

RESTATING THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION

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The American Law Institute's new Restatement of the U.S. Law of International Commercial Arbitration is only barely underway, and the reporters began with a chapter, on the recognition and enforcement of awards, that should represent for them a comfort zone of sorts within the overall project. Yet already a number of difficult, and to some extent unexpectedly difficult, questions have arisen. Some of the difficulties stem from the very nature of an ALI Restatement project.¹ Others stem from the nature of arbitration itself and, more particularly, from the inherent tension between arbitral and judicial functions in the arbitration arena. Still other difficulties—some of them the least expected—reflect what I

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1. On ALI Restatement projects in general, see Kristen David Adams, *The American Law Institute: Justice Cardozo's Ministry of Justice?*, 32 SO. ILL. U. L.J. 173 (2007) (exploring the strengths and weaknesses of the American Law Institute in a comparative analysis to Justice Cardozo's vision for a Ministry of Justice) and N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55 (1990) (examining the origin of the American Law Institute).

might call the “internationality” of this particular project.² It is the latter difficulties that chiefly occupy me in this paper.

I. BACKGROUND ISSUES

Of course, any Restatement worth producing, because it falls within an area of the law needing clarification, simplification, and—at least on the margins—improvement, presents intellectual challenges. It is easy in a paper that focuses, as this one does, on the special challenges that commercial arbitration’s international character poses for the task of restating the law in that field to overlook the presence of problems having little or nothing to do with that character. But, of course, not all the difficulties confronting the Restatement are due to the subject’s international character. It may be useful at the outset to indicate, by way of illustration, some problems already raised by the Restatement that are traceable more to the fact that the project concerns *arbitration* than that it concerns *international arbitration*.

Scope of the Submission to Arbitration. How far may parties go in building legal content into the notion of the “scope of the submission to arbitration”? May, for example, the exclusion in a contract of a particular form of damages for breach be considered as raising a matter of “scope,” so that if the arbitrators, notwithstanding the prohibition, proceed to award such damages, that portion of the award may be vacated or denied enforcement as lying “beyond the scope of the submission to arbitration”?³ Should it matter in this regard whether the exclusion is contained in the arbitration clause itself, rather than in a separate and independent contractual clause?⁴

By way of further example, may a provision in an arbitration clause directing the tribunal to make a “true and correct”

2. For a discussion not only of the history of ALI projects, but of the trend in ALI projects toward “transnational work,” see Lance Liebman, *The American Law Institute: A Model for the New Europe?*, in *MAKING EUROPEAN PRIVATE LAW 209* (Fabrizio Cafaggi & Horatio Muir-Watt eds., 2008).

3. The leading cases confronting this issue include *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974) and *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (S.D. Ohio 1981).

4. This issue appears not to have been squarely decided in any judicial opinion.

application of the chosen law properly be considered as an aspect of “scope,” so that if the tribunal errs in its application of law, it will have exceeded the scope of its authority, thus rendering the award, to that extent, subject to annulment and unenforceable?⁵ Courts will want to be attentive to the risk of thereby circumventing *Hall Street Associates*’ bar against expanded judicial review of awards⁶ under the Federal Arbitration Act (FAA)⁷ and, more generally, of entering impermissibly into the realm of merits review. The restaters will have to establish some standards for ensuring that the notion of “scope of the submission to arbitration” is not manipulated to the point that the benefits associated with arbitration, as compared to litigation, are forfeited.

Arbitrability. The question of statutory non-arbitrability has become mostly academic in the United States since the federal courts have deemed virtually every statutory cause of action to be arbitrable.⁸ This of course could change under certain amendments to the FAA currently under consideration in Congress.⁹ Even apart from that, unexpected questions about arbitrability, in this strict sense of the term, have arisen. For example, is non-arbitrability, as a ground for denying recognition or enforcement, to be determined in accordance with the specific statutory claim (e.g., the Sherman Act) being advanced or, instead, with the whole subject matter field (anti-trust) within which the claim falls? If a statutory claim were to be deemed non-arbitrable, would that mean only that arbitrators may not entertain causes of action based upon that stat-

5. In all likelihood, such a provision would be treated as an impermissible attempt to heighten the standard of review of arbitral awards under the FAA as proscribed by the Supreme Court in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396, 1408 (2008) (“[T]he FAA confines its expedited judicial review to the grounds listed in 9 U.S.C. §§ 10 and 11. . .”).

6. See *supra* note 5.

7. Federal Arbitration Act, 9 U.S.C. §§ 1-16, 201-208, 301-307 (2009) [hereinafter FAA].

8. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 767-72 (2009). For only the most recent example coming from the Supreme Court, see *14 Penn Plaza LLC v. Pyett*, 129 S.Ct. 1496 (2009) (holding a provision in a collective bargaining agreement that clearly and unmistakably calls for arbitration of disputes under the Age Discrimination in Employment Act enforceable as a matter of federal law).

9. Arbitration Fairness Act of 2009, H.R. 1020, 111th Congress (2009).

ute, or would it also mean that they may not entertain a defense to a breach of contract claim insofar as the defense is predicated on a breach of that statute? Moreover, we may assume that whether a claim is arbitrable or not, in this narrow sense of the term, represents a question of law as to which a court is to exercise fully independent judgment. But we increasingly encounter statutory causes of action that a legislature has declared “conditionally arbitrable,” that is to say, arbitrable only subject to certain safeguards.¹⁰ The agreement to arbitrate may by statute need to be separately signed or printed in a certain size font, or may be enforceable only if a consumer has not repudiated the agreement within a specified cooling off period. Does the question whether these conditions have been satisfied have a powerful enough factual component to justify showing a certain degree of deference on the matter to an arbitral tribunal that may already have addressed it, even if arbitrability is ordinarily a purely legal question on which no judicial deference to the arbitrators is owed?

Federal Preemption. Federal legislation all too often fails to indicate with clarity its intended preemptive effect vis-à-vis state law, and more should probably not be expected from an old and inadequate statute like the Federal Arbitration Act. According to the greater weight of authority, the FAA does not preclude the application of state arbitration law, even in interstate arbitration cases, provided the state law is not inconsistent with the FAA.¹¹ But when is a state law inconsistent with the FAA? The *Hall Street Associates* decision¹² creates something of a puzzle in this regard. If the FAA is so offended by party agreements expanding the level of judicial review of awards in vacatur that such agreements are invalid and unenforceable, may parties then achieve exactly the same result by opting out of the FAA altogether and submitting their arbitration agreement to state law instead, as *Hall Street* implies they may be able to do?¹³

10. See, e.g., Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (requiring written consent from all parties as a precondition for settlement by arbitration).

11. *Southland Corp. v. Keating*, 465 U.S. 1, 14-16 (1984).

12. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S.Ct. 1396 (2008).

13. The California Supreme Court has already so ruled. See *Cable Connection, Inc. v. DirecTV*, 190 P.3d 586, 590 n.2 (Cal. 2008) (“Because the

Article XIV. According to Article XIV of the New York Convention, “A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.”¹⁴ How is this provision to be understood? Should the drafters be understood to have thereby imposed a “secondary” reciprocity requirement? In other words, may a State not only by declaration limit its Convention obligations to awards rendered on the territory of another Contracting State, but also refuse to recognize or enforce an award, even if rendered in another Contracting State, if, under mirror-image circumstances, a U.S. award would be denied recognition or enforcement in that other State under its implementation of the Convention? The article’s phrasing (“a Contracting State shall not be entitled to avail itself of the Convention against other Contracting States”) seems to contemplate a direct action by one Contracting State against another for violation of the latter’s New York Convention obligations. But might the absence of such “secondary” reciprocity also be raised in the context of a private party’s attempt to have a Convention award recognized or enforced?¹⁵

Effect and Weight of Prior Determinations. The example that perhaps best typifies the kinds of uncertainties in international commercial arbitration that a Restatement in the field might hope to address is the question of the effect and weight of prior judicial determinations of issues recurring over the life of an arbitration. It is inherent in the staged life-cycle of arbitration that a number of fundamental questions are apt to surface repeatedly at various moments over the course of an arbitration’s lifetime. Did an arbitration agreement come into being? Is a given person a party to that agreement? Is the

parties proceeded in state court under the CAA, we conclude that judicial review of the award is governed by state law, though the arbitration proceedings are governed by federal procedural law and AAA rules under the terms of the contract.”).

14. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. XIV, June 10, 1958, 330 U.N.T.S. 38 [hereinafter New York Convention].

15. On this issue, the arbitration literature is divided. Compare 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, 1074 (1961), with GARY B. BORN, *supra* note 8, at 2393-94.

agreement for any reason invalid or unenforceable? Have the various contractual preconditions, if any, to trigger enforcement of the arbitration agreement been satisfied? Does the dispute at hand fall within the scope of disputes subject to the agreement to arbitrate? Is the kind of dispute at hand one that is legally capable of being arbitrated in the first place?

These issues—sometimes crudely lumped together as issues of “arbitrability”—may surface repeatedly over the arbitration’s life-cycle, sometimes in the same court, sometimes in a court of a different jurisdiction. They may surface as a jurisdictional defense to a suit brought in a court of law when the claim before the court arguably comes within the scope of the arbitration agreement, or as a basis for seeking an order to compel arbitration of the claim. They may surface again, after the arbitration has already begun, when a court is asked for one of the stated reasons to issue a stay of the arbitration on one or more of these same grounds.

If the arbitration nevertheless proceeds and culminates in an award, a vacatur proceeding in the place of arbitration will provide an opportunity for the losing party to revisit each of these questions again in an attempt to have the award set aside. To these issues will now be added a second series of issues relating not to the validity, enforceability, or coverage of the agreement to arbitrate, but to aspects of the arbitral proceeding itself, including the composition of the tribunal and the adequacy of a party’s right to be heard. If no set-aside action is brought, or if one is brought but fails, may the same or similar questions be again revisited on the occasion of the award being presented to a court in another jurisdiction in an action for enforcement?

A standard and tempting response would be to invoke the judicial forum’s generally applicable rules on judgment recognition.¹⁶ These prior determinations are judgments after all, whether of courts of the same jurisdiction or of another. Or, are these issues so critical to the legitimacy of the underlying arbitral proceedings and the resulting award that they deserve

16. In the vacatur context, see, for example, *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 63 F.3d 160, 165 (2d Cir. 1993) (holding that an arbitration award was improperly vacated because an earlier decision to consolidate arbitrations was not properly subject to reconsideration under the law of the case doctrine).

fresh consideration at each stage? Or would some intermediate solution, in the form of limited deference, be a better solution? There may also arise the converse problem: when, if at all, and under what circumstances, may a party that had the opportunity to raise one or more of these objections at a prior stage in the arbitral life cycle, but failed to do so, then be deemed estopped from doing so at a later stage?¹⁷ Are such objections, in short, subject to implied waiver?

Choice of Law. To virtually all the questions that I have here raised, and others, there may be added a choice-of-law layer of analysis. The answers to some of these questions may so impact the effectiveness of arbitration that they call for answers drawn, if not from the language of the FAA, then from its spirit and underlying purposes.¹⁸ The answers to others may have so profoundly a procedural character as to warrant governance by the law of the forum.¹⁹ Still others, for reasons of federalism or otherwise, may more properly be left to state law,²⁰ whether statutory or common law in form. Choice-of-law issues abound.

17. See, e.g., *Cobec Brazilian Trading and Warehousing Corp. v. Isbrandtsen*, 524 F. Supp. 7, 9 (S.D.N.Y. 1980) (stating that a party is generally deemed to have waived an objection by failing to raise it in earlier judicial proceedings).

18. For an example, consider burden of proof. Although the FAA is silent on the matter, courts have, based on the FAA's broad pro-arbitration philosophy, generally placed on the party resisting recognition or enforcement the burden of establishing a ground for non-recognition and non-enforcement of an award. See, e.g., *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 n.3 (11th Cir. 2004) (“[T]he award is presumed to be confirmable [and the] defendant to the confirmation action can overcome this presumption only by making one of the showings enumerated in the Convention.”).

19. An example might be the availability of a *forum non conveniens* defense to actions to enforce a foreign arbitral award. See *P&P Indus. v. Sutter Corp.*, 179 F.3d 861, 870 n.6 (10th Cir. 1999) (“Often . . . concerns such as the ‘first to file rule’ will play a role in deciding which court, of the many that have power to confirm the award, should in fact do so.”).

20. An example would be the availability of immediate appeal from rulings granting or denying enforcement of a non-Convention award or from state court rulings granting or denying enforcement of a Convention award. (In federal courts, a right of immediate appeal is guaranteed by 9 U.S.C.A. § 16(a)(1)(D)).

II. INTERNATIONAL ASPECTS OF AN ARBITRATION RESTATEMENT

The problems just canvassed represent only a handful of the kind that restaters of a field of law justifying a Restatement should expect to face; otherwise a Restatement would not seriously be needed. But there exists an entire overlay of challenges that are traceable specifically to the *international* character of the subject undergoing restatement. It is on these challenges that I intend at this point to dwell.

In this paper, I address four such challenges. First, to what extent is international law a proper subject of a Restatement or similar project in the first place? Second, should the law delineate the national and international aspects of the subject, and if so, how? Third, what are the legal “givens”—by which I mean legal understandings that restaters cannot avoid and to which they must accommodate themselves when restating the law—when a Restatement subject is international in character? Fourth, and finally, how conscious should one be, in restating the U.S. law of an international subject, of the legal principles and practices within other jurisdictions? All four questions reflect ways in which restating American law represents a different enterprise when that law situates itself within a distinctly international field, as compared to the more traditional fields of ALI activity. (I use the term “more traditional,” rather than “more usual,” precisely because, with the passage of time, treating matters of international law in ALI Restatements may no longer be described as unusual.)

A. *International Law as a Restatement Subject*

Writing in 2001, ALI vice-president Conrad Harper described the early years of the American Law Institute as ones in which reference to international law could not even be described as “episodic”; “occasional” was as much as one could say.²¹ Even the Conflicts of Law Restatements²²—including the Second²³—made at most incidental mention of the transnational aspects of conflicts of jurisdiction and conflicts of law.

21. Michael Traynor, *The President's Letter*, ALI REPORTER (Fall 2001), available at http://ali.org/ali_old/R2401_presltr.shtm.

22. RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

23. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

In that respect, of course, the Conflicts Restatements were no different in character than the conflicts of law scholarship of the day.

The picture has changed markedly over the last twenty to twenty-five years, with international law-oriented projects figuring ever more prominently on the ALI agenda. While this development has hardly been systematic, the international law initiatives of the ALI may nevertheless conveniently be divided into three distinctive species—a fact that in itself reveals the breadth of the “international” phenomenon.

1. *The U.S. Law of International Law*

A first species, exemplified by the Restatements of the Foreign Relations Law of the United States,²⁴ is one that advances a substantive United States law position on an international law subject. That model fit perfectly the intentions of the restaters for that project, which was to treat foreign relations law as a body of law that was as “national” as any other body of law, its “foreign relations” subject matter notwithstanding. It comes as no surprise that the U.S. legal understanding of international law, and public international law in particular, is not a global understanding. While it is no secret that the drafters of the Second Restatement of Foreign Relations Law sought to align U.S. understandings of international law more closely with understandings of international law held in certain other legal and political systems, there was never any doubt that it was U.S. understandings of international law that were being restated or otherwise advanced. It may not be particularly convenient that international law understandings differ from jurisdiction to jurisdiction, but it should not surprise us that they do.

While an ALI project having the ambition to set forth the U.S. law on an international law subject may readily take the distinctive Restatement form, that form is not the only available or appropriate one. When, for example, the ALI entered into the arena of recognition and enforcement of foreign country judgments, it chose to develop not a Restatement, but

24. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1965); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

a draft federal statute on the subject.²⁵ Of course, a major consideration in pursuing that strategy was the circumstance that a Hague Convention on the subject was being developed,²⁶ and such an instrument, if signed and ratified by the United States, was assumed to require federal implementing legislation. It would have made little sense to pursue a Restatement of an international law field that promised to become the subject of an international treaty requiring implementing legislation.

The Restatement of the U.S. Law of International Commercial Arbitration follows the path charted by the Restatement of Foreign Relations Law. It will set out the U.S. law governing international commercial arbitration, and, like the Restatement of Foreign Relations Law, needs to come to terms with legal norms, whether constitutional, statutory, or treaty in origin, that are unavoidably “American.” I consider the nature of these constitutional, statutory, and treaty “givens” more closely below.²⁷

2. *The International Law of International Law*

The mode of presenting a body of international law that I have just described, and that will be used in the present Restatement project, is only one among several. Binding international law is being made on today’s international legal landscape also under the aegis of certain distinctively international regimes, that is, regimes whose institutions are themselves in the business of issuing authoritative pronouncements of international law. Among these, WTO law is of special legal interest in the United States due to the combination of an international agreement (the Uruguay Round amendments)²⁸ and its federal implementing legislation (the Uruguay Round amend-

25. ALI, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE* (2006).

26. Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on Oct. 30, 1999, *available at* http://www.state.gov/www/global/legal_affairs/991030_forjudg.html.

27. *See infra* Parts 2, 3, and 4.

28. General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Dec. 15, 1993, 33 I.L.M. 1.

ments implementation statute).²⁹ WTO law is unquestionably a product of the WTO's own institutions, both legislative and judicial, even though its practical impact is limited by its not being understood to generate individually enforceable rights and obligations in U.S. courts.³⁰ Still, nothing would prevent the ALI from commissioning a Restatement of a body of law of this kind, and calling it a Restatement, even though what would be restated would be the law generated by the organs of an international organization, a "truly" international law.

When the ALI set out to address WTO law in this fashion, it employed the term "Principles" rather than "Restatement."³¹ One might suppose that this nomenclature reflected an assumption that the only law that an institution like the ALI can properly "restate" is domestic U.S. law, even if domestic law addresses an international law subject. But why should it be that the only law the ALI can properly restate is domestic law? The central objective of Restatements is to clarify and consolidate the law for understanding and application by U.S. courts.³² If WTO law were understood, as it happens not to be, to give rise to individually enforceable rights and obligations in U.S. courts, a Restatement of this field of law would be as valuable to the judiciary as are Restatements in any other field of law that U.S. courts have occasion to apply. I suspect that the real reason the ALI chose to present its work on WTO law in the form of Principles, rather than a Restatement, is that WTO law is simply still in too nascent a stage to presume to be restated.

Other fields that are international, in the sense of being made by international institutions, and that could form the subject of Principles along the lines of the ALI's Principles of WTO law, include the international law of investor protection. That body of law is essentially being made today by international arbitral tribunals, under the aegis of ICSID, NAFTA, or the multitude of bilateral investment treaties in force. Use of

29. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

30. See 19 U.S.C.A. § 3512(c)(1) ("No person other than the United States . . . shall have any cause of action or defense under any of the Uruguay Round Agreements . . .").

31. ALI, PRINCIPLES OF TRADE LAW: THE WORLD TRADE ORGANIZATION (2003).

32. See generally Hull, *supra* note 1.

the term “Principles” would be as apt here as in the case of WTO law; the understanding of even the most fundamental norms of investor protection law—such as “fair and equitable treatment”—cannot be considered to be anything more than nascent.

3. *Principles for Addressing Cross-Border or Common Problems*

A third species of ALI activity in international law includes instruments for dealing with recurrent cross-border situations. Such instruments neither restate a distinctively American law on an international law subject (as in the Foreign Relations Law Restatement) nor restate the international law on an international subject (as in the Principles of WTO law). Rather, they seek to accomplish a quite different task, namely to foster the development among jurisdictions of common principles for the treatment of problems that are either “cross-border” in nature or simply commonly experienced. Ventures of this sort are both “more” and “less” than the Restatements and Principles just considered. They are “more” because they go beyond what can currently claim to constitute law, but “less” because they lack the character of law in the full sense of the word. ALI projects of this kind reflect the emergence of what may best be considered as a kind of “soft law.” Unsurprisingly, the term “Principles” recurs regularly in projects of this kind as well.

The ALI prototype is the Principles and Rules of Transnational Civil Procedure,³³ an instrument produced jointly by the ALI and Unidroit. The Transnational Principles and Rules represent something along the lines of a model code for handling the procedural aspects of transnational litigation of civil and commercial law disputes. While they are positive law nowhere, they may be candidates for adoption either as positive law, as a procedural model that parties may direct international arbitrators to employ (or that arbitrators could possibly employ without direction by the parties), or as a source of “best practices” for courts and regulators in their application of independently existing procedural norms. The presence in a dispute of a “transnational” element, within the meaning of the Principles and Rules, justifies our considering an instru-

33. ALI, PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE (1998).

ment of this kind as a third type of international ALI product. The rationale for such a project is that truly transnational transactions or relationships may be more effectively regulated by instruments that have been designed for that purpose than by bodies of law that were fashioned in a purely domestic setting.

The possibilities for this species of international law project are legion. A more recent example is the ALI's Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Intellectual Property Disputes.³⁴ The drafters sought to distill and develop a body of principles on issues of private international law in the intellectual property area that might prove attractive to policymakers across jurisdictions. In that respect, the ALI drew closer to the kind of work traditionally performed by bodies like the Hague Conference on Private International Law,³⁵ Unidroit,³⁶ and UNCITRAL.³⁷ It is then really a small step for the ALI to move, as the Hague Conference, Unidroit, and UNCITRAL themselves have done, to the elaboration of specific inter-jurisdictional mechanisms for managing transnational problems. The ALI had at one point, for example, developed Guidelines on Court-to-Court Communications in Insolvency Proceedings³⁸—a project that initially was limited to the NAFTA countries but that has more recently expanded to the development of cooperative mechanisms for transnational bankruptcies more generally.³⁹

A problem does not need to have a distinctively transnational element to justify the ALI considering it an interna-

34. ALI, *INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES* (2008).

35. Statute of the Hague Conference on Private International Law, Oct. 9-31, 1951, 15 U.S.T. 2228, 220 U.N.T.S.121, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=29.

36. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (1994), *available at* <http://www.jus.uio.no/lm/unidroit.contract.principles.1994/doc.html>.

37. United Nations Commission on International Trade Law, G.A. Res. 2205 (XXI), U.N. Doc. A/2205 (Dec. 17, 1966).

38. ALI, *TRANSNATIONAL INSOLVENCY: PRINCIPLES OF COOPERATION AMONG THE NAFTA COUNTRIES* (2003).

39. Institute Moves Forward with Transnational Insolvency Project, ALI REPORTER (Summer 2006), *available at* http://www.ali.org/ali_old/R2804-07-transnationalinsolv.htm.

tional initiative. It is true that aggregate and collective litigation in national courts more and more often involves a multinational body of claimants. But, even if it does not, the fact remains that the effective handling of collective and aggregate litigation is a problem challenging contemporary legal systems across the board, even though internationality does not lie at the core of the problem. When the ALI commissioned the establishment of a project on the Principles of Aggregate Litigation,⁴⁰ it proceeded on the assumption that the difficulties associated with collective and aggregate litigation are so commonly experienced in jurisdictions around the world that it was worth launching an international effort, even in the absence of a distinctly transnational element in the underlying scenarios. The project is meant to produce a set of principles that legislatures around the world might observe in designing litigation mechanisms for collective redress.

Of course, it is precisely in the context of endeavors such as these that comparative law takes center stage. A common search for legal solutions draws upon comparative law for inspiration, even while it equally consults comparative law for determining the extent to which those solutions fit the legal environments in which they may eventually be introduced. In fact, this third species of international work is by no means entirely new. The ALI made an early foray into this mode of inquiry in its international human rights project of the 1940s, which resulted in a "Statement of Essential Human Rights"—a Statement that was never published, much less adopted,⁴¹ but that powerfully influenced the United Nations Universal Declaration of Human Rights.⁴²

B. *Delimiting National and International Law*

The examples given above suggest how untenable it has become to distinguish sharply between national and international law. Take the Restatement of International Commercial Arbitration. One might want to confine the inquiry to cases in

40. ALI, Current Projects on the Principles of the Law of Aggregate Litigation, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=7.

41. THE AMERICAN LAW INSTITUTE: 75TH ANNIVERSARY (1998).

42. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

which one or more elements in an arbitration are “foreign,” i.e., in which one or both parties are foreign, the place of arbitration is foreign, the cause of action arises under foreign law (or foreign law is otherwise applicable), the production of evidence or provisional relief that is needed is foreign, or the award was rendered on foreign territory. But transactions that are international in one or more of these respects may nevertheless fall squarely within the ambit of a preexisting body of domestic law that was, however, almost certainly designed for domestic cases.

U.S. arbitration law offers a prime example. The FAA, which applies in principle to all the “foreign” scenarios recited above, is the same regime that is applicable to purely domestic interstate arbitration. On many issues, foreign arbitral awards will be treated by U.S. courts no differently than domestic arbitral awards, and the truly voluminous FAA case law developed for domestic cases under the FAA will bear directly on the many fewer foreign arbitration cases. (Admittedly, on an issue like the recognition and enforcement of arbitral awards, and to a lesser extent arbitration agreements, the FAA has separate regimes for domestic and foreign awards, with FAA Chapter One⁴³ governing the former and FAA Chapters Two⁴⁴ and Three⁴⁵ governing the latter, but this was due to the necessity of statutorily implementing an international convention on the recognition and enforcement of foreign arbitral awards.⁴⁶) In fact, the leading precedents regularly cited in cases concerning foreign arbitral awards—*Prima Paint*,⁴⁷ *Southland Corporation*,⁴⁸ *Volt*,⁴⁹ *Mastrobuono*,⁵⁰ *First Options*,⁵¹ *Hall Street Associates*⁵²—are cases displaying no foreign element whatsoever, but falling within federal legislative competence, hence the FAA, because they involved interstate, as opposed to purely intrastate, commerce. Even so, these cases are as foundational

43. FAA §§ 1-16 (2009).

44. *Id.* at §§ 201-208.

45. *Id.* at §§ 301-307.

46. *See* New York Convention, *supra* note 14.

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

48. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

49. *Volt Info. Sciences, Inc. v. Stanford University*, 489 U.S. 468 (1989).

50. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

51. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

52. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

for international arbitration in U.S. courts as they are for interstate arbitration. To that extent, the distinction between the national and the international is largely artificial.

Of course, not all lines that one is tempted to draw in a project like the Restatement of the U.S. Law of International Commercial Arbitration implicate the distinction between domestic and international law. For example, in the run-up to this Restatement project, far more attention was given to the question whether investor-State disputes should be brought within the ambit of the project than to the question of where domestic ends and international begins.⁵³ Investment arbitration, as it has developed over the past fifteen years or so, bears many features that importantly distinguish it from standard international commercial arbitration. The State will ordinarily not have been a party to the underlying transaction constituting the investment; the conduct of the respondent State will almost invariably be conduct taken pursuant to its sovereign prerogatives; the relationship between Claimant and Respondent will be treaty- rather than contract-based; the law applicable to the dispute will not be the law applicable to the underlying investment transaction, but rather the law governing investor protection under the relevant international agreement; the pressure for transparency in what is otherwise the distinctively non-transparent world of international commercial arbitration (not to mention the very notion of *amicus curiae* briefs) is unique to foreign investment disputes. And so on.

It might be argued that this combination of special features justifies carving investor-State disputes out of the ALI Restatement altogether. That argument alone is testament to the high degree of differentiation and fragmentation of international law, even in a domain so seemingly unified as international arbitration. However, it was ultimately decided not to carve out such disputes from the Restatement, largely for the same reason, though in reverse, that it makes little sense to ignore domestic FAA cases in dealing with the international cases. If international commercial arbitration forms the bedrock of investor-State arbitration, it does not make a great deal of sense to segregate the latter for entirely separate treatment. Were the Arbitration Restatement to address substantive law,

53. George A. Bermann, *Restating International Arbitration*, 101 Am. Soc'y Int'l L. Proc. (forthcoming 2009).

my position would be quite different. The United Nations Convention on the International Sale of Goods (CISG)⁵⁴ and the Unidroit Principles,⁵⁵ among other instruments, which figure prominently as the applicable law in international arbitrations arising out of sales transactions, stand worlds apart from the investor protection principles that have been built into NAFTA and bilateral investment treaties. But, since the Restatement will have little to say about the substantive rules of decision to be applied in the arbitration, the distinction between investor-State and commercial arbitration bears much less significance. The distinction does not fade away entirely; certain procedural issues like transparency, for example, will inevitably be treated differently. But the distinction does fade.

C. *Constraints in Fashioning International Law Restatements*

While Restatements of the law seek chiefly to clarify and consolidate the law, they may also afford an occasion for some significant reshaping of the law in one aspect or another. Yet the latitude that restaters enjoy is limited, because every field is populated with at least some norms that cannot, or at least are not supposed to, be violated or ignored. I referred to these earlier as “givens,” in the sense that they must be respected and accommodated, even by restaters. Historically, such privileged authorities have included (a) settled constitutional understandings, (b) legislation of reasonably settled meaning, (c) international agreements of reasonably settled meaning to which the U.S. is a party (at least those that have been statutorily implemented or are deemed to be self-executing), and (d) reasonably settled case law of the U.S. Supreme Court (or of state supreme courts, where state law is concerned). Some legal principles are, for the restaters, what in private international law terms would be called “mandatory.”⁵⁶ Their disrespect by restaters would impair the legitimacy, and certainly the utility, of the resulting Restatement.

54. Convention on Contracts for the International Sale of Goods, Jan. 1, 1988, 1489 U.N.T.S. 3.

55. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

56. George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 AM. REV. INT'L ARB. 1, 1-2 (2007).

The first generation of Restatements, which were produced in roughly the first twenty years of the ALI's founding in 1923, and which dealt with subjects such as agency, conflict of laws, contracts, judgments, property, restitution, security interests, torts, and trusts, suffered few constraints in this regard. As far as the Constitution is concerned, it was assumed to have rather little to say on these subjects. As for legislation of settled meaning, it would almost invariably have been situated at the state level. Interestingly, the presence of one or more pieces of state legislation on a topic falling within the ambit of the Restatement was not thought of as getting very much in the way of those Restatement projects. Rather, those projects proceeded largely as if the existence of state legislation were no impediment. This may have been due in part to traditional notions that statutes should be construed as only narrow derogations from the common law.⁵⁷ It may also have been assumed that, while the courts of State A could not be expected to follow a Restatement provision that conflicts with the enacted legislation of that State, the same Restatement provision could nevertheless be influential in States B and C, lacking any such conflicting legislation. Of course, were the legislature of State B or C to intervene by enacting legislation such as State A's, that legislation would prevail, as a matter of local law. For their part, treaties and other international agreements had virtually nothing to say on the subjects of the early Restatements, at least not directly. Nor, finally, was there much scope for settled U.S. Supreme Court case law, at least not in a post-*Erie Railroad v. Tompkins* world.⁵⁸

Such is the idyllic landscape on which the Restaters, at least in retrospect, appear to have originally been deploying their efforts. This was the case not only for the first wave of Restatements, but also for the majority of Restatements in the second and third series.

The U.S. law of international commercial arbitration in the year 2009 presents a rather different picture. Admittedly, apart from possible concerns over due process in arbitral pro-

57. See *Meister v. Moore*, 96 U.S. 76, 79 (1877) ("No doubt, a statute may take away a common-law right; but there is always a presumption that the legislature has no such intention, unless it be plainly expressed.").

58. See *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1937) (holding that there is "no federal general common law").

cedure, the U.S. Constitution has rather little to say on the subject. But the other categories of “givens” mentioned above are very much in play. By way of legislation, there looms large a major, if outdated, piece of federal legislation in the form of the Federal Arbitration Act. However, as enacted in 1925, the FAA seems almost oblivious to international arbitration, at least as far as arbitral awards rendered abroad are concerned. Almost incredibly, from today’s vantage point, Chapter One of the FAA contemplates arbitrations arising out of interstate and foreign commerce, but seems to assume that all such arbitrations will be situated in the United States. The Act refers not to recognition or enforcement of awards (terminology generally associated with foreign awards), but to their vacatur or confirmation (terminology generally associated with domestic awards). Were the FAA to be enacted today, it would surely not employ such limiting language.

When Chapters Two⁵⁹ and Three⁶⁰ were added to the FAA to implement the New York and Panama Conventions, respectively, they expressly brought the recognition and enforcement of foreign arbitral awards within the scope of the Act. But the Conventions invited Contracting States to declare upon ratification that they would not be bound to recognize or enforce foreign awards unless rendered on the territory of a State party to the Convention,⁶¹ and the United States, like most other Contracting States, so declared.⁶² The logical result is that awards rendered on the territory of States not parties to one of the Conventions are specifically governed neither by Chapter One of the FAA (since not made domestically) nor by Chapters Two or Three (because not New York or Panama Convention awards). I return to this problem below, but the point to be made here is that the Restatement of the U.S. Law of International Commercial Arbitration has to reconcile itself with national legislation such as the FAA, as they stand, with all their idiosyncrasies and shortcomings.

59. FAA at §§ 201-208.

60. *Id.* at §§ 301-07.

61. New York Convention, art. I.3; Inter-American Convention on International Commercial Arbitration, *opened for signature* Jan. 30, 1975, OAS SER A20 (SEPEF), 14 I.L.M. 336 (1975) [hereinafter the Panama Convention].

62. FAA § 305.

Arbitration statutes are found at the state level as well. According to prevailing case law, state arbitration legislation is not categorically preempted by the FAA, though it will be inapplicable to the extent inconsistent with the FAA,⁶³ and much of this legislation, whether by its terms or impliedly, applies to international as well as domestic arbitration. I noted above that the early restaters, operating in essentially common law areas such as torts, contracts, property, or agency, proceeded as if free to take little or no account of existing state laws. But the situation may well be different when a Restatement intervenes in a field in which Congress has already enacted important legislation. Such a Restatement effectively builds a kind of federal common law of statutory interpretation, and in so doing poses a much more substantial threat to state law, if only because the capacity of state law to reassert itself legislatively will depend upon the state of federal preemption in the area of law in question.

Assuming the FAA does not occupy the international arbitration field to the exclusion of state law, but rather permits resort to state arbitration law to the extent not inconsistent with the FAA, how is “inconsistency” with the FAA to be ascertained? If the FAA places a ceiling on the grounds available for vacatur of local awards, or on the grounds for denying recognition or enforcement of foreign awards, does that mean that the parties may have no resort to state law that permits more searching review? This is precisely the question on which the Supreme Court’s recent *Hall Street Associates* decision⁶⁴ has managed to send profoundly mixed signals. In sum, drafters of a Restatement, entering upon the international commercial arbitration field, find themselves in anything but the juridical vacuum in which the early restaters somehow assumed themselves to be, whether they actually were or not.

The Restatement of the U.S. Law of International Commercial Arbitration also differs from most of the early Restatements in regard to the “givens” established by settled Supreme

63. *Southland Corp. v. Keating*, 465 U.S. 1, 16-17 (1984).

64. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1406 (2008) (holding that the statutory grounds provided by the FAA for a prompt vacatur and modification of an arbitration agreement may not be modified by contract, but suggesting that parties seeking a harder review than that provided by the FAA might look to state statutory or common law, where “judicial review of different scope is arguable”).

Court pronouncements in the field. Unlike those early Restatements, anchored as they were in state common law, this Restatement proceeds on terrain on which the Supreme Court has been keeping remarkably busy, up to and including the past term,⁶⁵ in establishing new “givens” for the field. However one may assess the contribution that recent Supreme Court rulings have made to clarity and coherence in the international commercial arbitration field, the fact remains that determining the extent to which the Supreme Court has “finally settled” a point of law within the field is a feat not to be underestimated.

Finally, as already implied, international agreements occupy a place in the international commercial arbitration field that the drafters of the early Restatements could not have imagined, and thereby supply restaters with additional “givens.” But instruments like the New York, Panama, and ICSID conventions,⁶⁶ and the innumerable bilateral investment treaties that contemplate the arbitration of foreign investment disputes,⁶⁷ also present some noteworthy gaps. As noted, the only chapters of the FAA that deal with foreign arbitral awards are Chapters Two and Three, implementing the New York and Panama Conventions, respectively—and those Conventions only. But one encounters from time to time international ar-

65. *Arthur Andersen LLP v. Carlisle*, 556 U.S. ___, 129 S. Ct. 1896 (2009) (addressing the issue of whether appellate courts have jurisdiction under § 16(a) of the FAA to review denials of stays requested by litigants who were not parties to the relevant arbitration agreement and examining whether § 3 of the act can even mandate a stay in such circumstances); *Vaden v. Discover Bank*, 129 S. Ct. 1262 (2009) (holding that while a federal court may “look through” a § 4 petition to determine whether it is predicated on a controversy that “arises under” federal law, it may not entertain a § 4 petition based on the contents of a counter-claim when the whole controversy between the parties does not qualify for federal court adjudication); *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (holding that a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law).

66. *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, Mar. 18, 1965, 4 I.L.M. 532 (1965).

67. United Nations Conference on Trade and Development [UNCTAD], *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, UNCTAD/ITE/IIA/2006/5 (2006), available at http://www.unctad.org/en/docs/iteiia20065_en.pdf; UNCTAD, *The Entry into Force of Bilateral Investment Treaties*, UNCTAD/WEB/ITE/IIA/2006/9 (2006), available at http://www.unctad.org/en/docs/webiteiia20069_en.pdf.

bitral awards that are not Convention awards (notably because the State where the award was made is not a contracting State and thus fails the Convention's reciprocity requirement). Do the awards rendered on the territory of States as commercially significant as, say, Liechtenstein and Taiwan, which have not ratified the New York Convention, fall between the cracks merely because they are definitionally not Convention awards? Should FAA Chapter One, or possibly even Chapters Two or Three, apply to these awards on the ground that, whatever else, such awards arise out of interstate or foreign commerce and should be considered as well within the FAA's domain?⁶⁸ Or are these awards relegated to the vagaries of state statutory or common law of arbitration⁶⁹—a result that may seem archaic, but that actually obtains even today in the closely related field of the recognition and enforcement of foreign country judgments, where we admittedly find no federal legislation, not even as rudimentary as the FAA?⁷⁰ Might we even be prepared to take the leap of asserting that, given the prominence of federal law in the international arbitration field, a sort of federal common law must be developed for coping with this "interstitial" subcategory of international awards?⁷¹

In short, it is one thing for the ALI to develop a Restatement in a purely common law field, or in one populated by few and scattered pieces of state or federal legislation—and quite another thing to do so where not only a broad federal statute, but important multilateral and bilateral international

68. There is a suggestion to this effect in *Cortez Byrd Chips, Inc. v. Bill Harbert Construction Co.*, 529 U.S. 193, 203 (2000) and in *San Martine Compania de Navegacion, S.A. v. Saguenay Terminals, Ltd.*, 293 F.2d 796, 799 (9th Cir. 1961).

69. For a suggestion to this effect, see *Weizmann Inst. of Science v. Neschis*, 421 F. Supp. 2d 654, 674 (S.D.N.Y. 2005) ("The Convention does not appear to preempt all other law governing the recognition of foreign arbitral awards or to bar the recognition of awards not falling under the Convention . . .").

70. See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (in diversity cases, federal courts apply the conflict of laws rules of the state in which they sit).

71. For a suggestion to this effect, see *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 579 (7th Cir. 2007) ("We believe that this overarching federal concern with the uniformity of treatment of international arbitration agreements requires that the issue before us be resolved by a federal common law rule, rather than by a state rule of decision.").

conventions dominate the field. One cannot help but be struck by the number of issues that, at least in the case of these non-Convention awards, are potentially governed by one or another “residual” body of law. On some issues, like the availability of a sovereign immunity defense to enforcement or the applicability of the act of state doctrine, the case for a federal law rule is quite powerful. On others—such as the availability of *forum non conveniens* as a basis for stay or dismissal of an enforcement action, of summary procedures, or of appeals from rulings on recognition or enforcement—the notion of borrowing forum law makes a great deal more sense. On still others—like the grounds for non-recognition and non-enforcement of awards, the burden of proof of the grounds, the reciprocity requirement, and the effectiveness of party agreements for expanded or lessened review as compared with the FAA standard—there is a contest between the residual application of state and common law, on the one hand, and a more free-wheeling resort to an FAA-based body of federal common law, on the other.

D. *The Relevance of Foreign Law*

A remaining question of special interest to an international law Restatement is the proper role of foreign law in such an enterprise.

A subject does not of course need to be international in character in order for foreign law to serve the usual range of comparative law purposes. Among the purposes comparative law serves is a better appreciation of one’s own law as it stands and a wider opening to the ways in which it might be improved. No area of the law—even those that were the Restatement’s earliest terrains and that were decidedly domestic in orientation—is beyond the reach of these core comparative law purposes. But when a subject is international in character, as international commercial arbitration assuredly is, foreign and comparative law may be doubly instructive. They stand to confer their usual benefits in the restaters’ consideration of the substance and content of the law being restated, but at the same time help equip restaters to address the “interface” of legal systems that every truly international subject entails in a legally globalized world.

The interface aspects of international commercial arbitration are obvious, for international commercial arbitration simply does not “belong” to any single jurisdiction. One need not assert some overarching “anationality”⁷² of international arbitration in order to appreciate this fact. The following scenarios, among many others, make the point:

- A court of country A compels arbitration of a dispute in country B, fully recognizing that the courts of country B may consider the dispute not legally arbitrable and even choose to enjoin the arbitration or vacate the resulting award.
- The courts of country C set aside an award, knowing that the courts of country D may nevertheless choose to recognize and enforce the award if they consider country C’s reasons for setting aside the award to be insular or idiosyncratic.
- The law of country E may permit the use of arbitral procedures that the law of country F considers to be fundamentally unfair, so much so as to cause a court of country F to withhold recognition from the award.
- Country G may be willing for its courts in principle to afford provisional relief in relation to arbitral proceedings elsewhere, but not when the tribunal sitting in country H is entertaining a claim that the courts of country G consider to be within country G’s exclusive jurisdiction or violative of country G’s notion of international public policy.
- The law of country I must decide whether its pro-arbitration policy is so emphatic as to justify the issuance of an anti-suit injunction targeting actions in the courts of country J whose pendency the courts of country I consider to be in violation of the agreement to arbitrate.
- The courts of country K must decide, when asked to deny enforcement to an award rendered in country L, how much weight to give to the prior decisions of the courts of country L that the award should not be vacated, or to the prior decisions of country M, whose courts had decided to compel arbitration in the first place.

72. See generally Arthur T. von Mehren, *The Rise of Transnational Legal Practice and the Task of Comparative Law*, 75 TUL. L. REV. 1215 (2001).

The point is this: the proper functioning of international commercial arbitration depends on the legal principles and practices of multiple legal orders. A Restatement of the U.S. Law of International Commercial Arbitration accordingly cannot fully achieve its purposes unless it considers the multiple points at which this body of law and the arbitration law of other jurisdictions interface. That aspect of the challenge, more than any other, reveals international commercial arbitration's distinctive multi-jurisdictional dependency.

