

WHEN LESS IS MORE: THE INTERNATIONAL SPLIT OVER EXPANDED JUDICIAL REVIEW IN ARBITRATION

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I. INTRODUCTION

Two competing ideas in the area of arbitration, party autonomy¹ and finality,² have caused an international split among countries in deciding whether parties are free to contract for expanded judicial review in their arbitration clauses.³ This divergence has the possibility of leading to anomalous results and disrupting the harmonization of international arbitration rules that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁴ ("NY Convention") was so instrumental in creating. While there is no quick panacea for this problem, the issue has the possibility of damaging the effectiveness of international arbitration as a tool for remedying disputes.

This Note seeks to address these issues and to advise a way to lessen the impact that the conflict may have. The first section provides background regarding the rise of arbitration as a favored method for solving international disputes. The second section

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1. Party autonomy in arbitration means that parties are free to dictate the aspects of arbitration in any manner that they choose. In an often quoted line from Judge Posner, "short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract." Baravati v. Josephthal, 28 F.3d 704, 709 (7th Cir. 1994).

2. Finality in arbitration means that an arbiter's decision is final and binding upon the parties and may be appealed only on limited grounds. Schaefer v. Allstate Ins. Co., 590 N.E.2d 1242, 1245 (Ohio 1992).

3. See *infra* Part II.

4. New York Convention on the Regulation and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter NY Convention]; see also Colloquy, *Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects*, UNITED NATIONS (1999).

discusses the major features of international arbitration and the treaties that are used to enforce them. The third section discusses the conflict in international arbitration between finality and party autonomy and the ways in which different countries address the issue. The fourth section addresses these problems with a series of proposed solutions, outlining their pros and cons. The final section explains why the "less is more" approach is the best way of dealing with the conflict.

II. THE RISE OF ARBITRATION

Despite common belief, the use of arbitration as a means of remedying disputes has a long history.⁵ Some legal historians have traced arbitration's beginnings all the way back to King Solomon and Alexander the Great's father.⁶ Although international arbitration has had a long and storied history, modern international arbitration has only recently become the favored means of settling international disputes.⁷ The increase in international trade and the explosion in globalization have resulted in an increased need for resolving disputes between two parties not subject to the same domestic laws.⁸ The result has been a vast increase in the number of international arbitrations.⁹

Despite the need for a systematic and efficient method for solving international disputes, prior to the adoption of the NY

5. See U.S. Dep't of State, The Alabama Claims, 1862-1872, <http://www.state.gov/r/pa/ho/time/cw/17610.htm> (last visited Mar. 5, 2010) (discussing the famous Alabama Claims cases that arose between the U.S. and Great Britain). The cases arose because Britain, during the American Civil War, had contracted to supply the Confederacy with warships disguised as merchant vessels. *Id.* These vessels were successful in damaging a number of Union ports and vessels. *Id.* The U.S. sought compensation for this damage because Great Britain had broken neutrality laws by supplying the ships to the Confederacy. *Id.* After many diplomatic avenues failed, an agreement was reached which included arbitration. *Id.* The success of the arbitration approach increased the belief in the United States and elsewhere of arbitration's benefits. *Id.*; see also Schaefer, 590 N.E.2d at 1245 (discussing the favored status of arbitration for resolving disputes); Robert V. Massey Jr., *History of Arbitration and Grievance Arbitration in the United States*, http://www.wvu.edu/~exten/depts/ilsr/arbitration_history.pdf (stating that the genesis of arbitration stretches back to King Solomon, to Philip the Second, who used arbitration in 337 B.C., and to England, where arbitration was used to settle commercial disputes as far back as 1224).

6. Massey, *supra* note 5.

7. See Patrick Thieffry, *Europe 1992: New Incentives, Arbitration Expected to Increase*, NAT'L L.J., Mar. 19, 1990, at 21.

8. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638 (1985) (stating that "[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade").

9. *Id.* at 638; see also Thieffry, *supra* note 7, at 21.

Convention, the laws governing arbitration were both varied and inconsistent. For example, after World War II, the United States began enacting bilateral treaties with individual countries to enforce written arbitration agreements.¹⁰ These treaties often had different provisions.¹¹ Therefore, a party entering into a contract was forced to go through the inefficient process of determining which bilateral treaty applied and to satisfy its individual provisions. Furthermore, the bilateral treaties only involved some countries.¹² Therefore, contracting with parties in countries where no agreement existed was inherently risky.¹³

In addition to the bilateral treaties, there also existed two international treaties: the Geneva Convention on the Execution of Foreign Arbitral Disputes of 1923¹⁴ and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927¹⁵ ("Geneva Conventions"). These treaties were some of the first attempts to create a worldwide system of laws to govern international arbitration.¹⁶ However, these treaties created a laborious process of enforcement, and were seen by many businesses as being ineffective in their ability to promote efficient international arbitrations.¹⁷ These difficulties led to the perceived need for a new treaty to govern international arbitration disputes.¹⁸ The United Nations convened a conference in order to draft a treaty to deal with these issues.¹⁹ The NY Convention was the result. The NY Convention was adopted in 1958 by 22 countries and has since grown to include 144 countries.²⁰

10. IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 160 (1992).

11. See generally Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 *YALE L.J.* 1049, 1051-53 (1960) (quoting China, Ireland, Greece, and the Netherlands' arbitration provisions, which are different).

12. See *id.* at 1052 (noting that no arbitration provisions were included in the treaties with Italy and Uruguay).

13. See *id.*

14. *Id.* at 1054.

15. *Id.*

16. Willem Schurmann, Dutch Permanent Member of the U.N. and Chairman of the U.N. Conference on Int'l Commercial Arbitration, Opening Speech for the U.N. Conference on Int'l Commercial Arbitration 4-5 (May 20, 1958) (transcript available at <http://www.arbitration-icca.org/media/0/12114773157730/004.pdf>).

17. JULIAN LEW ET AL., *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* 20-21 (2003); Schurmann, *supra* note 16, at 2.

18. U.N. Conference on Int'l Commercial Arbitration, 3d mtg., May 21, 1958, ¶ 2, U.N. Doc. E.Conf.26/SR.3 (Sept. 12, 1958).

19. Schurmann, *supra* note 16, at 4.

20. U.N. Comm'n on Int'l Trade Law, 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Mar. 5, 2010).

By all accounts, the NY Convention has been an unqualified success.²¹

III. INTERNATIONAL ARBITRATION'S MAJOR FEATURES

A. *The Body of Law*

There are three separate, yet integrated bodies of law that work to develop and formulate international arbitration law: treaties, arbitration administering institutions, and a country's domestic laws.²² Each of these is integrated with one another and works to form the body of law that governs international arbitrations. In addition to these, a fourth contributing source of law, closely related to a country's domestic law, is the United Nations Commission on International Trade Law's ("UNCITRAL") Model Law on International Commercial Arbitration ("Model Law").²³ The Model Law has been used as a guiding force for a number of countries' domestic laws as well as a statement of the international arbitration community's preferred rules for arbitrations.²⁴

The first major source of international arbitration law is treaties. The most important treaty is the NY Convention.²⁵ While there have been subsequent treaties governing international arbitration, these treaties have focused on regional disputes²⁶ or on smaller areas not covered by the NY Convention.²⁷ Despite these other treaties, the

21. THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION* 65 (1989).

22. See MARGARET L. MOSES, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 6-12 (2008) [hereinafter MOSES I].

23. The United Nations Commission on International Trade Law was established on December 17, 1966. G.A. Res. 2205 (XXI), ¶ 1, U.N. Doc. A/6396 (Dec. 17, 1966). The Commission was given the mandate to seek the "harmonization and unification of the law of international trade." *Id.* On December 15, 1976 the UNCITRAL Arbitration Rules were approved by the United Nations General Assembly. G.A. Res. 31/98, ¶¶ 1-2, U.N. Doc. A/RES/31/98 (Dec. 15, 1976).

24. U.N. Commission on International Trade Law, Model Law on International Commercial Arbitration, G.A. Res. 61/33, ¶¶ 1-3, U.N. Doc. A/RES/61/33 (Dec. 18, 2006).

25. See Karl-Heinz Bockstiegel, *The Role of Party Autonomy in International Arbitration*, in AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR 115, 118 (Thomas E. Carbonneau, Jeanette Jaeggi & Sandra K. Partridge eds., 2006).

26. *E.g.*, Inter-American Convention on International Commercial Arbitration, 9 U.S.C. § 301 (2006) (governing, after its completion in 1975, arbitration amongst members of the Organization of American States (OAS)); European Convention on International Commercial Arbitration art. 1, Apr. 21, 1961, 484 U.N.T.S. 364 (governing, after its completion in 1961, disputes between European countries).

27. *E.g.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 22 U.S.C. § 1650 (2006). Completed in 1965, this treaty is used to settle disputes between nationals of one country and the government of another.

vast majority of international arbitrations fall under the NY Convention.²⁸ The NY Convention's purpose is to force signatory countries to recognize arbitration decisions awarded in other countries.²⁹ Therefore, it does not create new substantive law that arbitrators are to use in order to decide the merits of a dispute; rather, it is a system of procedures that dictates when and how an award that has been rendered in one country can be enforced in another.³⁰

The second source of international law is the arbitration administering institutions. These institutions are both public³¹ and private³² and are used by parties to administer the actual arbitration. Arbitration clauses in contracts often refer to one of these institutions as the institution that will conduct the arbitration.³³ Based on the contractual provision, the rules of that particular institution will govern the proceedings.

The third source of international law is an individual country's

28. MOSES I, *supra* note 22, at 7-8.

29. *See id.* at 204-05.

30. *See id.* at 204-07.

31. One such public institution is the China International Economic and Trade Arbitration Commission, which governs arbitrations in China. *See id.* at 12.

32. The three most well-known arbitration administering institutions are all private: International Chamber of Commerce's International Court of Arbitration, London Court of International Arbitration, and American Arbitration Association's International Centre for Dispute Resolutions. *See id.* at 10-12.

33. The major arbitration administering institutions give example arbitration clauses for a practitioner's use in drafting a contract. One example is the following from the International Chamber of Commerce ("ICC"), which is meant to submit the proceeding to mediation first, and if unsuccessful to continue with arbitration conducted by the ICC:

In the event of any dispute arising out of or in connection with the present contract, the parties agree to submit the matter to settlement proceedings under the ICC ADR Rules. If the dispute has not been settled pursuant to the said Rules within 45 days following the filing of a Request for ADR or within such other period as the parties may agree in writing, such dispute 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 of Arbitration.

International Chamber of Commerce World Business Organization ("ICCWBO"), ADR – Dispute Resolution Services, <http://www.iccwbo.org/court/adr/id5346/index.html> (last visited Mar. 5, 2010). A more complete list of suggested ICC arbitration clauses is available at ICCWBO, International Court of Arbitration – Dispute Resolution Services, <http://www.iccwbo.org/court/arbitration/id4114/index.html> (last visited Mar. 5, 2010). A list of suggested arbitration clauses for the London Court of International Arbitration ("LCIA") can be found at LCIA, Arbitration: Rules, Clauses & Costs, http://www.lcia.org/ARB_folder/arb_english_main.htm (last visited Mar. 5, 2010). Finally, a list of suggested arbitration clauses for the International Centre for Dispute Resolutions ("ICDR") can be found at ICDR, Guide to Drafting International Dispute Resolution Clauses, <http://www.adr.org/si.asp?id=4945> (last visited Mar. 5, 2010).

domestic law enacted to regulate arbitrations. Arbitration law is split into two different categories: the law that will be used to determine the merits of the case and the law that will govern the procedure of the case, otherwise known as the *lex arbitri*.³⁴ Therefore, the law of every country involved in an arbitration is of significant importance to the conclusion and administration of an arbitration.³⁵

The substantive law that will govern the proceedings is usually decided by the parties to the contract.³⁶ The countries may, and often do, choose law other than the law of the place where the arbitration is to take place.³⁷ Therefore, an arbitration can take place in France while applying American substantive law. This aspect of international arbitration gives parties the freedom to choose the law that will best serve their interests in determining the outcome of any disputes that may arise from their contract.

The *lex arbitri* that governs an international arbitration is often the law of the site where the arbitration will take place.³⁸ The *lex arbitri* is the domestic law that governs the procedure of international arbitration.³⁹ While *lex arbitri* is mainly procedural, it also has substantive elements.⁴⁰ Essentially everything involved in a dispute, besides the merits of the case, fall under the guise of *lex arbitri*.⁴¹ Furthermore, the default rule is that if parties fail to specify the ruling *lex arbitri* in their contract, the law that will govern their dispute is the law of the situs⁴² of the arbitration.⁴³ The *lex arbitri* governs not only the procedure of the actual arbitration, but the access to appeal and the interplay between the courts of a country, the arbitration, and the enforcement of the arbitration

34. MOSES I, *supra* note 22, at 63-64.

35. See generally PAUL D. FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS 35-37 (2000) (discussing the various considerations that should be taken into account when choosing a place of arbitration).

36. MOSES I, *supra* note 22, at 55.

37. *Id.* at 56. There has been a movement for a *lex mercatoria*, or uniform system of substantive laws, to govern international arbitration disputes. *Id.* However, most arbitration clauses have not adopted these principles and have opted for the law of a particular nation. *Id.*

38. *Id.* at 64.

39. *Id.*

40. *Id.*

41. Loukas Mistelis, *Reality Test: Current State of Affairs in Theory and Practice Relating to "Lex Arbitri,"* 17 AM. REV. INT'L ARB. 155, 159-60, 165 (2006).

42. Situs refers to the place where the arbitration will occur. Therefore, if the arbitral proceedings are to occur in Paris, the situs is France, and if the parties have not specified a *lex arbitri* in their contract, French law will be the *lex arbitri*. See *id.* at 168-72 (discussing which law to apply when the parties did not previously decide).

43. *Id.* at 169.

award.⁴⁴

The fourth and final source is the UNCITRAL Model Law. The purpose of the Model Law is to give nations a guide with which to customize their own domestic law concerning international arbitration disputes.⁴⁵ Legislation has been enacted in many countries based on the Model Law.⁴⁶ Due to the pervasive use of the Model Law, it is seen as a strong indicator of international preference in regards to the laws applicable in international arbitration.⁴⁷

The process for how each of these bodies of law works together begins with the arbitration clause. The arbitration clause will set the parameters of the arbitration and determine which arbitration administering body will conduct the arbitration, the substantive law that will be used, and the *lex arbitri* that will dictate the process that needs to be followed.⁴⁸ The NY Convention looms over the entire process and will need to be adhered to at each step, including, most importantly, after an award has been rendered and needs to be

44. See generally MOSES I, *supra* note 22, at 64-78 (discussing the general application of *lex arbitri* by countries that have adopted it as their international arbitration law).

45. G.A. Res. 57/18, U.N. Doc. A/RES/57/18 (Jan. 24, 2003).

46. The countries that have adopted legislation based on the UNCITRAL Model Law are: Armenia (2006), Australia (1991), Austria (2005), Azerbaijan (1999), Bahrain (1994), Bangladesh (2001), Belarus (1999), Bulgaria (2002), Cambodia (2006), Canada (2006), Chile (2004), within China (Hong Kong Special Administrative Region (1996) and Macao Special Administrative Region (1998)), Croatia (2001), Cyprus (2005), Denmark (2005), Dominican Republic (2008), Egypt (1996), Estonia (2006), Germany (1998), Greece (1999), Guatemala (1995), Honduras (2000), Hungary (1994), India (1996), Iran (Islamic Republic of) (1997), Ireland (1998), Japan (2003), Jordan (2001), Kenya (1995), Lithuania (1996), Madagascar (1998), Malta (1995), Mauritius (2008), Mexico (1993), New Zealand (1996), Nicaragua (2005), Nigeria (1990), Norway (2004), Oman (1997), Paraguay (2002), Peru (1996), the Philippines (2004), Poland (2005), the Republic of Korea (1999), the Russian Federation (1993), Rwanda (2008), Serbia (2006), Singapore (2001), Slovenia (2008), Spain (2003), Sri Lanka (1995), Thailand (2002), the former Yugoslav Republic of Macedonia (2006), Tunisia (1993), Turkey (2001), Uganda (2000), Ukraine (1994), within the United Kingdom of Great Britain and Northern Ireland (Scotland (1990) and Bermuda (an overseas territory of the United Kingdom)), within the United States of America (California (1996), Connecticut (2000), Illinois (1998), Louisiana (2006), Oregon and Texas), Venezuela (Bolivarian Republic of) (1998), Zambia (2000), and Zimbabwe (1996). Furthermore, Mauritius (2008), New Zealand (2007), Peru (2008), and Slovenia (2008) have based legislation on the 2006 amended Model Law. U.N. Comm'n on Int'l Trade Law, Status 1985 – UNCITRAL Model Law on International Commercial Arbitration, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Mar. 5, 2010).

47. See Brief for American Arbitration Ass'n as Amicus Curiae Supporting Respondents at 24 n.7, *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008) (No. 06-989).

48. See MOSES I, *supra* note 22, at 5-9 (explaining the regulatory process that will govern the arbitral process).

enforced.⁴⁹

B. The Success of International Arbitration

There are two main characteristics of international arbitration that have worked to make it such a useful tool in adjudicating international disputes: harmonization and effective enforcement.⁵⁰ These two aspects are essential to improving the ability of international arbitration to function in the ever-changing world of international trade.⁵¹ The bodies of laws present in international arbitration⁵² have all worked to enhance harmonization and effective enforcement.

The ability of the NY Convention to harmonize arbitration rules amongst different countries has led to numerous benefits in the area of international arbitration. As noted above, prior to the NY Convention, international arbitrations were often governed by bilateral treaties or the ineffectual Geneva Conventions.⁵³ However, with the adoption of the NY Convention and the subsequent expansion in the number of signatory countries, the laws that govern vital aspects of international arbitration have become fairly uniform across the globe.⁵⁴

Furthermore, the creation of the UNCITRAL Model Law and its subsequent inspiration for over fifty countries have worked to harmonize the laws of many countries.⁵⁵ The harmonization of international arbitration rules has lessened the uncertainty that parties have to consider and be aware of when dealing with international arbitrations. Currently, a party in an international transaction deciding whether to enter into an arbitration agreement need only look to see if the other party to the contract is incorporated or has assets in a country that is a signatory country to the NY Convention. If the other party is subject to the NY Convention, he can be fairly confident that the rules of enforcing an arbitration award will be the same as those he has dealt with previously.

49.*Id.* at 7.

50. See Albert Jan Van Den Berg, *Striving for Uniform Interpretation, in Colloquy, Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects*, UNITED NATIONS (1999), at 41-43.

51. See U.N. Conference on Int'l Commercial Arbitration, *supra* note 18, at ¶¶ 4-7.

52. See *supra* Part II(b).

53. MACNEIL, *supra* note 10, at 159-60; see also U.N. Econ & Soc. Council [ECOSOC], Committee on the Enforcement of International Arbitral Awards, *Report of the Committee on the Enforcement of International Arbitral Awards*, U.N. Doc. E/AC.42/4/Rev.1 (Mar. 28, 1955).

54. See *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

55. Pieter Sanders, *The Making of the Convention, in Colloquy, Enforcing Arbitration Awards Under the New York Convention: Experience and Prospects*, UNITED NATIONS (1999), at 3-5.

The second major element of success, and arguably the most important, is the effective enforcement of international arbitration clauses. The NY Convention was instrumental in this success. Prior to the NY Convention, parties were forced to search through bilateral treaties to determine which applied, or to apply the much criticized Geneva Conventions.⁵⁶ With the subsequent adoption and worldwide adherence to the NY Convention, the enforcement of arbitration awards has been highly successful.⁵⁷ The NY Convention allows only seven very limited grounds upon which parties can seek to have international arbitration awards vacated:

1. "The parties to the agreement . . . were, under some incapacity or, . . . the said agreement is not valid under the law to which the parties have subjected it or, . . . under the law of the country where the award was made;"⁵⁸
2. The party "was not given proper notice;"⁵⁹
3. "The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration;"⁶⁰
4. The "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties;"⁶¹
5. The award was set aside in the country where it was made;⁶²
6. "The subject matter of the difference is not capable of settlement by arbitration under the law of that country;"⁶³ or
7. "[E]nforcement of the award would be contrary to the public policy of that country."⁶⁴

These limited grounds give very little room for national courts to vacate awards rendered by international arbitrators. Furthermore, none of the grounds, with the possible exception of vacating an award as being contrary to public policy, allow for vacating an award "based on the merits."⁶⁵ These limited grounds have been narrowly construed by virtually all signatory countries and have resulted in an impressive 98 percent of international arbitration awards being

56. See MACNEIL, *supra* note 10, at 159-61; see also ECOSOC, *supra* note 53, ¶¶ 12-14.

57. See *infra* text accompanying note 102.

58. NY Convention, *supra* note 4, art. V(1)(a).

59. *Id.* art. V(1)(b).

60. *Id.* art. V(1)(c).

61. *Id.* art. V(1)(d).

62. *Id.* at art. V(1)(e).

63. *Id.* at art. V(2)(a).

64. *Id.* at art. V(2)(b).

65. See MOSES I, *supra* note 22, at 208.

enforced.⁶⁶ The success of the NY Convention in enforcing arbitration awards has greatly increased the confidence, use, and efficiency of international arbitration.⁶⁷

C. Party Autonomy and Finality: The Competing Forces

There are two principles that are pervasive throughout international arbitration law: finality and party autonomy.⁶⁸ These two principles are important in effectuating the efficient application and use of international arbitration. Party autonomy gives parties the freedom to choose how their arbitration will be run and what should be included within it.⁶⁹ Finality ensures that once an arbitration award has been rendered, the award will be quickly and efficiently enforced without the delay and expense of dealing with appeals.⁷⁰

However, when parties contract for expanded judicial review, these two forces come into direct conflict. Countries are then forced to choose between these two essential principles. The difficulty in the decision has resulted in a split among countries as to which of these principles is more important.

D. Party Autonomy

Party autonomy has been recognized as an important aspect of international arbitration since some of the very first international arbitration treaties.⁷¹ The tradition has continued to present day. In fact, it has been noted that modern arbitration law has seen a vast increase in the deference to party autonomy.⁷² All of the bodies of

66. *Id.*

67. In fact, without the ability to properly enforce an arbitral award, most parties would likely opt for a country's court system rather than arbitration, rendering international arbitration useless as a tool for solving disputes. See Ottoarndt Glossner, *International Commercial Arbitration Some Practical Aspects*, in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 95, 100 (Pieter Sanders ed., 1967).

68. See Brief for United States Council for International Business as Amicus Curiae Supporting Respondents at 2, *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008) (No. 06-989).

69. See, e.g., Okuma Kazutake, *Arbitration and Party Autonomy*, 38 SEINAN L. REV. 1, 2-4 (2005).

70. See *id.* at 4-6; see also *id.* at 4 n.10 (listing sources).

71. See, e.g., Convention for the Pacific Settlement of International Disputes art. 19, Jul. 29, 1899, 32 Stat. 1779, U.N.T.S. 392.

72. See Bockstiegel, *supra* note 25, at 117 n.7 (quoting GEORGES R. DELAUME, LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS 282 (1988)) ("In recent years the consensual character of arbitration has become recognized and party autonomy has conquered new grounds heretofore denied to it under the judicial approach to the problem. Modern statutes and treaty provisions, together with enlightened judicial decisions, increasingly and relentlessly have given new dimensions to party autonomy

international arbitration law embrace this principle.⁷³

The NY Convention recognizes the importance of party autonomy by allowing courts not to enforce an arbitration award where “[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration.”⁷⁴ Furthermore, the NY Convention’s very structure is designed to promote party autonomy. The NY Convention sets down the rules for enforcement of arbitration awards, but refrains from the adoption of any set rules for the procedure or substantive matters to be used in arbitration. Instead, the NY Convention allows the parties to craft their own rules to govern the dispute.⁷⁵ Therefore, under the NY Convention, parties are free to choose their own course for how their arbitration will be conducted. If their wishes are not adhered to, the NY Convention allows the subsequent award to be vacated.⁷⁶

Similarly, the major arbitration administering institutions have all espoused the principle of party autonomy.⁷⁷ The major arbitration administering institutions have all allowed parties to decide the appointment of arbitrators,⁷⁸ the specifics of the arbitration’s procedure,⁷⁹ where the arbitration will occur,⁸⁰ and to

in an effort to cope with the needs of transnational commerce and eradicate from national systems a former parochialism out of context with the necessities of contemporary economic and commercial relations.”).

73. See discussion *supra* Part III(a).

74. NY Convention, *supra* note 4, art. V(1)(c).

75. Bockstiegel, *supra* note 25, at 124. Subsequent treaties to the NY Convention have also adhered to the policy underlining party autonomy. For example, the European Convention on International Commercial Arbitration allows parties to appoint arbitrators of their choosing or establish the process by which they will be chosen, to determine the place of arbitration, and to establish the procedure that the arbitrator must follow in conducting the arbitration. *Id.* at 118 (citing the European Convention on International Commercial Arbitration art. 4, Apr. 21, 1961, 484 U.N.T.S. 349).

76. It should be noted that vacating an award is antithetical to the purpose of the NY Convention. Therefore, any principle under the NY Convention that allows an award to be vacated implies a strong policy preference for that principle.

77. See, e.g., Int’l Rules of the Am. Arbitration Ass’n, arts. 5-6, <http://www.jus.uio.no/lm/american.arbitration.association.international.arbitration.rules.2000/doc.html> [hereinafter AAA]; Rules of the London Court of Int’l Arbitration, http://www.lcia.org/ARB_folder/ARB_DOWNLOADS/ENGLISH/rules.pdf [hereinafter LCIA].

78. See AAA, *supra* note 77, arts. 5-6; LCIA, *supra* note 77, art. 7.1 (reserving the right to refuse to appoint the parties’ choice as an arbitrator where they are “not suitable or independent or impartial”).

79. E.g., Int’l Chamber of Commerce Rules of Arbitration, art. 15 ¶1 [hereinafter ICC] (slightly more restrictive as it only allows parties to contract for procedural rules where the ICC rules are silent); AAA, *supra* note 77, art. 1 ¶ 1; LCIA, *supra* note 77, art. 14.1.

80. ICC, *supra* note 79, art. 14 ¶ 1; AAA, *supra* note 77, art. 13 ¶ 1; LCIA, *supra*

contract for any provision where the rules are silent.⁸¹ The International Center for Dispute Resolution goes as far as to expressly allow parties to modify *any rule* in accordance with their preference.⁸²

Court decisions from various countries have likewise taken an expansive view of party autonomy. In Germany, an arbitration clause appointing the executive of one of the companies as an arbitrator was upheld in spite of the well-known principle that one cannot be the judge in one's own dispute.⁸³ The Federal Supreme Court of Switzerland stated that the NY Convention "enables the parties either to set up their own rules of procedure, to choose already existing private rules of procedure, or to choose the rules of procedure of a State."⁸⁴ The opinion went on to state that "even the mandatory rules of procedure of a State . . . can be declared inapplicable."⁸⁵ The Spanish Supreme Court held that even though the translation of a document from English into Spanish failed to conform with Spanish law, the contract was still enforceable because the parties' intent in the contract was for the arbitration to be held in London and therefore international rules and not Spanish law applied.⁸⁶ United States law also has adhered to the principle of party autonomy. The United States Supreme Court has routinely affirmed its adherence to party autonomy in arbitration and many have argued that the Court has expanded party autonomy in recent years.⁸⁷

In addition to case law, many countries have enacted statutes that govern international arbitration.⁸⁸ These statutes also, with very few exceptions, embrace the idea of party autonomy. Similar to the arbitration administering bodies, countries, through their statutes, have almost universally allowed party autonomy in the following areas: the appointment of arbitrators,⁸⁹ the arbitration's

note 77, art. 16.1.

81. ICC, *supra* note 79, art. 15 ¶ 1.

82. AAA, *supra* note 77, art. 1 ¶ 1.

83. Bockstiegel, *supra* note 25, at 124.

84. *Id.* (quoting Bundesgericht [BGer] [Federal Court] Feb. 26, 1982 Entscheidungen des Schweizerischen Bundesgerichts [BGE] IX 437, 439 (Switz.)).

85. *Id.* at 124-25.

86. *Id.* at 125-26.

87. *E.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (stating that under the Federal Arbitration Act, "parties are generally free to structure their arbitration agreements as they see fit" (quoting *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Univ.*, 489 U.S. 468, 479 (1989))); Kazutake, *supra* note 69, at 24-25.

88. Markham Ball, *International Arbitration: The Fundamentals*, INT'L LAW INST., June 2005, at 3, http://www.ili.org/images/books/intl_arb_fundamentals.pdf.

89. *E.g.*, UNCITRAL Arbitration Rules, *supra* note 23, at art. 6.

procedure,⁹⁰ the arbitration's location,⁹¹ and provisions where the rules are silent.⁹² In fact, the UNCITRAL Arbitration Rules state that arbitrations are to occur "in accordance with these Rules subject to such modifications as the parties may agree in writing."⁹³ Thus, the Rules allow parties to modify any rule should they wish to do so.

As outlined above, every significant rulemaking body in international arbitration embraces the idea that party autonomy should be fostered.⁹⁴ In addition, every major country and all of the major arbitration administering bodies have adopted the belief that party autonomy is necessary in order to administer efficient and effective arbitrations in the ever-changing international business environment.⁹⁵ While there is general agreement on this principle, the question becomes whether party autonomy should be limited when confronted with another major driving force in international arbitration, finality.

E. Finality

Another major principle in international arbitration is finality. Finality is the idea that once an arbitrator has settled a matter through arbitration, that award is final and enforceable and neither party can appeal except on extremely limited grounds.⁹⁶ Without finality, many argue that the purpose and benefit of arbitration dissolve.⁹⁷ Parties often choose arbitration over litigation because of the belief that arbitration is less costly and more time efficient.⁹⁸

90. See, e.g., *id.* § III.

91. E.g., *id.* art. 16 ¶ 1.

92. See *id.* art. 1.

93. *Id.*

94. See generally Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure* (2008), http://www.arbitration-icca.org/media/0/12223895489410/limits_to_party_autonomy_in_international_commercial_arbitration.pdf (referring to party autonomy as "[a] basic principle").

95. *Id.* at 12-13.

96. See *Schaefer v. Allstate Ins. Co.*, 590 N.E.2d 1242, 1245 (Ohio 1992).

97. E.g., Brief for American Arbitration Ass'n as Amicus Curiae Supporting Respondents, *supra* note 47, at 7 (stating that "the unique characteristics of arbitration will be substantially undermined" by interfering with finality); Brief for the United States Council for International Business as Amicus Curiae Supporting Respondents, *supra* note 68, at 6 (stating that "[a]rbitration requires final and definitive resolution of disputes, free from the risk of protracted litigation. If arbitration is regularly followed by challenges to the arbitral award, the efficient resolution of disputes – a hallmark of arbitration – will disappear."); MOSES I, *supra* note 22, at 2-4 (stating that one of the main reasons international arbitration is chosen is "that arbitration results in a final and binding award").

98. CARBONNEAU, *supra* note 21, at 1-5. But see Zela G. Claiborne, *Designing a Fair, Efficient and Cost-Effective Arbitration*, 26 ALTERNATIVES TO THE HIGH COST OF LITIGATION 186, 186 (2008), reprinted in 3RD ANNUAL PATENT INSTITUTE, at 885, 887

When a country's court system is able to override the final decision of an arbitration – thus extirpating the process of finality – parties are forced to adjudicate through the often slow-moving national court systems.⁹⁹ Empirical studies, investigating the reasons why parties submit their international disputes to arbitration, found that one of the two main reasons cited was the ability to have their awards enforced.¹⁰⁰ Much like party autonomy, all three institutions that encompass international arbitration law have espoused the idea of finality.¹⁰¹

The NY Convention's very purpose was to allow foreign parties in a dispute to obtain an award and have it recognized in another country without interference from that country's national court system.¹⁰² To this end, the NY Convention allows parties to vacate awards in only extremely limited circumstances.¹⁰³ A party that fails to establish one of the limited grounds will have the award enforced against it by the national courts even in situations where the decision is contrary to domestic substantive law.¹⁰⁴ The creation of limited grounds for vacating an award has resulted in parties being extremely successful in their ability to have their awards enforced with little or no court interference.¹⁰⁵

The major arbitration administering bodies have probably been the most virulent in their advocacy and adherence to finality. Every major arbitration administering body has a statement providing that all awards rendered in arbitrations, using its rules, are final and enforceable.¹⁰⁶ Furthermore, these arbitration administering bodies

(PLI Intellectual Property, Course Handbook Series No. G-964, 2009) (stating "as arbitration has evolved, many lawyers and business people have expressed the concern that arbitration has become increasingly cumbersome and uneconomical – just like the trials it was meant to replace").

99. Brief for the United States Council for International Business as Amicus Curiae Supporting Respondents, *supra* note 68, at 3-4.

100. See Christian Buhring-Uhle, *A Survey on Arbitration and Settlement in International Business Disputes*, in *TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION* 25, 31 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

101. See *supra* text accompanying notes 77-82.

102. *Scherck v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) ("The goal of the [NY] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.").

103. See *supra* notes 58-64 and accompanying text.

104. NY Convention, *supra* note 4, at art. V.

105. See *MOSES I*, *supra* note 22, at 208 (noting an estimated 98% success rate).

106. See ICC, *supra* note 79, at art. 28, ¶ 6 ("Every award shall be binding on the parties."); AAA, *supra* note 77, at art. 27 ¶ 1 ("Awards shall be . . . final and binding on the parties."); LCIA, *supra* note 77, at art. 26.9 ("Awards shall be final and binding on

state that the parties, by submitting their dispute to their organization, have waived their right to appeal.¹⁰⁷ The American Arbitration Association, showing its adherence to the idea of finality, wrote as *amicus curiae* in *Hall Street Associates v. Mattell* that, without finality, arbitration's "unique characteristics . . . will be substantially undermined."¹⁰⁸ Because the majority of international arbitrations are conducted by one of the three major arbitration instituting bodies, finality is a major aspect of arbitration agreements.

Finality also has a strong presence in domestic arbitration law. UNCITRAL's Model Law, used as a basis for domestic arbitration law in almost sixty countries,¹⁰⁹ provides that arbitration awards "shall be recognized as binding."¹¹⁰ Some countries have taken the idea of finality one step further by advocating and encouraging parties to waive the limited review available under domestic law.¹¹¹ In addition to those countries that mirror UNCITRAL, the other major arbitration jurisdictions all champion the belief that finality is essential to international arbitration.¹¹² Akin to party autonomy, finality is an established principle that is pervasive throughout international arbitration law.

III. EXPANDED JUDICIAL REVIEW – WHEN PRINCIPLES COLLIDE

While the major bodies governing international arbitration all adhere to the idea of finality and party autonomy, the issue becomes

the parties.").

107. ICC, *supra* note 79, art. 28 ¶ 6 ("Parties have waive[ed] their right to any form of recourse."); AAA, *supra* note 77, at art. 27 ¶ 1 ("The parties undertake to carry out any such award without delay."); LCIA, *supra* note 77, at art. 26.9 ("Parties . . . waive irrevocably their right to any form of appeal.").

108. Brief for American Arbitration Ass'n as Amicus Curiae Supporting Respondents, *supra* note 47, at 7.

109. *See supra* note 46.

110. U.N. Commission on International Trade, Model Law on International Commercial Arbitration art. 35.1, U.N. Doc. No. A/40/17, Annex I (June 21, 1985) [hereinafter UNCITRAL Model Law].

111. *See, e.g.*, Code of Civil Procedure, art. 446 (as amended by Legislative Decree No. 93-09 of 1993) (Alg.); Law No. 17.454, 6 COD. PROC. CIV. Y COM. 741 (as consolidated by Decree 1.042 of 1981) (Arg.); Organic Law of the Judiciary, Law 7421, Tit. IX, Art. 239 (1943) (Chile); Hong Kong Arbitration Ordinance, Cap. 341 § 23B(1) (1997) (H.K.); General Arbitration Law No. 26572, Art. 60 (1996) (Peru); Private International Law Act, Ch. XII, Art. 192 (1987) (Switz.).

112. *See, e.g.*, Civil Code of Procedure, IV N.C.P.C. 1484 (Fr.) (stating that parties may not appeal unless expressly allowed in their contract); Private International Law Act, Ch. XII, Art. 190 (1987) (Switz.) (stating that an award is final and listing the limited grounds upon which an award may be challenged); Federal Arbitration Act, 9 U.S.C. § 12 (1994) (listing the limited grounds upon which a party can vacate an award).

what happens when these two guiding principles are in conflict with one another? This issue comes into focus when parties contract for expanded judicial review in their arbitration clauses. In these situations, international arbitration law is forced to choose between upholding party autonomy and enforcing the contract as written, or adhering to the principle of finality and not allowing parties to contract for more judicial review.

A. *The Arguments For and Against*

Much ink has been spilt advocating for and against expanded review in arbitration settings with presumably every possible position being advocated.¹¹³ Despite the exhaustion of academic scholarship on this topic, there has been very little discussion of the conflict and its relation and effect in international arbitration.¹¹⁴ While this Note seeks to redress the international split over this topic, remedying the conflict of whether party autonomy or finality is a better policy is beyond its scope. However, it is useful to outline and take note of the various arguments advocated in favor of both sides of the argument.

There are three basic arguments that have been put forth in favor of expanded judicial review. The first argument is that parties should be able to contract for expanded review to overcome the fear that a “maverick” arbitrator will render a decision on the merits that is not in accordance with applicable law.¹¹⁵ This argument is premised on the belief that arbitration should be encouraged, but that parties should be free to choose national court systems over arbitration because of the inaccessibility to an appellate process.¹¹⁶

113. See, e.g., Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 199-200 (2003) (arguing for a split-approach where expanded review would be upheld in negotiated contracts between parties of relatively equal bargaining power but denied in contracts of adhesion); Katherine A. Helm, *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?*, 1 DISP. RESOL. J. 16 (Nov. 2006-Jan. 2007) (arguing in favor of finality); Thomas S. Meriwether, *Limiting Judicial Review of Arbitral Awards Under the Federal Arbitration Act: Striking the Right Balance*, 44 HOUS. L. REV. 739, 743 (2007) (arguing that parties should be allowed to “confine judicial review to the district court level but may neither totally eliminate nor narrow the scope of the court’s review”); Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 262 (1999) (explaining that judicial review clauses that expand the scope of judicial review may “decrease the danger of irrational [arbitration] award”).

114. But see Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 456-65 (2004) (examining the “complexities of international enforcement of arbitral awards”) [hereinafter Moses II].

115. Younger, *supra* note 113, at 262.

116. See William H. Knull III & Noah D. Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, 11 AM. REV. INT’L ARB. 531, 532

Furthermore, the existence of arbitration decisions contrary to applicable law calls into question the effectiveness and reliability of the arbitration process.

The second argument in favor of allowing expanded judicial review is in order for arbitration to meet parties' expectations.¹¹⁷ Arbitration clauses are creatures of contract and the most fundamental tenet of contract law is to meet parties' expectations to ensure that when parties agree, those agreements are enforced.¹¹⁸ By striking expanded review clauses, the courts are supplementing their view of what the arbitration clause should be for what the parties desired it to be.

The final argument in favor of expanded judicial review is efficiency. Parties that contract for expanded review are in the best position to determine whether expanded review is beneficial.¹¹⁹ By not allowing parties to contract for expanded review, parties will be forced to choose other less efficient means to insulate themselves from any future dispute. For example, parties may choose to forgo arbitration as a means to govern their disputes¹²⁰ or parties may take out more insurance in order to protect themselves against "maverick" decisions.¹²¹ These actions all impose additional costs on parties and decrease the ability of parties to use arbitration as a method for solving disputes.¹²²

Advocates for not allowing expanded review rely on two main arguments. The first goes to the core of the purpose for arbitration – speed and efficiency. The most often cited reason for the use of arbitration is that it provides a more efficient and more cost effective way of adjudicating disputes.¹²³ Arbitration provides a means to bypass the slow, costly, and often inefficient national court systems through a process that provides quick decisions that are enforceable

(2000) (noting that a study reported that 54.3% of those who did not choose arbitration to govern a dispute did so "because arbitration awards are so difficult to appeal").

117. *E.g.*, *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995), *overruled by* *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008). The *Gateway Techs., Inc.* decision, while later overturned, is illustrative of the arguments used in favor of expanded review, stating that not allowing expanded review "would frustrate the mutual intent of the parties." *Id.*

118. L.L. Fuller & William R. Perdue Jr., *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52, 58 (1936). In this classic essay that formed the foundation for the modern understanding of contract law, Fuller and Perdue argued that the goal of contracts is to protect the "expectation interest." *Id.* at 57-66.

119. See David K. Kessler, *Why Arbitrate? The Questionable Quest for Efficiency in Hall Street Associates*, 8 FLA. ST. U. BUS. L. REV. 77, 87 (2009).

120. *Id.*

121. *Id.*

122. *Id.* at 86-88.

123. See *Moses II*, *supra* note 114, at 434; see also Schurmann, *supra* note 16, at 2.

without time consuming appeals.¹²⁴ Expanded judicial review rids arbitration of these benefits by including an expensive and time consuming appeal process. Therefore, by allowing expanded review, the very purpose and benefits of arbitration are removed.¹²⁵

The second argument in favor of finality is that many businesses choose arbitration as a way to protect their confidentiality.¹²⁶ Arbitration procedures are often subject to strict confidentiality so that information about the process, evidence submitted, and the subsequent decision is never released to the public.¹²⁷ However, if parties are allowed expanded review, courts will necessarily be forced to examine the facts in order to decide the case on its merits. The nature of the appellate process results in the disclosure of pertinent facts released to the public, thereby extirpating the confidentiality that gives arbitration one of its main benefits.¹²⁸

B. *The International Split*

The conflict between these two principles exists in all jurisdictions and a split in decisions has occurred among countries.¹²⁹ Most domestic arbitration statutes are silent on the issue of whether parties can expand judicial review in their arbitration clauses.¹³⁰ However, several major arbitration jurisdictions expressly allow expanded review in their statutes governing international arbitration proceedings.¹³¹ These splits have the capacity to disrupt the harmonization of international arbitration that the NY Convention was so instrumental in creating with inconsistent decisions in various jurisdictions based on whether contracts allow for or deny the ability to expand judicial review.

124. See Moses II, *supra* note 114, at 434.

125. Brief for American Arbitration Ass'n as Amicus Curiae Supporting Respondents, *supra* note 47, at 3-4.

126. See MOSES I, *supra* note 22, at 3-4.

127. *Id.*

128. Knull & Rubins, *supra* note 116, at 549.

129. Compare Arbitration Act, 1996, c. 23 § 69 (U.K.) (allowing parties to agree to expanded review), with Paris Court of Appeal, Oct. 24, 1968, J.C.P. 1969, II, 15738 (rejecting the contractual agreement for expanded review).

130. See Knull & Rubins, *supra* note 116, at 545; Barry Leon & Laila Karimi, *The Canadian Position: Can Parties to an Arbitration Agreement Vary the Statutory Scope of Judicial Review of the Award?*, 14 *ILSA J. OF INT'L AND COMP. L.* 451, 451-55 (2008).

131. *E.g.*, Arbitration Act, 2002, c. 10, § 49 (Sing.); Arbitration Act, 1996, c. 23 § 69 (U.K.). Despite these statutes, the current trend seems towards adhering to the principle of finality. Brief for American Arbitration Ass'n as Amicus Curiae Supporting Respondents, *supra* note 47, at 6-7; see also *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 586-87 (2008) (holding that parties in arbitrations under the FAA may not contract for expanded review).

C. The Scenarios

There are four possible scenarios where the split between different jurisdictions could lead to problems with having harmonized decisions among countries involved in a dispute.¹³² The scenarios' threat is in having awards vacated in one jurisdiction while enforceable in another, or the threat of having multiple adjudications in several jurisdictions at once. These types of issues are the reason why the NY Convention was enacted¹³³ and any disruption in the NY Convention's effectiveness can throw into question the effectiveness of international arbitration.

Scenario One¹³⁴ – Party A and Party B enter into an arbitration clause with expanded judicial review. Furthermore, the parties pick as their *lex arbitri* a jurisdiction, such as France or the United States, which does not allow expanded review. The arbitration clearly could not allow for the expanded review aspect of the clause to be enforceable; however, the issue would be whether the arbitration clause as a whole is enforceable or whether parties are then subjected to the domestic courts to remedy their disputes.¹³⁵

The majority of jurisdictions in international arbitration apply the separability doctrine.¹³⁶ The separability doctrine allows the contract to be a separate agreement from the arbitration clause.¹³⁷ Therefore, when a dispute arises over the validity of the contract itself, the arbitration agreement remains enforceable as a separate contract.¹³⁸ However, the separability doctrine has not been held to allow arbitrators to have a blue-pencil rule¹³⁹ in order to strike out parts of an arbitration clause that offend applicable law. A court faced with this issue would likely invalidate the entire arbitration clause because the parties would not have entered the arbitration agreement without the access to expanded review.¹⁴⁰ The result would be that the parties would be forced into the domestic court

132. Three of these scenarios were adapted from Moses II, *supra* note 114, at 462-64. The fourth scenario was created based on applicable international law.

133. Quigley, *supra* note 11, at 1051.

134. See *supra* note 132.

135. See Knull & Rubins, *supra* note 116, at 546-48.

136. See, e.g., UNCITRAL Model Law, *supra* note 110, art. 16; Prima Paint Co. v. Flood & Conklin Mfg. Corp., 388 U.S. 395, 411 (1967); Harbour Assurance Co. (U.K.) Ltd. v. Kansa Gen. Int'l Assurance Co., (1993) Q.B. 701, 704.

137. MOSES I, *supra* note 22, at 18.

138. *Id.*

139. The blue-pencil doctrine allows judges to strike out sections of a contract that they deem to be in violation of the law while enforcing the remainder of the contract. E.g., Ferrofluidics Corp. v. Advanced Vacuum Components, Inc., 968 F.2d 1463, 1469 (1st Cir. 1992).

140. Moses II, *supra* note 114, at 462.

system despite a clearly stated desire for arbitration.

Scenario Two¹⁴¹ – Party A and Party B again contract for expanded review; however, this time the jurisdiction is one that allows expanded review. After the arbitration award has been rendered and upheld on appeal, the prevailing party attempts to enforce the award in another jurisdiction. In its attempt to have the award enforced, the other party seeks appellate review in the enforcing country. Despite having exhausted its appeals in the country of situs, the party would argue that the clause did not specify that expanded review was limited to the courts of the arbitration's situs.

Most jurisdictions would not allow a second appellate review on the merits; however, the real problem is the possibility of the enforcing court vacating the award.¹⁴² The non-enforcing party could argue that if it had known that expanded review was not available in place of both arbitration and enforcement it would not have entered the contract.¹⁴³ If the court follows this logic the award could be vacated.¹⁴⁴ Therefore, the parties, after having gone through the time and expense of obtaining an arbitration award and defending it on appeal, would be left with no recourse for enforcement except adjudication through the country of enforcement's domestic court system.

Scenario Three¹⁴⁵ – Party A and Party B enter an arbitration agreement and contract for expanded review in a jurisdiction that allows it. However, this time the arbitrator's decision is overturned on appeal. Despite having the arbitrator's decision overturned, the prevailing party at arbitration takes the now vacated award to a country of enforcement in order to have the award enforced. Notwithstanding the award being vacated, some jurisdictions may still enforce the original arbitration award.

The French Supreme Court has held that even though an arbitrator's decision was annulled in the place of situs the award could still be enforced in France.¹⁴⁶ Similarly, the District Court for the District of Columbia held that it could enforce an arbitration award that had been vacated in the place of situs.¹⁴⁷ Given these

141. *Id.*

142. *Id.* at 463-64.

143. *Id.* at 462.

144. *See* NY Convention, *supra* note 4, art. V(1)(d).

145. *See* Moses II, *supra* note 114.

146. Hamid G. Gharavi, *A Nightmare Called Hilmarton*, 12-9 MEALY'S INT'L ARB. REP. 15 (1997).

147. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, 914-15 (D.D.C. 1996). *But see* MOSES I, *supra* note 22, at 215-16 (stating that most other U.S. courts to address the issue subsequent to this case have distinguished it or overruled

decisions it is possible for a vacated award to be unenforceable in the place of situs while enforceable in another jurisdiction. Parties in these situations would have to deal with two different outcomes, and if one of the parties has assets in multiple countries, it may be found liable in one country and forced to pay the award, while simultaneously not being liable in another.

Scenario Four¹⁴⁸ – Party A and Party B enter into an arbitration agreement for expanded review in a jurisdiction that does not allow it, however, the court enforces the arbitration clause without the expanded review aspect because the parties wished to arbitrate. The prevailing party attempts to have the award enforced in another jurisdiction. The enforcement jurisdiction does not enforce the award under NY Convention Article V(1)(d) because the arbitral procedure was not in accordance with the agreement of the parties. Here again the parties would be forced to deal with a situation where they had an enforceable award in one jurisdiction that was vacated in another.

All four scenarios outlined above leave the possibility for inefficient and ineffective results. The main success of the NY Convention was its ability to harmonize and enforce international arbitration agreements. However, if results such as those outlined above become more common, parties may begin to avoid international arbitration because of its inefficiency and ineffectiveness in resolving disputes in accordance with their expectations.

IV. SOLUTIONS

There have been three ideas put forth in order to remedy the problems that exist in regards to the split among countries in terms of expanded review. The first remedy is to create an international appeal board that would be able to review arbitration decisions.¹⁴⁹ Second, UNCITRAL could issue guidelines stating the accepted interpretation of the NY Convention in regards to expanded review.¹⁵⁰ The third and final remedy would be to create a new

it).

148. See Moses II, *supra* note 114.

149. See, e.g., Howard M. Holtzmann, *A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, in *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE* 109, 111-12 (Martin Hunter et al. eds., 1995); Stephen M. Schwebel, *The Creation and Operation of an International Court of Arbitral Awards*, in *THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE*, *supra*, at 115; Knull & Rubins, *supra* note 116, at 550-63; Barton Legum, *The Introduction of an Appellate Mechanism: The U.S. Trade Act of 2002*, in *ANNUALMENT OF ICSID AWARDS* 289 (Emmanuel Gaillard & Yas Banifatemi eds., 2004).

150. See Van Den Berg, *supra* note 50, at 41-42 (advocating a UNCITRAL Model

treaty in order to update the NY Convention on a number of issues including expanded review.¹⁵¹ While each approach has its advantages, each one has a number of serious drawbacks that puts into doubt whether any will be a viable option.

A. *The International Arbitration Appeal Board*

There have been several variations on how an international appeal board to hear arbitrations would be set up.¹⁵² However, the differences are minimal for the purpose of this Note and therefore this Note will focus on the paper by Knull and Rubins.¹⁵³ Knull and Rubins list eleven aspects that a potential international arbitration appeal board would encompass.¹⁵⁴ Despite the exhaustive list, Knull and Rubins fail to answer the question of why an appeal board would be better than the current arbitral system.

Justice Robert H. Jackson famously stated in regards to the United States Supreme Court, “[w]e are not final because we are infallible, but we are infallible only because we are final.”¹⁵⁵ There is no guarantee that the addition of an appeal process will give any more protection against “maverick” decisions. The appeal board is

Law for the Procedure of Enforcing Arbitration Awards which would most likely cover the ability to contract for expanded review); see also U.N. Comm’n on Int’l Trade Law, *Annex II: Recommendation Regarding the Interpretation of Article II, Paragraph II, and Article VII, Paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/6/17 (July 7, 2006) (recommending that the list of possibilities for fulfilling the writing requirement necessary for enforceability of arbitration clauses expressly listed in the NY Convention is not exhaustive in order to allow for new electronic forms to meet the requirement). The 50-year-old text of the NY Convention did not provide for e-mail and other forms of writing requirement necessary for arbitration awards. MOSES I, *supra* note 22, at 20-24. In response to this issue, the United Nations released the above recommendation in order to expand the possible writing requirements to include electronic forms such as e-mails and faxes. *Id.* at 22-23. In addition, UNCITRAL amended the Model Law to include two options that allowed for the new electronic forms of writing to meet the enforceability writing requirements. *Id.* at 24-27.

151. Van Den Berg, *supra* note 50, at 41-42.

152. See sources cited *supra* note 149.

153. Knull & Rubins, *supra* note 116.

154. The eleven elements are: 1) that an appeal be optional; 2) that the appeal process has modules with default values to ensure predictability, but allows parties to alter these in order to obtain flexibility; 3) that the appeal process is expedient and efficient; 4) that the appeal process has express and explicit standards of review; 5) that there are default rules for monetary amounts in order to appeal; 6) that the English Rule of shifting costs to the losing party is followed; 7) that at the appeal board’s discretion the appealing party can be forced to give a security deposit; 8) that frivolous appeals be subject to sanctions; 9) that parties who submit themselves to the appeal process waive any right to go before national court systems; 10) that the appeal board consist of a standing board or an ad hoc one; and 11) that the remedies available to the appeal board are distinct and defined. *Id.* at 559-63.

155. *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

just as likely to uphold bad decisions or even to reverse correct ones as the arbitration panel.¹⁵⁶ Therefore, the inclusion of an appeal board will add an extra layer of expense, time, and review while still subjecting parties to the same possibility of poor decision-making.¹⁵⁷

B. UNCITRAL Guidelines

The second possible remedy is for UNCITRAL to issue guidelines interpreting the NY Convention to either include or exclude expanded review as a proper addition to an arbitration clause. Currently, the UNCITRAL Model Law mirrors the ambiguity of the NY Convention and does not expressly indicate whether expanded review is proper in international arbitration.¹⁵⁸ However, UNCITRAL could either amend the Model Law to include or exclude expanded review, or it could issue recommendations for how the NY Convention should be interpreted in regards to expanded review. Both of these UNCITRAL actions were done in regards to another interpretation issue with the NY Convention.¹⁵⁹ The advantage of this approach is that it takes very little effort and does not disrupt the arbitration process. UNCITRAL's Model Law is not binding¹⁶⁰ and therefore changes to it are only suggestions, which do not require the ratification of the various signatory countries.

Despite the ease of implementing this remedy, it also has some serious drawbacks. First, UNCITRAL's previous change was in regards to a problem that was universally agreed to be a problem with an agreed upon solution.¹⁶¹ However, the contentious nature of

156. One need to only look at the history of United States Supreme Court decisions to see that even on appeal poorly-reasoned decisions are given. *See, e.g., Korematsu v. United States*, 323 U.S. 214 (1944) (upholding the right of the federal government to set up concentration camps to intern Japanese-Americans during World War II); *Buck v. Bell*, 274 U.S. 200, 207 (1927) (upholding a statute that made it compulsory for the mentally challenged to undergo forced sterilization stating that "[t]hree generations of imbeciles are enough"); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding separate but equal facilities as constitutional); *Scott v. Sandford*, 60 U.S. 393 (1857) (upholding the legal right of slavery).

157. Knull and Rubins argue that many companies forego arbitration because of the difficulty of appeal. Knull & Rubins, *supra* note 116, at 532. They state that one corporate lawyer "had difficulties explaining to his management and the supervisory board why he – having proposed a contract including an arbitration clause – had 'exposed the company to the unpredictability of an arbitral award.'" *Id.* at 533. A response is simply because the alternative is exposing the company to the unpredictability of litigation in domestic courts with the additional expense that comes along with it.

158. *See* MOSES I, *supra* note 22, at 196-99.

159. *See* sources cited *supra* note 150. These actions were taken two years ago and therefore it is still not clear whether they have had any beneficial effect.

160. UNCITRAL Model Law, *supra* note 110, at art. 1, ¶ 1.

161. Neil Kaplan, *New Developments on Written Form*, in *Colloquy, Enforcing*

the arguments for and against expanded review makes the process more difficult. UNCITRAL would have to agree on what is best for countries with very different desires and interests.

Even assuming UNCITRAL was able to reach agreement on the proper interpretation on expanded review, UNCITRAL is not binding law.¹⁶² Countries would be free to disregard the amendments and recommendations. Therefore, in order to harmonize the laws of 144 countries, all parties would have to unilaterally change their existing laws to conform with UNCITRAL's interpretation, an unlikely proposition.

Finally, amending the laws of 144 countries would be a slow and laborious process. Consider the United States as an example, which has only amended Chapter Two of the Federal Arbitration Act, dealing with international arbitrations, twice since it was adopted in 1970.¹⁶³ Therefore, any amendments or recommendations on such a large scale over such a diverse group of countries are likely to fail to obtain their objective. It is therefore doubtful that recommendations will do much in altering the problems associated with the international split in regards to expanded review.

C. *A New Treaty*

The final, and most drastic, solution is to implement a new international treaty. The advocates of this approach believe that the NY Convention is antediluvian and in need of being updated.¹⁶⁴ The belief is that while the NY Convention has been a success, there are a number of issues that need to be addressed and the best method is through a new treaty.¹⁶⁵ The obvious advantage of such an approach is that those that signed on to the treaty would immediately have this issue remedied.

However, the approach has serious drawbacks. First, it is likely to disrupt the harmonization of international arbitration law. The

Arbitration Awards Under the New York Convention: Experience and Prospects, UNITED NATIONS (1999), <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf>. (stating that “[i]t appears to be common ground that the definition of writing contained in [the NY Convention] does not conform to international trade practices”).

162. UNCITRAL Model Law, *supra* note 110, at art. 1, ¶ 5.

163. See Federal Arbitration Act, 9 U.S.C. § 1 (2006).

164. Van Den Berg, *supra* note 50, at 42-43.

165. *Id.* at 41-42 (listing the areas that need to be addressed as: 1) “[t]he absence of a global field of application of the Convention”; 2) an update of the writing requirement; 3) enforcement of interim measures; 4) “[d]iscretionary power to enforce an award, notwithstanding the presence of a ground for refusal of enforcement”; 5) “[w]aiver of a ground for refusal of enforcement”; 6) “[t]he annulment of the award in the country of origin”; and 7) “[p]rocedure for enforcement of a Convention award”).

United States took twelve years to adopt the NY Convention,¹⁶⁶ and many other countries have only recently adopted the treaty.¹⁶⁷ Therefore, any new treaty would likely go through the same long process of ratification where many countries would not ratify the new treaty for many years. As a result, the changes meant to correct the problem with expanded review would not occur for many years, if at all, as many countries would continue to work under the old treaty. The new treaty would necessarily result in a schism between countries' international arbitration laws as some countries would continue under the NY Convention while others adopt the new treaty.

V. WHY LESS IS MORE

While there are clear problems with the three proposed solutions, taking a step back to ask whether a solution is warranted leads to the inevitable conclusion that the "less is more" approach is best. First, the situations where appellate review is most likely to be necessary are the same situations where contract drafters will be more likely to carefully choose which jurisdiction best fits their needs. Second, incentives over time will push countries towards the same rule regarding expanded review, thereby eliminating the need for a concerted international approach. Finally, expanded judicial review is unlikely to be a necessary requirement of many arbitration clauses because the disadvantages of adding an extra layer of time and expense outweigh the benefits.

The use of expanded review in arbitration clauses only occurs in situations where the drafter is particularly careful in drafting the arbitration clause. First, arbitration clauses that contain a provision for expanded review are but a small subset of all arbitration clauses.¹⁶⁸ Second, parties that enter into international contracts are often sophisticated businesses that are well aware of the laws governing international disputes.¹⁶⁹ Third, typically the situation where appellate review is required is where large potential liabilities exist.¹⁷⁰ As a result, parties are likely to carefully draft their

166. MACNEIL, *supra* note 10, at 160-162.

167. See U.N. Comm'n on Int'l Trade Law, *supra* note 20 (listing the countries that have ratified the treaty along with the date of ratification and the date that the treaty went into force for that country).

168. See Brief for American Arbitration Ass'n as Amicus Curiae Supporting Respondents, *supra* note 47, at 23 ("[The American Arbitration Association] estimates that less than one percent of arbitration agreements submitted to it for administration contain provisions for appellate review.").

169. See Knull & Rubins, *supra* note 116, at 537 (discussing the high cost and technical and legal complexity of many international arbitrations).

170. See *id.* at 541.

arbitration clause where expanded review is required. Therefore, in the rare situation where expanded review is required, parties will be in a position to tailor their arbitration clause to meet their needs and avoid the scenarios outlined above.¹⁷¹ The statistic cited earlier that approximately 98% of international arbitration awards are enforced is proof that this is occurring.¹⁷²

Another argument in favor of the “less is more” approach is that the market will correct, over time, the difference in approaches. In choosing the place where the arbitration takes place, one of the main concerns is whether the law of that country is favorable to a party’s desires of what should necessarily be contained in their arbitration clause to effectively adjudicate any dispute.¹⁷³ Parties therefore will select forums that will tend to meet their expectations.¹⁷⁴ As a result, the countries with the more favorable laws will attract more arbitrations. Countries that experience a decline in arbitrations will be forced to examine their own laws to determine why parties have chosen other forums to adjudicate their disputes.¹⁷⁵

Inadequate laws may also affect domestic businesses’ ability to compete in the global market. International parties will be aware of the unfavorable laws in a country. Parties, aware of inadequate laws and knowing that enforcement may be difficult, will be less willing to enter into contracts with these countries or will expect a premium in order to do so.¹⁷⁶ Therefore, domestic businesses will have a strong

171. *E.g.*, Moses II, *supra* note 114, at 463 (giving an example clause in order to avoid the problem identified in scenario two).

172. MOSES I, *supra* note 22, at 208.

173. William G. Bassler & Robert B. Davidson, *How to Select the Best Seat for Your International Arbitration – The Case for the United States*, 23 MEALEY’S INTL. ARB. REP. 23 (2008).

174. *See generally* THOMAS MICELI, *THE ECONOMIC APPROACH TO LAW* 1-3 (2d ed. 2009).

175. This conclusion necessitates the assumption that countries prefer to have arbitrations in their country. However, given the explosion in the number of signatories to the NY Convention, presumably done in order to foster international arbitrations in their country, as well as the need to foster business opportunities in a global economy, this assumption is likely to be true. *See supra* pages 30-31; *see, e.g.*, 2009 BUREAU OF ECON. AFFAIRS, *Investment Climate Statement – Afghanistan* (Feb. 2009), <http://www.state.gov/e/eeb/rls/othr/ics/2009/117835.htm> (last visited Mar. 5, 2010); *see also* Giuseppe De Palo & Linda Costabile, *Promotion of International Commercial Arbitration and Other Alternative Dispute Resolution Techniques in Ten Southern Mediterranean Countries*, 7 CARDOZO J. CONFLICT RESOL. 303, 304 (2007).

176. *See* De Palo & Costabile, *supra* note 175, at 304 (stating that “[a] country benefits from the confidence of international investors if its delivery of justice is perceived as generally fair and reliable, relatively quick and inexpensive, and involving procedural formalities that are not onerous There is no doubt that the availability of functioning commercial arbitration and mediation systems . . . would help . . . attract foreign trade and investment.”).

incentive to lobby their governments for more adequate laws in order to foster and promote their ability to trade internationally. Under this analysis, over time, laws that are deemed inferior will slowly fade away as a consensus grows over what law should govern international arbitrations.

These arguments while appearing strong on their face have several underlying assumptions that could limit their overall persuasive force. However, when looking at the situations in which expanded review may be beneficial, these arguments are unpersuasive. First, arbitration clauses are often speedily put together and are often not as meticulously thought out as the theory suggests.¹⁷⁷ Most deals are done with an eye towards success and therefore a future dispute is one of the last concerns of the parties.¹⁷⁸ With this premise in mind, the idea that the market will correct the problems of a country's international arbitration laws is far more tenuous.

Despite this argument, the need for expanded review often only arises in situations where the potential for dispute would result in a large award.¹⁷⁹ In these situations, parties to the contract are likely to be much more careful in drafting their arbitration clause because of the known extent of the potential liabilities. Therefore, the exact situations where the need for expanded review is important are those situations where counsel will take a second look at the clause to ensure it meets their client's needs.

Finally, it is doubtful that expanded review is even a desirable option for many businesses entering into contracts. As discussed above, expanded review is as likely to result in incorrect awards as arbitration.¹⁸⁰ Adding an appellate process is creating an added layer of expense without any perceptible benefit. The fact that only 1% of the arbitrations before the American Arbitration Association have included an expanded review clause is indicative of the fact that most businesses agree with this analysis.¹⁸¹

VI. CONCLUSION

The NY Convention turned fifty years old last year. Despite its age, the treaty is still remarkable in its ability to effectively enforce international arbitration awards. Over the last fifty years, the NY Convention has grown from its original twenty-two signatories to 144

177. Stephen R. Bond, *How to Draft and Arbitration Clause (Revisited)*, in TOWARDS A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH 65, 65 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

178. *See id.*

179. *See supra* notes 169-73 and accompanying text.

180. *See supra* notes 157-58 and accompanying text.

181. *See supra* note 169.

countries. Furthermore, it has been used to enforce countless arbitration awards and has had a significant effect on the ability of businesses to confidently conduct their business abroad. Despite its successes, situations have arisen where the NY Convention has failed to properly and efficiently remedy disputes. It has been argued that the conflict of expanded review is just such an issue.

Any time a treaty reaches fifty years old, the tendency is to find faults with the document and come up with remedies to modernize the antiquated aspects of it. However, when the potential for problems are easily remedied by leaving the document alone, the "less is more" approach should always be taken. Expanded judicial review in international arbitration is such a situation. The NY Convention coupled with the remaining bodies of law allow room and flexibility for countries, practitioners, and businesses to remedy any conflict that may arise for expanded review. While it is impossible to know if the NY Convention will last another fifty years, it certainly should not be forced to succumb because of conflicts over expanded judicial review.