on.

The Restatement is primarily concerned with the role of the U.S. courts with respect to arbitration proceedings. This makes sense; court involvement is indispensable to the arbitration process. For example, a party who once agreed to arbitrate might, at the time a dispute arises, commence a lawsuit in connection with a dispute that belongs in arbitration. In such circumstances, the other party would have to seek the assistance of the court to stay or dismiss that litigation and/or compel arbitration. Similarly, a party might secure a favorable arbitration award with which the losing party fails voluntarily to comply. In such circumstances, the prevailing party would have to seek the assistance of a court to reduce that award to judgment.

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Structure of Restatement

The bulk of the Restatement sets forth the law governing court involvement in international and investor-state arbitration. It is structured around the three stages of the lifecycle of an arbitration proceeding: (1) the beginning of the process, typically in connection with the enforcement of the agreement to arbitrate; (2) during the arbitration proceeding, for example, to enforce an arbitral subpoena; and (3) at the end of the process, in connection with an action to enforce or vacate an arbitration award.

Five Chapters

The Restatement consists of five chapters. Chapter 1 is divided into three parts (or "topics"): (1) "Definitions," which defines the distinctive terms that apply to the fields of both international and Investor-State arbitration; (2) "Basic Principles of U.S. Arbitration Law," which discusses certain central concepts and features of international and Investor-State arbitration, such as party autonomy and the role of the New York, Panama and ICSID Conventions; and (3) "Federal Preemption of State Law," which discusses the relationship between federal and state arbitration law.

Chapters 2 to 4 concern international arbitration (as distinct from investor-state arbitration). Each of the three chapters respectively addresses the three stages of an arbitration proceeding in the sequence in which they occur in its lifecycle. Thus, Chapter 2, "Enforcement of the Arbitration Agreement," addresses court involvement at the beginning of the arbitration process. It focuses primarily on the situation where there is a disagreement at the outset about whether a particular dispute belongs in arbitration. It discusses various defenses to the enforcement of an arbitration agreement, such as the defenses that a party has waived its right to arbitrate, that the dispute falls outside the scope of the arbitration agreement, or that the party against whom enforcement is sought did not sign the arbitration agreement. It also discusses the allocation of authority as between courts and arbitrators regarding the resolution of such defenses.

Chapter 3, "The Judicial Role in Connection with The Arbitration Proceeding," addresses court involvement in an ongoing arbitration proceeding, and is divided into three Topics. The first, "Court Involvement in Interna-

tional Arbitration," highlights the general principle that court involvement in ongoing arbitration proceedings should be minimal, and addresses the limited situations in which courts may intervene to support the process, for example, to appoint arbitrators or to grant interim relief.

The second Topic, "Multiparty Arbitral Proceedings," addresses a court's authority to resolve questions of joinder or intervention in arbitration proceedings, as well as class arbitration. The third Topic, "Issues Ancillary to the Arbitral Proceeding," concerns such matters as attorney conduct during an arbitration, arbitral immunity and the confidentiality of arbitration proceedings.

Chapter 4, "Post-Award Relief," addresses court involvement following the issuance of an arbitral award, primarily in the contexts of an application to a court to reduce an arbitration award to judgment or an application for its vacatur. The Restatement's discussion of this issue rests on two important distinctions (drawing on the defined terms in Chapter 1). The first is between Convention awards (i.e., awards governed under the New York or Panama Conventions) and non-Convention awards (i.e., awards made in a country—other than the United States—that is not a party to either Convention).

The second is between Convention awards made outside of the United States, which cannot be vacated by U.S. courts, and those made in the United States (U.S.-Convention awards), which can. Slightly different terminology and standards apply depending on the type of award, and the bulk of Chapter 4 addresses the different standards governing the "recognition or enforcement" of Convention awards, the "recognition or enforcement" of non-Convention awards, and the "confirmation or vacatur" of U.S.-Convention awards.

Chapter 5 addresses investor-state arbitration. Most of the arbitrations addressed in this Chapter are those on those based on an investment treaty, but the chapter also covers arbitrations between an investor and a host State based either on a contract or an investment statute. The chapter is divided into four Topics. The first is the "Law Governing the Judicial Role in Investor-State Arbitration." As with the Restatement's treatment of international arbitration, the next three topics track court involvement in investor-state arbitration in the three stages of its lifecycle: (1) "Enforcement of the Obligation To Arbitrate"; (2) "Court Involvement in Investor-State Arbitral Proceedings"; and (3) "Post Award Relief in Investor State Arbitration."

Contrasting Positions

In preparing the Restatement, the Reporters inevitably had to take a position on certain issues in the field where the court decisions were not always consistent. I offer two examples. One is on the question of whether 28 U.S.C. §1782, which permits U.S. courts to order the taking of evidence for use in a proceeding "in a foreign or international tribunal," applies to international commercial arbitration proceedings. The circuit courts are split on this. The Restatement takes the position that section 1782 may be used to obtain evidence for such arbitrations whether the parties thereto are two commercial entities or, by contrast, have as a disputant a state or state entity.

A second example is the question of whether a party may effectively delegate a "gateway" issue to arbitrators by agreeing to arbitrate under rules providing that an arbitral tribunal has the power to rule on its own jurisdiction. See, e.g., ICDR Rule 19 ("The arbitral tribunal shall have the power to rule on its own jurisdiction …"). A majority of courts have endorsed that position. By contrast, the Restatement holds that while arbitral rules could, in theory, be drafted to provide the "clear and unmistakable" evidence needed under current law to entrust certain gateway issues primarily to the arbitrators, as currently drafted, they do not; they simply confirm an arbitral tribunal's authority to consider jurisdictional issues when they arise, but do not prevent courts from addressing such issues.

Conclusion

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