International Commercial Arbitration For Law Students (2nd Edition)

By Jeffrey H. Dasteel
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2. The Role of International Commercial Arbitration in the Resolution of Cross-Border Disputes

Parties to a cross-border dispute have a number of alternatives when deciding how the dispute will be resolved. When voluntary party negotiations or mediation fail to resolve the dispute, the parties can elect self-help, litigation in one or more domestic courts, or private binding arbitration. While self-help remedies and litigation in domestic courts can be carried out without the cooperation of the other parties to the dispute, binding arbitration is a voluntary process to which all necessary parties must agree. Parties may agree to binding arbitration after a dispute arises and while engaged in domestic court litigation, before a dispute arises as a part of the overall commercial arrangement between the parties, or as a separate agreement entered into before or after execution of the related commercial agreement.

This chapter provides a general discussion of matters parties should consider when determining whether to pursue litigation in domestic courts or binding international commercial arbitration.

2.1 Litigation Of Cross-Border Disputes In Domestic Courts

The object of any litigation is to resolve a dispute between the parties in a manner that disposes of all pending issues in a final and enforceable manner. In domestic court litigation, the court issues a judgment, which is subject to normal appellate rights. The final judgment is enforceable in the jurisdiction where the judgment was issued. Typically, the judgment precludes future litigation over the same issues in that jurisdiction as a matter of res judicata or claim preclusion. Before the significant rise in cross-border transactions, it was commercially sufficient to bring a lawsuit in a single jurisdiction to get final resolution of a dispute between commercial parties. However, with the increasing frequency of cross-border transactions involving multiple jurisdictions, a single judgment in a single domestic court may not finally resolve the dispute.

Suppose a company located in the United States enters into a contract with a company located in China for the Chinese company to produce auto parts for delivery to the American company’s manufacturing plant in Mexico. Where would any disputes regarding performance under the contract take place? The answer is that litigation potentially could take place anywhere a court would accept jurisdiction over the parties and the contract. The three most obvious places are China, the United States and Mexico. However, there is nothing about international law that precludes the parties from litigating the case elsewhere in the world if, for example, one of the companies has assets located in that other possible jurisdiction. The only practical limitation is whether the court in the designated jurisdiction will determine that it has jurisdiction over the subject
matter and the parties sufficient to enter a judgment enforceable in that jurisdiction.

Three Possible Locations For Domestic Litigation

Whether a judgment entered in one jurisdiction will be enforceable in another jurisdiction is uncertain. There is a significant risk in the above example that each company would initiate litigation in its home jurisdiction hoping for a home court advantage. Assuming the domestic courts in China and the United States each took jurisdiction over the dispute, not only would there be a multiplicity of litigation, but there would be the very real possibility of inconsistent judgments. In the event of inconsistent judgments, where, how and to what extent each judgment could be enforced would be subject to grave doubts. In the end, there is a significant risk that no amount of litigation in domestic courts would actually resolve the parties’ disputes in an effective or final manner.

2.2 The Absence Of International Treaties Enforcing Foreign Judgments

Perhaps in a more perfect world, at least from the perspective of companies engaged in cross-border transactions, there might exist an international legal system that would provide for the international enforcement of judgments properly entered in a single, objectively fair jurisdiction. However, no such legal
system exists and there exist no generally applicable international treaties requiring that countries around the world enforce domestic judgments entered in other jurisdictions. The reason for this may be the unwillingness of sovereign nations to make their citizens involuntarily subject to the judicial systems of other countries or it may simply be a mistrust of the legal systems of other jurisdictions.

There are several considerations at work here. Judicial systems around the world provide litigants with differing rights and obligations as well as different means of adjudication. The United States is famous for its jury trial system, even with respect to complex commercial cases, and the availability of punitive damages for commercial torts. The United States also is well known for extensive rights of discovery, including depositions, production of documents, interrogatories and requests for admission. Other jurisdictions provide little or no discovery and do not provide for punitive damages in commercial disputes. Juries generally are unavailable for commercial disputes outside the United States, even in other common law jurisdictions.

Parties, naturally, feel more at home in the domestic courts of their home countries. An American company may feel very uncomfortable having its case heard in a Chinese court in the Chinese language. Understandably, a Chinese corporation may feel equally uncomfortable having the same case heard before an American jury in English. An American court may view the outcome or procedure in a Chinese court as unjust and contrary to the standards of justice in the United States and vice versa. In the end, it will be a significant challenge to get the United States to accept as a matter of treaty all judgments entered in China and to require American courts to enforce all such judgments. One can easily imagine that China would have a hard time accepting as a matter of treaty enforcing all judgments rendered in the United States, especially those imposing huge punitive damages awards for commercial conduct.

A key to the problem of cross-border enforcement of domestic court judgments is that the party resisting enforcement may have been hauled into a foreign court involuntarily. It is, then, important for the court in the country of enforcement to determine whether the resisting party participated voluntarily in the foreign proceedings and whether those proceedings were fair under the standards of justice in the jurisdiction of enforcement. Using the above China-United States example, was it fair to bring the Chinese company into a court in, for example, California? Were the judicial proceedings and judgment rendered in California fair and reasonable under Chinese judicial standards? In conducting its analysis, the Chinese court, in the absence of some international treaty regarding the enforcement of foreign judgments, would apply its own standards of justice and may review the outcome of the California judicial proceedings on the merits leading to what may amount to a second trial.

Ultimately, the absence of a generally applicable international treaty enforcing foreign court judgments makes the ultimate outcome of domestic court
litigation unpredictable. If a party does not know whether a judgment entered in one jurisdiction will be enforceable in any other jurisdiction, then the risk of engaging in the underlying transaction is increased. That increased risk is an impediment to cross-border transactions.

Regional treaties regarding the enforcement of foreign judgments do not solve the lack of a generally applicable international treaty. For example, European Union Council Regulation (EC) No. 1215/2012 governs jurisdiction, recognition and enforcement of judgments in civil and commercial matters. This regulation, however, only applies to the member states of the European Union and judgments made in those states. Thus, though very useful when operating within the European Union, EC No. 1215/2012 is of no assistance when attempting to enforce a judgment made in a European Union member state in a jurisdiction outside the European Union or when attempting to enforce a judgment made outside the European Union in one of the European Union member states.

2.3 Jurisdictional Problems For Commercial Disputes

In addition to the general problem of cross-border enforcement of domestic court judgments, there is the specific concern of court jurisdiction.
Under United States law, the issue is one of personal jurisdiction over the parties to the litigation. Under relevant United States Supreme Court case law due process requires sufficient contacts in the jurisdiction to give the domestic court power over the non-domestic party with respect to the subject dispute. This may be a question of general jurisdiction over the party where the party has systematic and extensive contacts with the jurisdiction, or specific jurisdiction where the party engaged in sufficient conduct in the jurisdiction regarding the subject matter of the dispute to give the court power to resolve that specific dispute. Other jurisdictions have similar considerations when determining under their own domestic laws whether it is appropriate to haul a citizen from another country into that particular domestic court. Because there is no universal standard for determining the reach of personal jurisdiction, it can be expected that the willingness of domestic courts to exert jurisdiction over non-citizens will vary widely from jurisdiction to jurisdiction.

In addition to personal jurisdiction, the domestic court must have subject matter jurisdiction over the matter in dispute. The subject matter of the dispute must be of such magnitude and character that it falls within the court’s authority. There are in many court systems around the world allocations of jurisdiction among the courts such that certain types of disputes are handled by different classes of courts within the judicial system. For example, common contract disputes may be handled by commercial courts while other types of disputes may be handled by specialty courts, e.g., patent courts. In the United States, federal courts are courts of limited jurisdiction and state courts are courts of general jurisdiction. Thus, a cross-border dispute may be of such a character or magnitude that it can only be litigated in a state court in the United States and only in a specialized court in another jurisdiction.

Further, some types of disputes may not be amenable to litigation in private law courts. For example, it may be against the public policy of a particular jurisdiction for any entity other than a public entity to enforce wage and hour laws or securities laws. In such jurisdictions, it would not be possible for a private party to bring an action in domestic court to enforce such rights.

2.4 Venue Of Domestic Litigation And The Possibility Of Multiple, Concurrent Proceedings

Venue and convenience of the forum also are important considerations when a commercial matter is subject to domestic litigation. Many of the cross-border commercial agreements that leave resolution of disputes to domestic courts provide for permissive or mandatory jurisdiction in specific domestic courts. For example, in the automobile parts manufacture agreement between the Chinese company and the American company, hypothesized above, it is possible for the parties’ contract to provide for mandatory venue in the federal court in the Central District of California together with consent to personal jurisdiction in that court.
The effect of a mandatory venue agreement may result in a single litigation proceeding, but not necessarily so. One of the parties to the agreement may challenge the mandatory venue provision by initiating litigation in another forum. In that event, the question will be whether the domestic court in the other forum will enforce the mandatory venue clause from the parties’ agreement. In the event the other forum does not honor the mandatory venue clause, multiple simultaneous proceedings may result.

In addition to the possible initiation of litigation in another forum, one of the parties may challenge venue in the initial forum under the doctrine of forum non-conveniens. The doctrine of forum non-conveniens generally applies when the selected forum bears little or no relationship to the dispute. Thus, notwithstanding a mandatory venue clause in a commercial contract, a court in the selected forum may refuse to take jurisdiction over the matter leaving identification of proper venue over the dispute in disarray. In some jurisdictions, the court may require some measurable activities in the selected jurisdiction to justify use of court resources to resolve the dispute; in other jurisdictions, the mere fact that the parties have agreed that the domestic courts of that jurisdiction should resolve the otherwise unrelated dispute is sufficient to support use of that forum’s courts.

Once again referring to the hypothesized China-US-Mexico auto parts contract, suppose all of the witnesses and the main offices of the parties are located in Hong Kong. Notwithstanding a venue selection clause designating a federal court in the Central District of California, a Chinese court may decide that California is not a convenient forum and permit litigation in Hong Kong courts. The Chinese court may make this determination without regard to whether the federal court in the Central District of California agrees to cede venue to the Hong Kong court.

In the absence of a mandatory venue clause the likelihood of litigation in multiple forums increases. Indeed, many commercial contracts provide for non-exclusive forums for the resolution of disputes. In that event, each party to the dispute must consider whether litigation in its home domestic court or some other forum represents an advantage in the resolution of a pending dispute. Assuming multiple litigation forums, there is a substantial risk of inconsistent judgments. Presumably, the domestic courts in the jurisdiction where a judgment is issued will enforce the domestic judgment rendered there rather than the conflicting foreign judgment, thus leaving resolution of the dispute unclear. Where there are assets in jurisdictions outside the parties’ home courts, there presumably would be a battle in such third-party jurisdictions to enforce one foreign judgment over another foreign judgment, again leading to uncertain results.

For example, suppose the Chinese company and US company each obtain court judgments in their home jurisdictions. Presumably, US courts will enforce the US judgment and Chinese courts will enforce the Chinese judgment. However,
what will happen if the US company has assets in Indonesia and the Chinese company takes its Chinese judgment to Indonesia for enforcement against the US company’s assets located there? The Indonesian court would then have to decide whether to enforce the Chinese domestic court judgment, the US domestic court judgment, or neither. In the case that the Indonesian court respects neither judgment, the parties would then be required to re-litigate the merits of the dispute in Indonesian domestic courts.

2.5 Comity As A System Of Enforcement Of Foreign Judgments

At first blush, it may appear that the absence of treaties to enforce foreign judgments results in chaos. Fortunately, that is not entirely the case. Although cross-border litigation may be messy and frequently result in a multiplicity of litigation, the doctrine of comity acts as a calming influence. The doctrine of comity permits a court in one jurisdiction to enforce the judgment of a court in another jurisdiction or to stay its own proceedings in favor of existing proceedings in another jurisdiction.

For example, suppose English Company, plc. and Argentinian Company, s.a. are participants in competing lawsuits against each other in both England and Argentina. The court in England may determine as a matter of comity to stay its own proceedings in favor of the existing proceedings in Argentina. In the event of a judgment in Argentina, the court in England may give comity to that judgment and enforce it as a judgment in England, thereby eliminating multiplicity of litigation.

In common law jurisdictions, the doctrine of comity may be based solely on court precedent. In other jurisdictions, comity may be enshrined in statutes that set forth the standards under which a court in those jurisdictions will defer to a court in another jurisdiction. The standards by which a court in one jurisdiction gives deference (or comity) to a court in another jurisdiction frequently is left to the sound discretion of the court that is asked to defer its own jurisdiction in favor of another court’s jurisdiction. Comity is discretionary because, absent a treaty, as a matter of sovereignty, a court in one jurisdiction will not be required to give up jurisdiction to a court in another jurisdiction.

Whether the courts of one jurisdiction will give comity to the courts of another jurisdiction frequently is based on (1) whether the judicial procedures in the jurisdiction to be given comity are perceived to be fair, (2) whether the courts in the jurisdiction to be given comity provided the parties with reasonable due process in the dispute, (3) whether the courts in the jurisdiction to be given comity had personal jurisdiction of the parties, and (4) whether the courts in the jurisdiction to be given comity exercise reciprocity with respect to the judgments and proceedings in the jurisdiction that is being asked to grant comity.
There are two basic types of **comity** requests. First, a party may ask a court to suspend pending proceedings in favor of on-going proceedings in another jurisdiction. Under this form of **comity**, the court granting **comity** is merely allowing the proceeding in the other jurisdiction to finish first. A court granting this kind of **comity** is not making a final determination that it will abide by whatever the other court concludes. Whether a court will grant **comity** to the judgment in the other proceeding is left for another day.

The second type of **comity** is where a party asks a court in one jurisdiction to enforce a judgment obtained in another jurisdiction as though that foreign judgment were a judgment of the court in the jurisdiction in which **comity** is sought. The standards applied by the court in which **comity** is sought likely will be stricter than in the first kind of **comity** because if the court grants **comity** to the foreign judgment, the litigation in the jurisdiction in which **comity** is sought will terminate and the foreign judgment will be granted preclusive effect.

Using the English Company-Argentinian Company example, above, suppose each company files an action in its home jurisdiction. Further suppose that the Argentinian Company files an application in the English court to stay the English court proceedings pending the outcome of the action in Argentina. The Argentinian Company may argue that it filed its action first, that Argentina is a convenient and fair forum for the resolution of the dispute between the parties, that it properly has personal jurisdiction over the English Company, and that English courts routinely enforce the judgments of Argentinian courts. If everything the Argentinian Company pleaded is true, the English court may be bound under English law to exercise **comity** and stay the English court action pending the outcome of the Argentinian action. Once the Argentinian court issues its judgment in the case, the English court must make a second, independent determination as to whether it will enforce the Argentinian judgment as a matter of **comity**.
2.6 Foreign Money Judgment Acts: A System To Enforce Foreign Money Judgments

The problem with getting a judgment in the courts of one country and then enforcing that judgment against assets or a party located in another country is that
There is no universal regime giving full faith and credit to such judgments. There may be bilateral, multilateral or even regional treaties that provide for the enforcement of a judgment obtained in one jurisdiction in the courts of a nation that is a signatory to such a treaty, but those regimes are limited in breadth of coverage. In response to this problem, many jurisdictions have some form of statutory solution that provides standards for determining when the courts in that jurisdiction will grant enforcement of money judgments entered in another jurisdiction even where there is no applicable treaty. In the United States, most states have enacted some form of the Uniform Foreign Money Judgments Recognition Act (UFMJRA). States that have adopted a form of the UFMJRA often provide for a summary procedure to determine whether a particular foreign money judgment meets the terms of the UFMJRA for purposes of enforcement.

As compared to the doctrine of comity, UFMJRA statutes provide courts with less discretion as to whether to enforce the foreign money judgment. Less discretion means more certainty of outcome, which is generally considered to be supportive of international commerce. Commercial entities may be more willing to engage in cross-border transactions if they have greater certainty that resolution of disputes in one jurisdiction will be enforced in other relevant jurisdictions.

What this leads to for practitioners is a patchwork of treaties, court doctrines and statutes to look to when attempting to give effect to judgments obtained in one jurisdiction in other relevant jurisdictions. Practitioners will look for bilateral, multilateral and regional treaties, court-made rules of comity, and statutes that permit enforcement of foreign money judgments. In some cases, there is sufficient trust between court systems that nothing more is needed. For example, even though there is no bilateral treaty between the United States and the United Kingdom to enforce their respective judgments, the courts in these two countries tend to respect each other’s judgments sufficiently to make reciprocity of enforcement probable. Nonetheless, even there, each case must be taken on its own merits making enforcement anything but routine.

2.7 Self-Help Remedies To Assist In The Resolution Of Cross-Border Disputes

Faced with uncertainty in the resolution of disputes in domestic courts, parties to commercial agreements may design self-help remedies to shift the burden of uncertainty from one party to the other. One example of a self-help remedy is to require a trading partner to post a letter of credit in favor of the other party. Frequently, the beneficiary of the letter of credit may unilaterally draw down on the letter of credit on the occurrence of certain conditions, which that party alone may determine have been satisfied. The other party is then left to chase the beneficiary of the letter of credit in domestic courts if it disputes its trading partner’s justification for drawing down on the letter of credit.
Even without a formal self-help mechanism negotiated into a contract, there may be de facto self-help mechanisms. For example, in a contract for the sale of goods, where the purchaser is not required to make a payment in advance of receipt of the goods, the de facto self-help mechanism is that the purchaser may refuse to make payment if it is for some reason dissatisfied with the seller’s performance. Similarly, where the seller has received an advance deposit for the purchase of goods, the seller may engage in self-help by refusing to transfer custody of the goods to the purchaser until final payment is received. In these cases, the burden shifts to the party against whom self-help has been invoked to attempt to achieve a resolution in a domestic court.

The practical effect of self-help actions is that the party against whom self-help has been invoked must rely on the domestic courts of the other party’s jurisdiction or the domestic courts where the other party has assets to achieve a satisfactory resolution to the dispute.

2.8 The International Commercial Arbitration Solution

The uncertainties associated with domestic litigation, including the possibility of an unfair forum, multiplicity of litigation, and uncertainty of enforcement, have led many commercial entities to seek a private law solution for the resolution of commercial disputes. The most popular private law solution is binding arbitration. Arbitration is distinguished by the voluntary submission of disputes to a private arbitrator for final determination under procedures determined by the parties.

International commercial arbitration is a voluntary system of private law primarily used for cross-border transactions and for when parties anticipate that after having obtained a litigation outcome in one jurisdiction they will need to enforce that litigation outcome in other jurisdictions. Indeed, it is the latter consideration that is the foundation of international commercial arbitration. An essential feature of international commercial arbitration is the presence of one or more of the following elements: (1) an arbitration award made in one jurisdiction and enforceable in another jurisdiction; (2) the participants in the arbitration are citizens of different nations; or (3) the subject matter of the arbitration is “international.” Another key feature of international commercial arbitration is the “commercial” nature of the dispute. Although the definition of “commercial” may vary from jurisdiction to jurisdiction, it does not include criminal matters or, in most cases, family law matters. In some jurisdictions, “commercial” does not include employment matters or consumer matters.

The fundamental idea behind international commercial arbitration is to provide a voluntary dispute resolution mechanism the parties consider to be fair and that has sufficient hallmarks of neutrality so the parties will have confidence in both the process and the outcome. Hopefully, the parties will have sufficient
confidence in the process and outcome that they will voluntarily comply with the resulting arbitral award. It is typical in party-agreed regimes for there to be an agreement to hold the proceedings in a location perceived to be neutral and to provide for the appointment of one or more neutral arbitrators using a mechanism that prevents one of the parties from gaining an unfair advantage in the arbitrator selection process. In that regard, some international arbitration rule sets provide preferences for arbitrators who do not share the same nationality with any of the parties. The procedures for conducting the arbitration are designed to give equal dignity to all parties, to provide for a fair hearing on the merits of the dispute taking into account that the parties may come from different legal systems, and to provide a process to issue an arbitral award that will be respected by all participants in the arbitration and enforcing courts.

Of course, the international commercial arbitration solution is only as good as the mechanism to enforce any resulting arbitral award. The parties want a final resolution to their dispute. If the parties agree to arbitrate their disputes, but the resulting arbitral award cannot be turned into a judgment that is enforceable in relevant jurisdictions, then the process will have been a failure. As discussed in detail in Chapter 3, below, there is an international mechanism for the enforcement of international arbitration awards, the so-called New York Convention. The New York Convention is an international treaty with 150 signatory nations that provides for the recognition and enforcement of international arbitral awards and protects parties against domestic litigation commenced in derogation of agreements to arbitrate.

Although the New York Convention is the most significant international arbitration treaty, there are other international arbitration treaties, including the Washington Convention for the resolution of investment disputes, and regional treaties, such as the Panama Convention for the Americas and the European Union’s treaty for the enforcement of international arbitration awards. There also are bi-lateral and multi-lateral treaties providing for the enforcement of international arbitral awards.

As detailed in Chapter 4, the New York Convention is implemented in signatory nations through statutes that interpret the general provisions of the treaty and provide for enforcement of its terms in the domestic courts of the signatory nations. The statutes implementing the New York Convention provide a mechanism for a party to an arbitration agreement to take an arbitral award, which is essentially a creature of private contractual law, and obtain a judgment in a domestic court under the standards provided for in the New York Convention. In some cases, the signatory nations enact specific legislation to implement the New York Convention. In other cases, signatory nations rely on compatible domestic arbitration law.
2.9 How International Commercial Arbitration Is Different From And The Same As Domestic Arbitration

Treaties for the enforcement of international arbitration awards by their terms do not apply to domestic arbitration awards. As discussed in Chapter 9, below, international arbitration procedures generally attempt to meld the litigation methods of diverse legal systems, while procedures associated with domestic arbitrations may closely resemble domestic litigation techniques. Domestic arbitrations are subject to domestic arbitration law, which may permit a wider variety of subject matters to be arbitrated. For example, it may be possible under domestic arbitration law to arbitrate family law disputes, while international arbitrations generally are limited to commercial disputes. Recognizing the differences between domestic and international arbitrations, many jurisdictions have different arbitration statutes applicable to domestic and international arbitrations. Critically, the procedures for enforcement of domestic arbitration awards may be different from those applicable to international arbitrations. Domestic courts may have means to review domestic arbitration awards unavailable under applicable international treaties, including merits-based reviews unavailable for international arbitral awards.

For example, in the United States, Chapter 2 of the Federal Arbitration Act generally governs recognition and enforcement of foreign arbitral awards. Chapter 1 of the US Federal Arbitration Act governs domestic arbitration awards. The grounds to refuse enforcement of foreign arbitral awards in Chapter 2 of the Federal Arbitration Act are limited to those included in the New York Convention, which though similar to the grounds available for US domestic arbitration awards are different. In addition, the procedures to apply for confirmation of a domestic
arbitration award, though similar, have at least one key difference. The statute of
limitations to make an application to enforce a US domestic award is one year,
while the statute of limitations to enforce a covered foreign arbitral award is three
years.

For all the differences that may exist procedurally between domestic and
international arbitrations, there are key similarities. Whether domestic or
international, arbitration is a voluntary process to reach a binding resolution to a
dispute.¹ Arbitrators, whether domestic or international, generally are required to
be neutral. Parties typically are given equal dignity in the proceedings and the
right to a hearing of some sort (due process).

It is important to distinguish between those arbitration awards considered
“international” and those considered “domestic.” Virtually all jurisdictions
consider an arbitration to be “international” when the arbitral award is made in
one jurisdiction and sought-to-be-enforced in another jurisdiction. However, an
arbitration also may be considered “international” where the award is both made
and enforced in the same jurisdiction, but the subject matter of the arbitration
involves transactions or property in another jurisdiction or the parties are citizens
different jurisdictions. As noted below, different nations take differing positions
on what is known as the “territoriality” definition versus the “subject matter”
definition of what constitutes an international arbitration.

2.10 Distinguishing Binding Arbitration From Other Dispute Resolution
Techniques

Binding arbitration should be distinguished from other common
alternative dispute resolution techniques. The most common of these are non-
binding arbitration, mediation, conciliation, and expert proceedings. As noted
below, none of these alternative dispute resolution techniques by themselves is
final and binding in the same way an arbitral award is, nor can any of these
procedures without more be turned into an enforceable judgment.

**Non-Binding Arbitration.** Courts generally lack the power to order parties
to relinquish their rights to a civil trial of their dispute. Accordingly, although
courts may order parties to engage in alternative dispute resolution procedures,
they may not have the power to order parties to engage in binding private
arbitration. There also are times when parties want what is effectively an
advisory opinion as part of their dispute resolution procedure. Under these
circumstances, a court may order, or the parties may agree, to engage in non-
binding arbitration. The key feature of non-binding arbitration is, as the name
implies, neither party is bound by the outcome. In California, for example, non-

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¹ There are, in some jurisdictions, mandatory court-ordered arbitration procedures. Generally, in
those jurisdictions that require arbitration of some disputes, the mandatory arbitrations are not final
and binding, but rather are subject to de novo trial or merits appeals.
binding arbitration is one of the alternatives available to the parties under court-mandated alternative dispute resolution procedures. Following an award in non-binding arbitration, either party has the right to seek a trial de novo before the court.

**Mediation and Conciliation.** Parties always are free to engage in settlement negotiations to resolve their dispute with or without court assistance. Mediation and conciliation procedures are essentially formalized negotiations. Mediation and conciliation use a neutral mediator to facilitate or direct the negotiations between the parties. The key features of mediation and conciliation are: (1) any settlement achieved between the parties must be voluntary, and (2) the parties are not required to reach a settlement. If the parties do achieve a settlement, the settlement generally must be reduced to writing to become enforceable. In some jurisdictions, such as California, the settlement agreement itself is enforceable through a summary court proceeding. In other jurisdictions, a mediation or conciliation procedure that is ancillary to an arbitration agreement requires the parties to obtain a consent award from the arbitral tribunal to become enforceable. For a settlement arising out of a dispute subject to international arbitration to become binding under the New York Convention, the parties must obtain a consent award from a properly constituted arbitral tribunal.

**Expert Proceedings.** There are three types of experts commonly found in private adjudicative proceedings. Much as with experts in court proceedings, party and arbitrator-appointed experts are witnesses intended to assist the arbitrators to decide issues before them. As witnesses, they do not make decisions even if the arbitral tribunal appoints them to be special masters. At most, expert witnesses appointed as special masters make recommendations to the arbitral tribunal on specific issues.

Experts also can be decision-makers either in expert proceedings or as arbitrators. Experts as decision-makers in expert proceedings make final determinations on issues within their designated jurisdiction. Typically, these decisions are subject to review by arbitrators under standards set forth in the parties' arbitration agreement or by domestic courts where there is no arbitration agreement. For example, the parties may have set forth formulae or procedures the expert must follow when conducting the expert proceedings. Where there is an arbitration agreement, the agreement may allocate to arbitrators the power to determine whether the expert properly followed the contractual instructions. Ultimately, in that case, the arbitrators determine whether to confirm or vacate the expert's determination. The arbitrator's decision is then subject to customary judicial standards of review in the appropriate jurisdiction.

Sometimes, parties designate subject matter experts as the arbitrators of a particular dispute. When designated as arbitrator, the expert has all the powers of an arbitrator subject only to the customary judicial standards of review in the appropriate jurisdiction. The key difference between an expert proceeding and an
expert as arbitrator is that the decision in an expert proceeding lacks the legal status of an arbitral award. The decision in an expert proceeding cannot be turned directly into a judgment as can be done with a proper arbitral award. That is the case even if the parties intended the decision-making expert to have the final say on the dispute. Typically, contracts that include expert proceedings provide a procedure for the expert determination to be confirmed by arbitrators so that the resulting arbitral award can be turned into a judgment. If the parties want the expert’s decision to be final and binding they must declare the expert to be an arbitrator by express statement or necessary implication.
Types of Dispute Resolution Proceedings

1. Domestic Arbitration
2. International Arbitration
3. Non-Binding Arbitration
4. Mediation & Conciliation
5. Expert Proceedings

Readings for Chapter 2

Dependable Highway Express, Inc. v. Navigators Ins. Co., Case No. 05-56346 (9th Cir. 2007) (Read Parts I, IV and V only)

Uniform Foreign Money Judgments Recognition Act

Discussion Questions for Readings for Chapter 2

1. The Star Reefer Pool, Inc. case illustrates the problem of when parties to a dispute attempt to litigate that dispute in multiple forums. In this case, Star Reefer Pool attempted to concentrate litigation in the English court by means of an anti-suit injunction. The appellate court in Star Reefer Pool, Inc. described the standard an English domestic court must apply when deciding whether to enter an anti-suit injunction against a party proceeding in a foreign court. What is that standard and does it make sense?

2. Although reversed at the appellate level in the Star Reefer case, of what effect is an anti-suit injunction issued by a court in one country against pending or prospective proceedings in another country? Who is the injunction directed against and how can it be enforced so as to halt proceedings in a foreign court? If you were representing a client who was subject to an anti-suit injunction, how would you advise your client to proceed with regard to a foreign court proceeding that would be in violation of the anti-suit injunction? If your client insisted on commencing proceedings in violation of an anti-suit injunction, do you have any ethical obstacles with regard to your continued representation of your client?

3. Other than an effective anti-suit injunction, is there a means by which litigation in multiple forums could have been avoided in the Star Reefer case? What is likely to happen if the Russian and English courts render conflicting judgments?

4. Are the “comity” standards applied in the Star Reefer and Dependable Highway cases the same? In the Dependable Highways case, why did the US court decline to grant comity to the English court’s anti-suit injunction? With an English court having issued an anti-suit injunction and a US court having declined to grant comity to the English court, what are the various outcomes and consequences that can be anticipated?

5. What are the subject matter limitations for judgments under the UFMJA? Are these limitations significant in international commerce?

6. How much discretion does the enforcing court have to review the merits of a dispute under the guise of Section 4 (Grounds for Non-Recognition) of the UFMJA?
7. Would general implementation of the UFMJA both in the United States and in other countries solve the problem of universal enforcement of foreign money judgments?

Hypothetical #1 for Chapter 2

Company U (United States), a furniture manufacturer, sold desks to Company M (Mexico). After delivering the desks to Company M, Company U sent an invoice to Company M for US$1 million. Company M refused to pay for the desks. There is no choice of law clause or dispute resolution clause (i.e., no arbitration agreement) in the contract between the parties.

Discussion Questions for Hypothetical #1 for Chapter 2

1. What are Company U’s options to try to recover the US$1 million?

Required student preparation:

Doctrinal considerations: (a) which courts are likely to have jurisdiction over a commercial dispute between a US company and a Mexican company; (b) what factors will a domestic court likely consider when determining whether it will exert jurisdiction over a dispute.

Counseling considerations: (a) when selecting a means to resolve the dispute, discuss why the various means of resolution are or are not advantageous to Company U; (b) are there non-domestic court options that Company U might try and why might those options be superior to domestic court litigation.

Ethical considerations: (a) are there ethical considerations to be evaluated when determining the means to recover the US $1 million; (b) if so, what are they?

2. Exercise: Divide the class into attorneys representing Company U and attorneys representing Company M. Each student should draft dispute resolution provisions on behalf of the selected client to protect the client against the possibility of the other company’s default. Each student then will
negotiate the dispute resolution provisions with another student in the class who represents the other party.

**Required student preparation:**

In advance of class, each student will prepare dispute resolution provisions for the selected client’s benefit. For each dispute resolution provision, the student will prepare a short paragraph explaining why that particular provision is beneficial to the selected company and fair to the other party. During negotiations, the students will select one of them to maintain the negotiated draft on that student’s laptop. The outcome of the exercise is an agreed set of dispute resolution provisions for the contract between Company M and Company U.

**Hypothetical #2 for Chapter 2**

Company E (England) and Company C (China) enter into a contract for Company E to build a gas turbine for a power plant Company C is constructing in the Philippines for the Philippine government. Once installed, the turbine does not operate properly. The contract includes an arbitration agreement.

**Discussion Question for Hypothetical #2 for Chapter 2**

**Exercise:** Each student should select Company E, Company C or the Philippine government as his or her client. Each student will then make a list of provisions to include in the arbitration agreement to make sure the arbitration proceeding will be fair, impartial and effective from the selected client’s perspective. Students will then be divided into groups of three (one student representing Company E, one student representing Company C, and one student representing the Philippine government). The groups of three will negotiate a single arbitration agreement.
Required student preparation:

In advance of class, each student will prepare a draft arbitration agreement for the selected client’s benefit. For each provision in the arbitration agreement, the student will prepare a short paragraph explaining why that particular provision is beneficial to the selected company and fair to the other parties. During negotiations, the three students will select one of them to maintain the negotiated draft on that student’s laptop. The outcome of the exercise is a single arbitration agreement.
15. **Sovereign Immunity, the International Convention for the Settlement of Investment Disputes and Bilateral Investment Treaties**

The thrust of this course is international commercial arbitration between non-sovereigns. There is, however, a subset of international arbitration that must be considered due to its growing importance in the worldwide economy. There are increasingly disputes between foreign investors and the nations in which they have invested. Foreign investors want to be assured that in the event a dispute arises concerning their investment they have a neutral forum in which to resolve that dispute. What if, for example, an oil and gas company makes a $2 billion investment in the oil production infrastructure of a foreign nation only to have its investment nationalized? What protections are there for such an event if the nationalization process does not provide fair compensation? Due to its increasing importance in the world economy, this topic is worthy of an entire course. This chapter addresses a few key issues in investor disputes and is very much summary in nature.

The first and most important problem when there is an action involving a sovereign is whether that sovereign in some manner has waived its right to sovereign immunity. It is a basic tenet of international law that sovereign nations cannot be sued in the domestic courts of other countries unless in some manner they agree to be sued. There are two basic theories of sovereign immunity: (1) absolute immunity, and (2) restrictive immunity. In jurisdictions that follow the “absolute” theory of sovereign immunity, the sovereign is immune from all manner of suits regardless of the subject matter, unless there is a specific waiver. For jurisdictions that follow the restrictive theory of sovereign immunity, the sovereign is immune from all suits except when the sovereign is engaged in routine commercial activity.

In the United States, the Foreign Sovereign Immunities Act governs whether a foreign country has agreed to be sued. The Foreign Sovereign Immunities Act provides that “[s]ubject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”20 There are a series of exceptions, but the exception of importance to this topic is found in subdivision (a)(6):

> “[T]he action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning

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a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if

(A) the arbitration takes place or is intended to take place in the United States,

(B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,

(C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or

(D) paragraph (1) of this subsection is otherwise applicable.”

This provision of the Foreign Sovereign Immunities Act essentially permits a foreign sovereign to agree to arbitrate claims for which there existed a waiver of immunity under the Act. Section 1605(a)(2) provides the most common basis for waiver of immunity where “the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.” The so-called “commercial activity” exception applies where the foreign sovereign acts as a commercial entity and not on the basis of its customary sovereign activities (e.g., military and diplomatic activities).

The Foreign Sovereign Immunities Act and similar statutes in other countries are useful for when a sovereign engages in conduct either in a foreign country or that has effects in a foreign country. But, what about where a foreign party contracts with a sovereign to carry out activities in that sovereign’s jurisdiction? Unless there are local laws that permit the foreign party to bring an action in the host country’s courts, there may very well be little recourse for the foreign party in the event of a dispute. Even if there is an ability to bring an action in the sovereign’s jurisdiction, lack of neutrality and enforceability may be significant issues. This especially has been a problem for foreign nationals who invested in a sovereign’s infrastructure only to have their investments nacionalized or made valueless through acts of the sovereign. The practical consequence has been that foreign nationals consider investing in sovereign infrastructure a high-risk proposition.

The answer to the problem of sovereign immunity with regard to foreign investors has come in two parts. First, there is the International Center for the Settlement of Investment Disputes (ICSID) with its Convention on the Settlement of Investment Disputes between States and Nationals of Other States. There are 159 signatories to this international treaty. The ICSID Convention set up a
mechanism for foreign investors and sovereigns to agree to arbitrate disputes arising out of foreign investments in a neutral and enforceable manner. Under the ICSID Convention, the foreign investor and the sovereign can agree to international arbitration under a variety of rule sets. They can agree to dispute resolution procedures in advance of binding arbitration. Or, they can leave resolution of their disputes to the domestic courts of the sovereign.

The second answer to the investor confidence problem has been a series of bilateral investment treaties between the nation of which the investor is a citizen and the other sovereign. Bilateral investment treaties (BITs) provide a range of dispute resolution mechanisms that may be available to the parties. The strongest treaties give the foreign investor the absolute right to proceed at some point to binding arbitration against the sovereign. Other BITs provide for binding arbitration only if the sovereign agrees.

15.1 The International Center For The Settlement Of Investment Disputes

The International Center for the Settlement of Investment Disputes (ICSID) is an arm of the World Bank and is funded, at least in part, by subscriptions to the World Bank. ICSID was established to administer the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States. The fundamental feature of this Convention is that if a signatory state and a national of another signatory state agree to resolve an investment dispute through arbitration, they are both bound by that agreement and cannot later revoke it. The award in such arbitration is binding on both the state and the national from another state and must be treated like a court judgment in all signatory states.

15.1.1 Jurisdiction under the ICSID Convention

There are three essential elements to jurisdiction under the ICSID Convention. First, the dispute must be between a signatory or contracting state and a national of another signatory or contracting state. Second, both parties must have consented to have their dispute finally resolved by arbitration under the ICSID Convention. Third, the dispute must arise directly out of an investment between the signatory state and the national of another signatory state.

There can be difficulties when determining whether a person or legal entity is a national of another contracting state. There are two points in time to consider when determining nationality of the investor: The time when the agreement to arbitrate was made and the time when the ICSID Secretariat registers the request for arbitration under Article 36, Section 3 of the Convention. There is no jurisdiction under the Convention for natural persons who are citizens of the state.
where the investment takes place even if that person has dual citizenship and, therefore, also is a citizen of another contracting state.

For legal entities (e.g., corporations), nationality is controlled by the juridical citizenship of the entity. However, even if the legal entity is a citizen of the state in which the investment was made, there may be jurisdiction under the Convention if, because of foreign control over the entity, the parties have agreed that the legal entity should be treated as a citizen of another contracting state.

15.1.2 Arbitration under the Convention

The ICSID Convention comes with its own set of arbitration rules, which apply to any arbitration conducted under the Convention unless otherwise agreed. The Arbitration Rules of the Convention provide a detailed set of procedures for the constitution of the tribunal, the conduct of the proceedings and the preparation of any award. With regard to constitution of the tribunal, the parties are free to select the arbitrators of their choice so long as they are of “high moral character” and qualified in matters of law, industry, commerce or finance and capable of acting independently in the proceedings. If the parties are unable to agree on the selection of the tribunal or the appointment of a chair of the tribunal, the Chairman of the Administrative Council of ICSID appoints the chair of the tribunal from an ICSID arbitrator panel.

A distinguishing characteristic of ICSID Convention arbitration is that any arbitration award is reviewable by the Secretary General appointed to administer the ICSID Convention. The request for review may take three forms. First, any party to an award may request an interpretation of the award. The request for interpretation goes to the tribunal that rendered the award, unless that is not possible, in which event a new tribunal will be constituted.

Second, any party to the award may request a revision of the award. That request is made to the Secretary General, who refers the request to the tribunal that issued the award, unless that is not possible, in which event a new tribunal will be constituted. A revision may be requested on the ground of the discovery of a significant fact, which was not known to the tribunal or the applicant and the applicant’s ignorance of the fact was not due to its own negligence.

Third, any party can request annulment of the award. A request for annulment is heard by a special tribunal consisting of three arbitrators appointed by the Chairman of the Commission from an authorized panel of arbitrators. There are five grounds for annulment: “(a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a
serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.”

15.1.3 Recognition and enforcement under the ICSID Convention

Once an award under the Convention becomes final, it is enforceable in any contracting state as a final judgment of that state without any further right of appeal or review. The consequence of this is that a party intending to challenge enforcement of an ICSID award must do so within the ICSID protocol, including the procedures for interpreting, revising or annulling the award. Once those procedures have been exhausted or waived by failure to meet the applicable time frames, the ICSID award is not subject to any further challenge in any contracting state. This finality is a unique feature of ICSID. Recall that under the New York Convention, primary and secondary jurisdictions each have an opportunity to determine whether to enforce a particular arbitration award. Under ICSID, contracting states have no such opportunity.

Finally, Article 54, Section 3 of the Convention provides that “execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.” However, according to Article 55 of the Convention, “nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.” That means that, as much fun as it might be, an investor with an ICSID award in hand will not be able to foreclose on a tank from the debtor’s military arsenal or the building that houses that state’s embassy.

One final note about administration of the ICSID Convention. Unlike most arbitration treaties, all arbitration awards (or, if the parties did not consent, at least the legal reasoning in such awards) are made available publicly online.

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21 ICSID Convention, Article 52, Section 1.
### Key Points for ICSID Arbitration

1. Jurisdiction under ICSID requires three elements: (1) a dispute between a signatory state and a citizen of another signatory state; (2) both the signatory state and the foreign citizen have agreed to arbitrate the dispute; and (3) the dispute must arise directly from the foreign citizen’s investment in the signatory state.

2. The ICSID procedures provide for a review of arbitral awards by a specially appointed ICSID panel of arbitrators for deviation from procedural standards set out in the ICSID convention.

3. A final arbitral award under ICSID must be treated with equal dignity to a domestic court final judgment in all signatory domestic courts.

### 15.2 Bilateral Investment Treaties (BITs)

There are a host of bilateral investment treaties among various nation states. These investment treaties are individually negotiated and bind only the signatory nations (usually, two – hence “bilateral”). That does not mean that arbitration awards arising out of bilateral investment treaties are not enforceable elsewhere. Indeed, arbitration awards arising out of bilateral investment treaties may be ICSID awards if referred to ICSID under the particular terms of the treaty, or they may be generally enforceable under the New York Convention or regional arbitration treaties.

That an arbitration award arose out of a BIT does not say anything about coverage under, for example, the New York Convention. The question is where the award was made and whether the award is considered non-domestic under the law of the place of enforcement. Suppose an award arising out of a BIT between the United Kingdom and Argentina is made in France. Further suppose that the parties to the award are an Argentinian national and the United Kingdom, and the Argentinian national seeks to enforce the award in the United States. The award falls under the New York Convention as implemented in Chapter 2 of the
Federal Arbitration Act because none of the parties to the award is a citizen of the United States and the award was made outside the United States.

However, because the debtor is a foreign sovereign, the Argentinian national will have to show that there is an exception to sovereign immunity. In this case, if the Argentinian national can show that the United Kingdom waived sovereign immunity or otherwise agreed to final and binding arbitration, then the arbitration award may be enforced in the United States, subject to the usual **New York Convention Article V** defenses.

Traditionally, BITs were used to remedy expropriation and unfair or inequitable treatment of foreign investors. However, increasingly, BITs are being used to challenge domestic regulations that interfere with foreign investments even in situations where similarly situated domestic investors would have no claim. For example, a group of Italian nationals who invested in Argentina took advantage of the BIT between Italy and Argentina to bring an ICSID arbitration over their treatment in Argentina's sovereign debt default.²²

Another possible use for a BIT is to remedy the situation where a signatory to the **New York Convention** improperly refuses to enforce an arbitral award. For example, suppose Company A (Australia) obtains an arbitral award against Company B (India) where the seat of the arbitration is England and the award was made in England. Suppose Company A seeks to enforce the award against Company B in India, but the enforcing court in India refuses to enforce the award on grounds not permitted under the **New York Convention**. There is little recourse against Company B without a judgment in India recognizing and enforcing the arbitral award. Assuming there is a bilateral investment treaty between Australia and India, a possible tactic for Company A is to file a claim under the provisions of that treaty alleging that the refusal to abide by the **New York Convention** as a form of expropriation.²³

**Readings for Chapter 15**

ICSID Convention and Rules of Procedure

Bilateral Investment Treaty between the United States and Republic of Argentina


BG Group v. Republic of Argentina (US 2014)

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²³ See White Industries Australia, Ltd. v. Republic of India (Arbitration Award).
Discussion Question regarding Readings for Chapter 15

1. Compare the dispute resolution procedures available in the US-Argentina BIT with the ICSID procedure. How does the BIT interact with ICSID?

2. Compare the level of court review in the BG Group and Blue Ridge Investment cases. Identify the procedural impediments to enforcement of the arbitration awards in each of the cases.

Hypothetical for Chapter 15

The Death Skull Tobacco Company (US) has invested US$100 million in a successful advertising campaign in Argentina. The Death Skull entered into a long-term contract with Argentina Tobacco, Inc. (Argentina) to sell cigarettes in Argentina. Death Skull now has US$400 million per year in gross revenues from its tobacco sales in Argentina. Unfortunately, tobacco smoking in Argentina has resulted in a dramatic increase in smoking related illnesses causing Argentina to spend over US$1.3 billion per year on tobacco related illnesses, which is more than 15% of Argentina’s total expenditures on health care. In response, Argentina has outlawed the sale of cigarettes in Argentina putting Argentina Tobacco, Inc. out of business.

Question for Hypothetical for Chapter 15

Assuming Argentina Tobacco, Inc. is insolvent, what are Death Skull’s options to recover a damage award against Argentina and what do you think are its chances of success for each option?
Necessary Student Preparation:

**Doctrinal Considerations:** This hypothetical requires the student to determine whether Death Skull’s losses are covered under the US-Argentina BIT and, if so, what are the relative merits of the options under that BIT. The student should consider the barriers to enforcement under each option.

**Counseling Considerations:** After consideration of the various options, what is your advice to your client Death Skull as to how to proceed?

**Ethical Considerations:** You are an associate in a large law firm that has been hired by Death Skull to pursue legal action against Argentina. You personally think tobacco companies like Death Skull are immoral and should be put out of business. The partner in charge of the Death Skull account has instructed you to work on the matter on behalf of Death Skull. What do you do?