

International Arbitration From a U.S. Perspective

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OUTLINE

- I. The Arbitration Process
- II. Sources of Governing Law
- III. Arbitration Agreements and Arbitrability
- IV. Challenges, Enforcement, and Recognition of Arbitral Awards



OUTLINE

I. The Arbitration Process



Arbitration:

A voluntary, binding,
non-judicial method
of resolving disputes.

- Arbitration is an adversarial process.
(Not a negotiation, mediation or settlement).
- Decision is made by one or more (often three) arbitrators,
sometimes referred to as a "panel" or "arbitral tribunal."
- Arbitrators' decision is called an "award."
- Public policy (in the U.S. and generally) in favor of arbitration
in most types of disputes.

Arbitration Compared to Litigation

- Speed
- Cost
- Relative informality
- Flexibility (governed by agreement)
- Confidentiality
- Not tied to national courts (avoids “home field advantage” and unique national procedures)
- “Expert” decisionmakers
- Finality; minimum of review (good & bad)
- Ease of enforcement
- International Enforcement

Institutional and “Ad Hoc” Arbitration

- Institutional arbitration is administered by an organization separate from the arbitrators.
- Institutions include ICC, AAA (ICDR), LCIA
- Ad hoc is often under the UNCITRAL rules
- Cost considerations
- Supervision of the arbitration
 - ICC Court: supervision and review
- Arbitrator appointment, disqualification / removal, substitution, payment

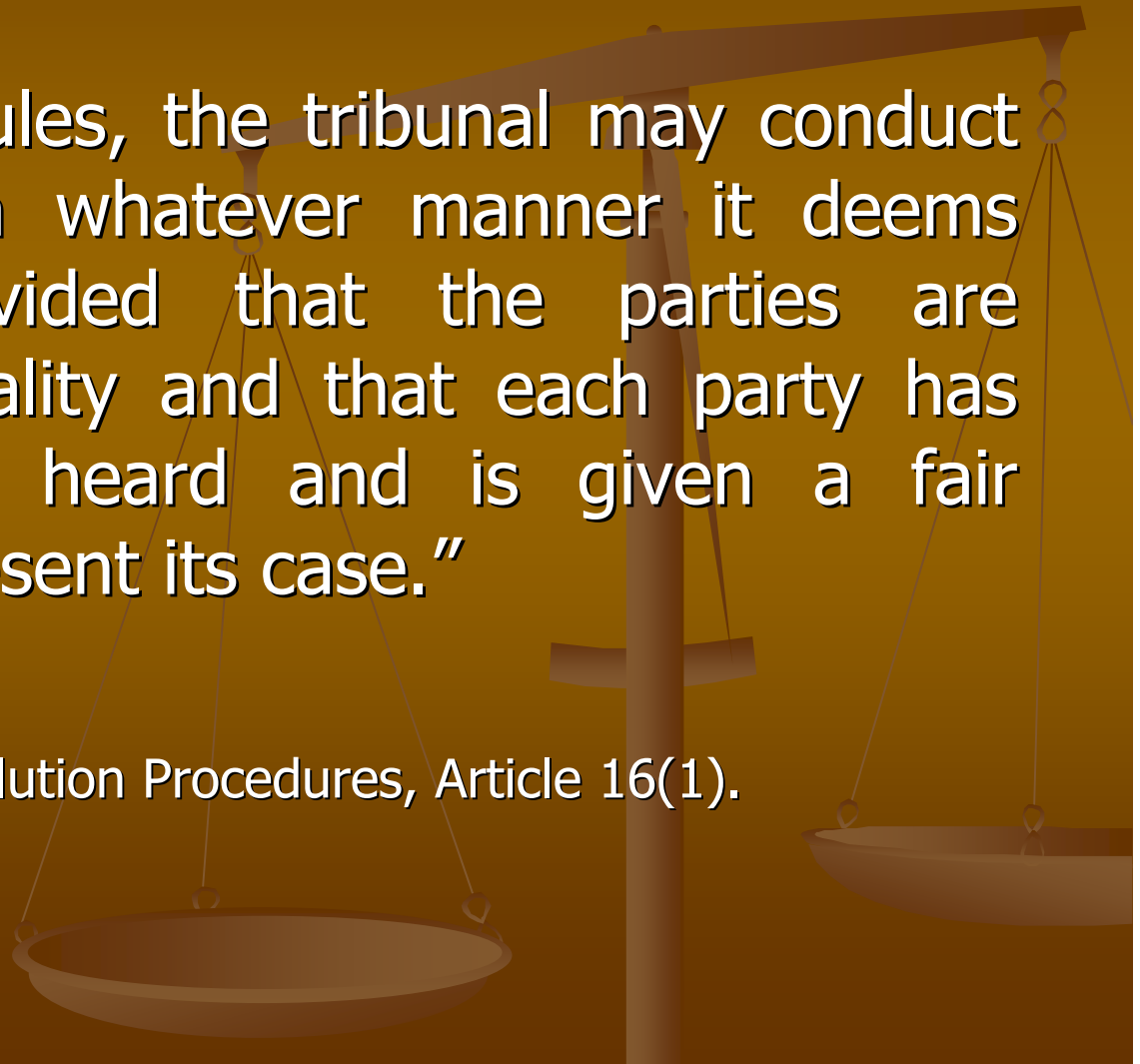
International Character of Arbitration

- Unlike litigation, arbitration is not tied to the rules and procedures of one country.
- Procedural law of the “seat” applies, but is limited.
- Arbitrators, counsel, parties often from different countries
- Different expectations about the process
- Rules provide for flexibility
- Convergence – IBA Rules of Evidence as an example

Flexibility: AAA International Centre for Dispute Resolution (ICDR)

“Subject to these rules, the tribunal may conduct the arbitration in whatever manner it deems appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”

--International Dispute Resolution Procedures, Article 16(1).



Flexibility: UNCITRAL Rules



“Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.”

--UNCITRAL Arbitration Rules, Article 15(1).

Flexibility: ICC



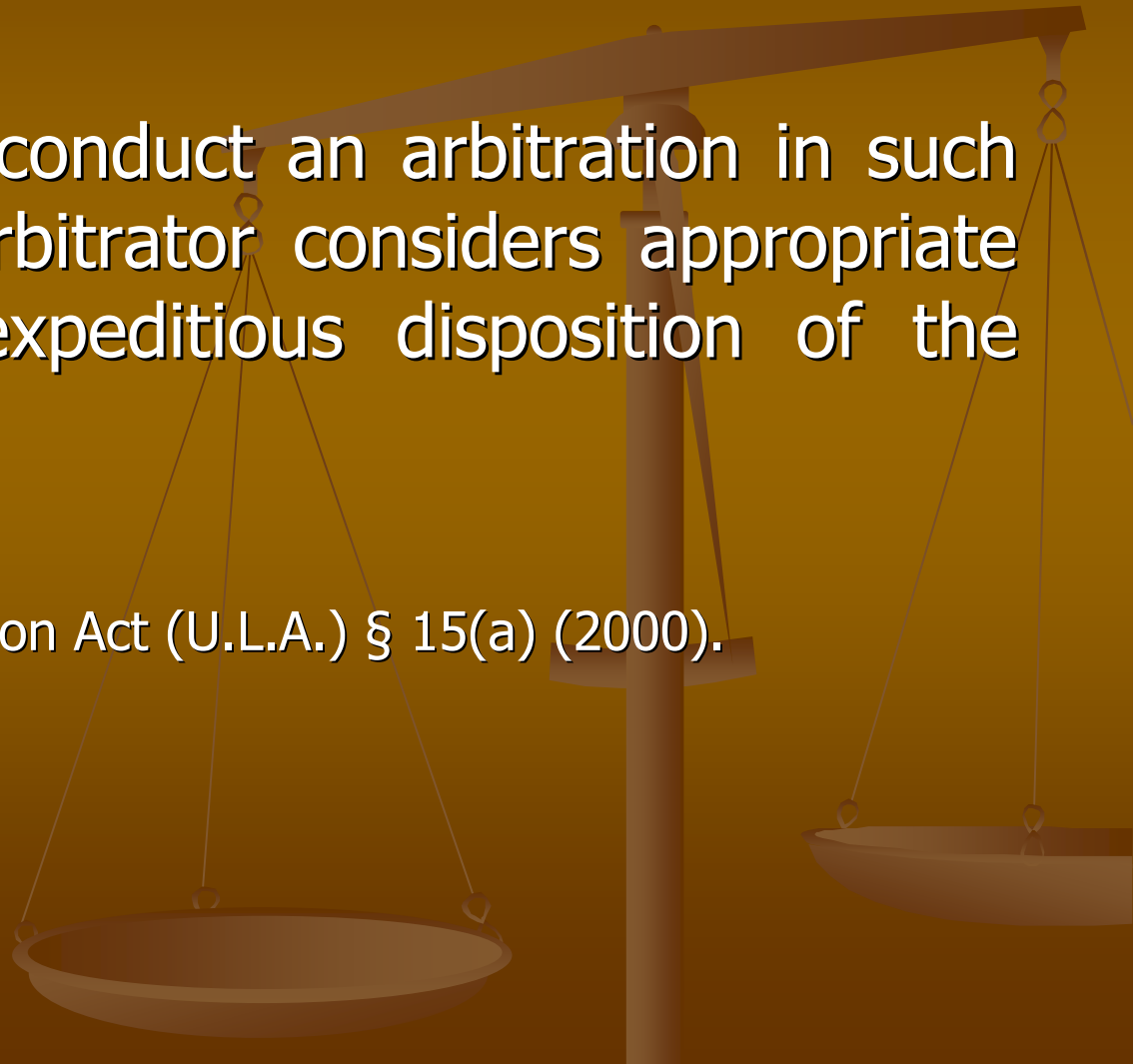
- “1. The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.”
- “2. In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”

--ICC Rules of Arbitration, Article 15(1).

Flexibility: Where No Rules Have Been Agreed Upon

“An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding.”

--[Revised] Uniform Arbitration Act (U.L.A.) § 15(a) (2000).



Flexibility: Procedural Issues

- Pre-hearing disclosure and discovery
- Presentation of evidence
- Cross-examination
- Use of Experts (who appoints, reports & discovery, manner of presentation)
- Interim Relief and Conservatory Measures
- International Bar Association (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (1999)

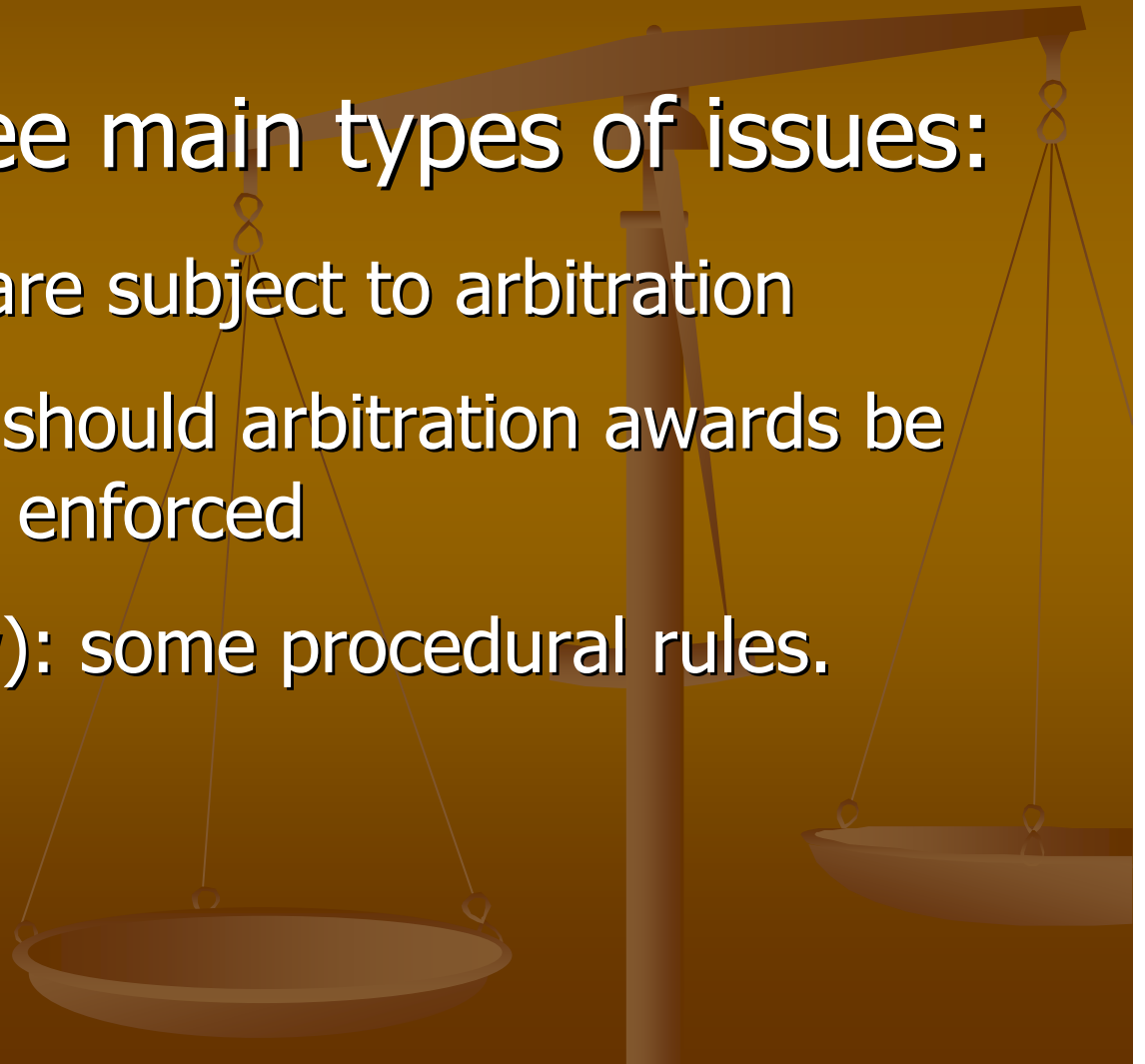
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II. Sources of Governing Law



Governing Law in the U.S.

- Applies to three main types of issues:
 - What disputes are subject to arbitration
 - How and when should arbitration awards be enforced or not enforced
 - (Non-treaty law): some procedural rules.



Governing Law in the U.S.



- Federal Arbitration Act, 9 U.S.C. § 1 et seq.
 - Applies to arbitrations concerning transactions “involving commerce” (i.e., interstate or foreign commerce)
- New York Convention: United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958)
- Panama Convention: Inter-American Convention on International Commercial Arbitration.
- Law of individual states.
 - Some states have two sets of laws. E.g., Florida Arbitration Code, Fla. Stat. § 682.01 et seq.; Florida International Arbitration Act, Fla. Stat. § 684.01 et seq.
 - Pre-emption by conflicting federal law.

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III. Arbitration Agreements and Arbitrability



Agreement to Arbitrate

- May occur after dispute has arisen
- More often, agreement to arbitrate occurs when parties begin their relationship or sign a contract
- Arbitration agreement is often a provision in the parties' commercial contract – so it is often called an “arbitration clause”

Sample Arbitration Provision (ICDR Rules)

- “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”
- [add clause re entry of judgment]

Sample Arbitration Provision (ICC Rules)

- “All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”
- [add clause re entry of judgment]

Arbitration Clause Decisions

- Place of arbitration
- Number of arbitrators
- Qualification and selection of arbitrators
- Language of the arbitration
- Applicable rules of procedure and evidence (IBA?)
- Discovery rights
- Timeframes
- Expenses provisions
- Fees and costs awards
- Amiable compositeur
- Reasoned award
- Waiver of appeal
- Waiver of sovereign immunity
- Emergency arbitrator / pre-arbitral referee

“Pathological” Arbitration Clauses

- Describe non-existent rules or institutions
- Impose impossible arbitrator qualifications
- Name an arbitrator that is unwilling to serve
- Impose requirements that an administering agency is unwilling/unable to follow
- Impose requirements contrary to law of the “seat” or law where enforcement will be sought

How Are Arbitration Agreements Enforced?

- Court must find that parties have agreed to arbitrate
- If dispute is arguably within the scope of the parties' agreement to arbitrate, court will refer the parties to arbitration
- The arbitrators have the jurisdiction to determine whether they have jurisdiction over the case (doctrine of Kompetenz-Kompetenz).

Arbitration Agreements

Must Be In Writing to Be Enforced

- “A written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

--Federal Arbitration Act, 9 U.S.C. § 2.

Arbitration Agreements

Must Be In Writing to Be Enforced

- “1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any difference which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.”
- “2. The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.”

--New York Convention, Article II(1) and (2)

Arbitration Agreements:

Written Agreements Must Be Enforced

- “A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction ... for an order directing that such arbitration proceed in the manner provided for in such agreement. ... The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”

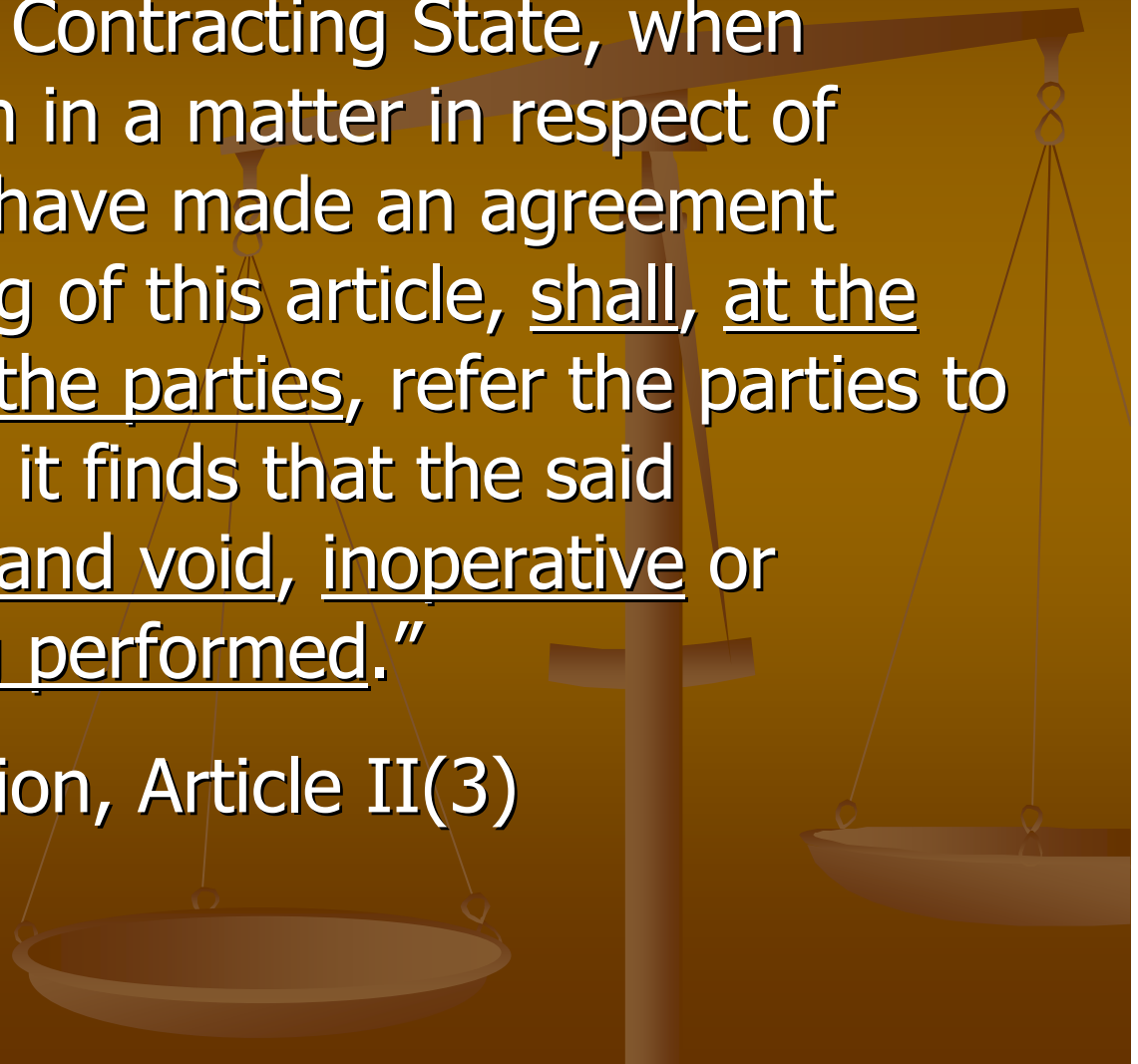
--Federal Arbitration Act, 9 U.S.C. § 4.

Arbitration Agreements:

Written Agreements Must Be Enforced

- “3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.”

--New York Convention, Article II(3)



Challenge to Arbitration Clause: Fraud

- Under FAA, defenses to arbitration are “such grounds as exist at law or in equity for the revocation of any contract.”
- Challenge to arbitration: the contract was “fraudulently induced” – only agreed to because of fraud – so that it can be revoked and there is no right to arbitration.
- U.S. Supreme Court: fraud is only a basis for resisting arbitration if it relates directly to the arbitration clause itself and not to the contract as a whole.

--*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

Challenge to Arbitration Clause: Illegality of Contract (Usury)

- “Payroll loan” business in Florida. Agreement to arbitrate with each transaction. Challenge: transaction charged illegally high interest rates (usury) and therefore the contract was illegal.
- Plaintiffs argued that *Prima Paint* did not apply because contract resulting from fraud is voidable, whereas an illegal contract, such as this one, is automatically void.
- Florida Supreme Court agreed with plaintiffs, relying upon Florida public policy (no severability).
- U.S. Supreme Court: arbitration clause is “severable” from the rest of the contract as a matter of federal law. Illegality of the rest of the contract does not defeat the arbitration clause.

--*Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

Challenge to Arbitration Clause: Unconscionability of Clause

- Direct-mail advertising franchise dispute in California. Clause provided for AAA arbitration in Massachusetts.
- Plaintiff sought to block arbitration, arguing that the arbitration agreement itself was unconscionable under California law.
- The U.S. Court of Appeals for the Ninth Circuit held that the courts (not the arbitrator) should determine whether the agreement to arbitrate was unconscionable.

-- *Nagrampa v. MailCoups, Inc.*, No. 03-15955 (9th Cir. 2006).

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IV. Challenges, Enforcement, and Recognition of Arbitral Awards



What Happens After The Award? (Federal Arbitration Act)

- Motion to confirm (1 year), motion to vacate, modify or correct (three months)
- Expedited procedure (motion rather than lawsuit)
- If no grounds for vacating the award, judgment is entered. Effect is that award is treated as a judgment of the court.

What Happens After The Award? (New York Convention)

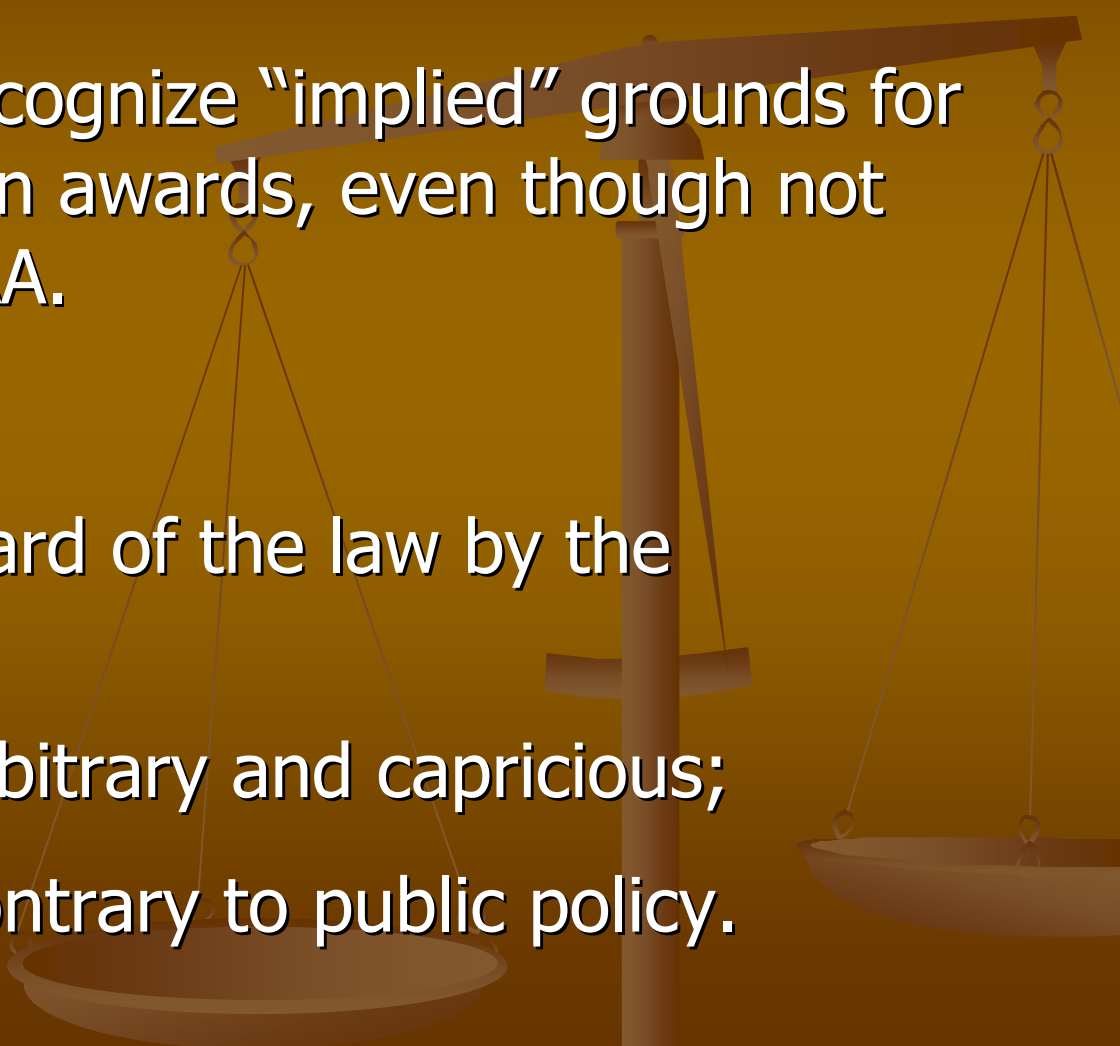
- Confirmation vs. recognition
- N.Y. Convention imposes treaty obligation to enforce qualifying awards entered outside the jurisdiction where recognition is being sought
- “There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.” (Article III).

Grounds for Vacating Award: Federal Arbitration Act

- Where the award was procured by corruption, fraud, or other undue means.
- Where there was evident partiality or corruption in the arbitrators, or either of them.
- Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

--9 U.S.C. § 10.

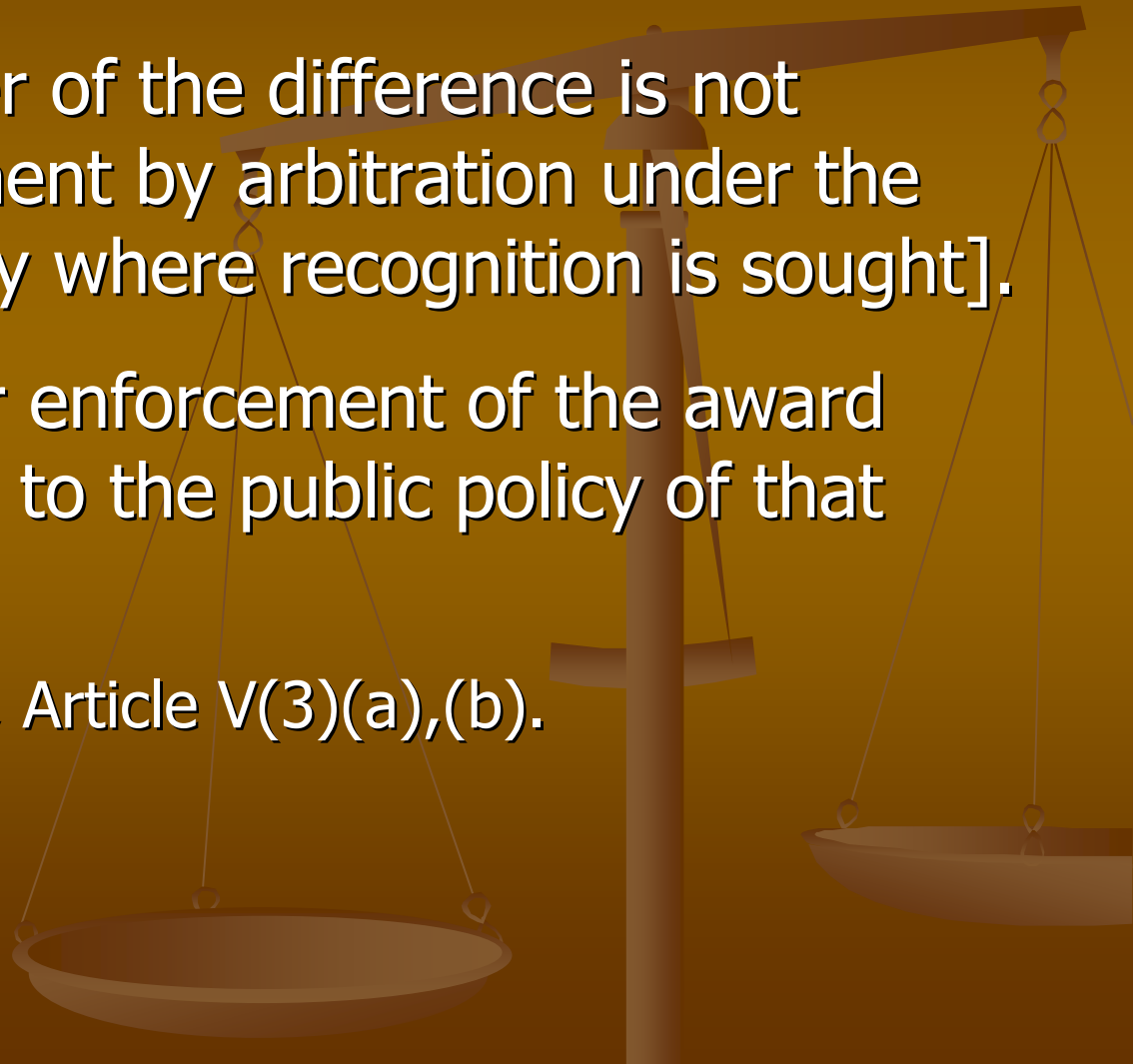
Grounds for Vacating Award: Federal Arbitration Act

- The courts also recognize “implied” grounds for vacating arbitration awards, even though not specified in the FAA.
 - These include
 - Manifest disregard of the law by the arbitrators;
 - The award is arbitrary and capricious;
 - The award is contrary to public policy.
- 

Grounds for Non-Recognition: New York Convention

- The subject matter of the difference is not capable of settlement by arbitration under the law of [the country where recognition is sought].
- The recognition or enforcement of the award would be contrary to the public policy of that country.

--New York Convention, Article V(3)(a),(b).



Grounds for Non-Recognition: New York Convention

- The parties ... were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

--New York Convention, Article V(1)(a),(b).

Grounds for Non-Recognition: New York Convention

- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

--New York Convention, Article V(1)(c).

Grounds for Non-Recognition: New York Convention

- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.
- The award has not yet become binding on the parties or 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.

--New York Convention, Article V(1)(d),(e).

Limitations of N.Y. Convention

- Primary vs. secondary jurisdictions
- N.Y. Convention's treaty obligation to enforce awards from elsewhere does not apply to "domestic" awards.
- U.S. courts may set aside "domestic" awards for grounds not specified in the N.Y. Convention – including the "implied" grounds under the FAA.

--*Yusuf Ahmed Alghanim & Sons v. Toys "R" Us*, 126 F.3d 15 (2d Cir. 1997); *but see Industrial Risk insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434 (11th Cir. 1998).

Limitations of N.Y. Convention

- N.Y. Convention permits non-recognition where grounds are met. However, it does not require non-recognition.
- Case involving Egyptian military procurement contract; arbitration in Egypt; contractor won, but Egyptian court nullified the award.
- The U.S. court granted the contractor's motion to enforce the award in the U.S., even though the award had been "set aside ... by a competent authority."

--*Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.C. Cir. 1996)

Efforts to Change Scope of Review

- One court rejected attempt to expand the grounds for vacating an award to include (a) findings of fact not supported by substantial evidence and (b) conclusions of law erroneous. *Kyocera Corp. v. Prudential-Bache Trade Services, Inc.*, 341 F.3d 987 (9th Cir. 2003).
- Another court enforced the parties' agreement to expand the grounds for vacating an award to include errors of law by the arbitrator. *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995).
- A third court has held that the parties could not restrict the grounds for review under the FAA – and could not even exclude the implied ground of “manifest disregard of the law.” *Hoelt v. MVL Group, Inc.*, 343 F.3d 57 (2^d Cir. 2003).

Anti-Enforcement Injunctions: The *Pertamina* Case

- Dispute re electrical power plant in Indonesia. Pertamina (with government support) hostile to arbitration.
- Arbitration in Switzerland; claimant wins.
- Pertamina files action to vacate in Switzerland – unsuccessful (case is dismissed).
- Claimant seeks to enforce in Texas (also Hong Kong and Canada).
- Pertamina begins case in Indonesia. Indonesian court sets aside the Swiss arbitration award and issues an injunction ordering the claimant not to try to enforce it anywhere (including Texas).

Anti-Enforcement Injunctions: The *Pertamina* Case

- The trial court in Texas understands the Indonesian court's order as an interference with its jurisdiction – issues an injunction ordering Pertamina to dismiss the Indonesian case and to protect the claimant against any penalties by the Indonesian court.
- The trial court in Texas also does not consider that the Indonesian court had “primary jurisdiction” to vacate the award, and so enforces the award in Texas.
- The appellate court in Texas agrees that the award should be enforced, but reverses the trial court's injunction, as the United States is also not a “primary jurisdiction” with authority to affect proceedings in other countries.

--*Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Negara*, 364 F.3d 274 (5th Cir.)

- Issues with appellate court's analysis.

CONCLUSION

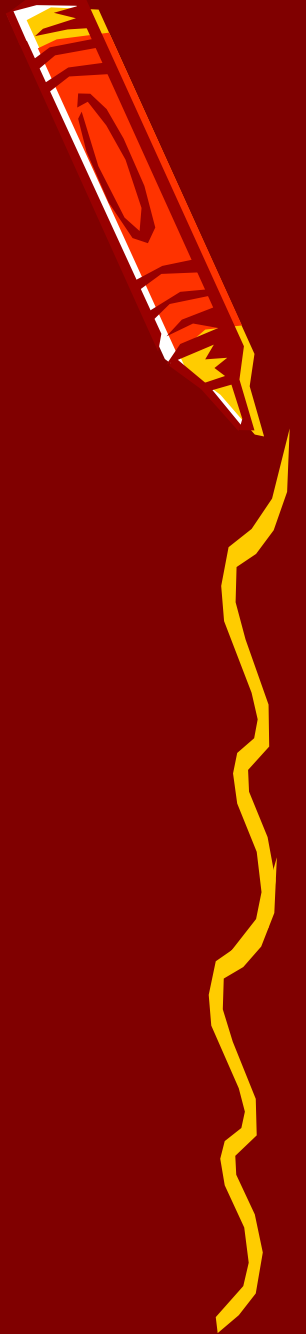
Flexibility

Innovation & Creativity

Legal Issues

Issues of International Significance

Fun



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