Revista Brasileira de
Alternative Dispute Resolution

RBADR

01

Ano I · Número I
Jan./Jun. 2019

Publicação Semestral
ISSN: 2596-3201

CBMA | CENTRO BRASILEIRO DE MEDIAÇÃO E ARBITRAGEM

FORUM

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The New York Convention and the American Federal System

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Summary: **I** Introduction – **II** Background – **III** Implementation of Arbitration Conventions in a Federal System – **IV** Applying the Models to U.S. Implementation of the New York Convention – **V** Party Autonomy and the Role of State Law Under the New York Convention – **VI** Implications and Conclusions

I Introduction

Virtually all American states have statutes that make arbitration agreements and awards enforceable and that set out procedures for their enforcement in state courts.[1] A number of states, including California, Texas, and Florida, have enacted international arbitration statutes to supplement their domestic arbitration laws.[2] But this extensive body of state arbitration law has had only a "marginal impact" on American arbitration practice – particularly international arbitration practice –[3] because the Federal Arbitration Act (FAA) preempts conflicting state arbitration laws, even in state court.[4]

1 Gary B. Born, International Commercial Arbitration 142 (2009). Alabama is an exception. See Ala. Code §8-1-41 ("The following obligations cannot be specifically enforced: An agreement to submit a controversy to arbitration ...".). The FAA preempts this Alabama rule to the extent an arbitration agreement is within the (very broad) scope of the FAA. See Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995).

2 Howard M. Holtzmann & Donald Francis Donovan, United States, in Int'l Council for Commercial Arbitration, International Handbook on Commercial Arbitration, at U.S.A., Annex V. [At least eight] of those state international arbitration statutes are based on the UNCITRAL Model Law on International Commercial Arbitration. See Uncitral, Status: 1985 - Uncitral Model Law on International Commercial Arbitration, with Amendments as Adopted in 2006, available at https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status.

3 William W. Park, The Specificity of International Arbitration: The Case for FAA Reform, 36 Vand. J. Transnat'l L. 1241, 1245 n.16 (2003); see also Born, supra note 1, at 143 ("To date, however, both these [state international arbitration statutes] and state law more generally have played a distinctly secondary role in the international arbitral process").

4 See, e.g., Southland Corp. v. Keating, 465 U.S. 1, 15-16 (1984); see generally Christopher R. Drahozal, Federal Arbitration Act Preemption, 79 Ind. L. J. 393, 407-21 (2004) (describing framework for analyzing FAA preemption issues in domestic cases).

Although we know that the FAA preempts state law, the scope of that preemptive effect is not clear. Indeed, a pair of United States Supreme Court cases have suggested a possible broader role for state law in arbitration matters. In *Hall Street Associates, LLC v. Mattel Inc.*, the Court indicated in dicta that parties might be able to contract for expanded review under state law although the FAA does not permit them to do so.[5] And in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, the Court suggested that the arbitrators might not have exceeded their powers in construing an arbitration clause to permit class arbitration if they had relied on a state default rule permitting class arbitration.[6]

Whether state law can play a broader role in international arbitration matters in the United States depends on the extent to which the New York Convention[7] and Chapter Two of the FAA (which implements the Convention) preempt state arbitration law. This article undertakes a preliminary analysis of that broad topic by examining several legal questions central to determining the preemptive effect of the New York Convention: (1) What effect, if any, does the federal-state clause (Article XI) have on U.S. obligations under the Convention? (2) To what extent does Chapter Two of the FAA apply in state court? and (3) Is the New York Convention self-executing? Part II briefly sets out background information on the New York Convention and its implementation in the U.S. Part III describes three models of how an arbitration convention might be implemented: the "exclusive spheres" model, the "federal preemption" model, and the "access" model. Part IV analyzes the legal questions identified above and considers their implications for the models. Part V discusses the extent to which parties can contract out of the FAA and into state arbitration law. Finally, Part VI identifies some possible implications of this analysis and concludes.

II Background

Although the U.S. participated in the United Nations conference that adopted the New York Convention in 1958,[8] it did not itself ratify the Convention until

5 552 U.S. 576, 590 (2008).

6 559 U.S. 662, 672-75 (2010). The Court's subsequent decision in AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011), raises some questions about that possibility, however.

7 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention]. I do not consider the Panama Convention in this article – see Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (1975) – although it is similar to the New York Convention in many respects. See generally John P. Bowman, The Panama Convention and Its Implementation Under the Federal Arbitration Act (2002).

8 The U.S. Delegation participated in the Conference only "in a limited way". Official Report of the United States Delegation to the United Nations Conference on International Commercial Arbitration (Aug. 15, 1958), reprinted in 19 Am. Rev. Int'l Arb. 91, 95 (2008) [hereinafter U.S. Delegation Report]. "It did not attempt to exert a strong influence on the content of the convention, confining itself to exposition of its views on matters of basic principle and emphasizing the value of the pragmatic as opposed to the multilateral convention approach to progress in arbitration". Id.

1970.[9] The U.S. Delegation to the conference recommended "strongly" against ratification in 1958, in important part because of likely conflicts between the Convention and state law. The Official Report of the U.S. Delegation explained that if the Convention were "accepted on a basis that avoids conflict with State laws and Judicial procedures," it "will confer no meaningful advantages on the United States".[10] But if it were "accepted on a basis that assures such advantages," it "will override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedure".[11] The Delegation concluded that before the U.S. should adhere to the Convention, Congress needed to expand the scope of the FAA, more states needed to adopt their own arbitration laws, and either courts or legislatures needed to enhance the enforceability of foreign arbitral awards. Also, the Delegation found "no visible evidence of a strong movement in any of these directions".[12]

By the late 1960s, however, business interest in international arbitration had increased and American arbitration law had evolved. All three developments identified by the U.S. Delegation had in fact taken place: the Supreme Court had held that the FAA creates federal substantive law making pre-dispute arbitration agreements enforceable;[13] a number of additional states had adopted new arbitration laws; and "significant additional legal precedent has been added to American jurisprudence to indicate that our courts will enforce foreign arbitral awards".[14] On April 24, 1968, President Johnson forwarded the Convention to the Senate for its advice and consent, informing the Senate that changes to the FAA were needed and that "the United States instrument of accession to the convention will be executed only after the necessary legislation is enacted".[15] The Senate ratified the New York Convention on October 4, 1968,[16] and thereafter enacted Chapter Two of the FAA to implement the Convention.[17] President Nixon deposited the instrument of ratification with the United Nations on September 30, 1970,[18] and the Convention took effect in the U.S. on December 29, 1970.[19]

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9 See New York Convention, supra note 7.

10 U.S. Delegation Report, supra note 8, at 95.

11 Id.

12 Id. at 117.

13 Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405-06 (1967).

14 Gerald Aksen, American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 3 Sw. U.L. Rev. 1, 4-6 (1971).

15 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Message from the President of the United States Transmitting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1, Exec. E., 90th Cong., 2d Sess. (1968).

16 114 Cong. Rec. 29605 (1968).

17 Pub. L. No. 91-368 (1970).

18 63 Dept. State Bull. 367 (1970).

19 See United Nations Treaty Collection, Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en.

The central substantive provisions of the New York Convention are Articles II and III, which address the enforceability of arbitration agreements and awards, respectively. Article II(1) provides that "[e]ach contracting state shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them".[20] Article II(3) specifies that "[t]he courts of a Contracting State ... shall, at the request of one of the parties, refer the parties to arbitration," unless the arbitration agreement is "null and void, inoperative or incapable of being performed".[21] Article III provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles".[22] The following articles then set out the showing required of the party seeking recognition or enforcement of the award (Article IV)[23] and the limited grounds on which a court may deny recognition or enforcement (Article V).[24]

FAA Chapter Two made a number of statutory changes to implement the Convention. Section 201 provides generally that the Convention "shall be enforced in United States courts in accordance with this chapter".[25] Section 202 defines the agreements and awards that "fall under the Convention".[26] Section 203 creates subject matter jurisdiction in federal district courts over actions falling under the Convention,[27] and Section 204 governs venue in such actions.[28] Section 205 establishes a right for a defendant in a state court action that "relates to an arbitration agreement or award falling under the Convention" to remove the case to the appropriate federal court.[29] Section 206 authorizes a "court having jurisdiction under this chapter" to compel arbitration at any place provided in the arbitration agreement, even if that place is located outside the U.S.[30] Section 207 sets out a three-year statute of limitations for actions to enforce arbitral awards subject to the Convention.[31] Finally, section 208 is a residual provision, stating that the provisions of Chapter One of the FAA also apply under Chapter Two to the extent they do not conflict with either Chapter Two or the Convention itself.[32]

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20 New York Convention, supra note 7, art. II (1) (limiting the obligation to differences "in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration").
21 Id. art. II(3).
22 Id. art. III.
23 Id. art. IV.
24 Id. art. V.
25 9 U.S.C. §201 (2011).
26 Id. §202.
27 Id. §203.
28 Id. §204.
29 Id. §205.
30 Id. §206.
31 Id. §207.
32 Id. §208.

These provisions addressed perceived inadequacies of FAA Chapter One as applied to international agreements and awards. Chapter One does not itself create subject matter jurisdiction in federal courts over actions to enforce arbitration agreements and awards.[33] Chapter One does provide for broad venue,[34] but that had not been resolved at the time the New York Convention was ratified.[35] Chapter One does not address removal from state court, and limits the district court's power to compel arbitration to the district in which the action is brought.[36] And the statute of limitations for actions to enforce arbitral awards is only one year under Chapter One.[37]

III Implementation of Arbitration Conventions in a Federal System

The previous part detailed how the New York Convention was implemented in the United States. This part sets out three models that describe more generally how a federal system like the United States might implement its convention obligations: the "exclusive spheres" model, the "federal preemption" model, and the "access" model.[38] A key difference among the models is the extent to which national law overrides state law as part of the convention implementation process.

My aim in setting out these models is to help illustrate, in a simplified form, the possible relationships between the New York Convention (and its implementing legislation) and state arbitration law in a federal system. I describe each model briefly in turn.

III.1 The Exclusive Spheres Model

In this model, the national government and the state governments have exclusive authority to regulate in their own spheres. If arbitration matters are

[33] Vaden v. Discover Bank, 556 U.S. 49, 58-61 (2009) (construing the FAA as permitting the court to look-through the arbitration agreement to the underlying claim in evaluating whether federal question jurisdiction exists); Southland Corp. v. Keating, 465 U.S. 1, 15 n. 9 (1985) (stating that the FAA "does not create any independent federal question jurisdiction under 28 U.S.C. §1331 or otherwise").

[34] 9 U.S.C. §9.

[35] See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 195 (2000) (construing venue under FAA section 9 as permissive rather than exclusive).

[36] 9 U.S.C. §4; see Ansari v. Qwest Communications Corp., 414 F.3d 1214, 1218-20 (10th Cir. 2005).

[37] 9 U.S.C. §9. At least one court has held that the one-year time period specified in FAA section 9 is not a statute of limitations, however. See Sverdrup Corp. v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993). But see Photopaint Techs., LLC v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003) (holding that "section 9 of the FAA imposes a one-year statute of limitations on the filing of a motion to confirm an arbitration award under the FAA").

[38] This listing does not purport to be exhaustive, but highlights models of particular relevance in the context of the New York Convention.

within the national government's sphere of authority, then the national government implements the convention. But if arbitration matters are within the sphere of authority of state governments, the national government has no formal power to require the states to act. In that case, implementation of the convention depends on cooperative action by states.[39] Under the exclusive spheres model, the national government regulates only matters over which it has exclusive authority, such that national law cannot and does not override state law in any respect.

III.2 The Federal Preemption Model

Unlike the exclusive spheres model, this model (as well as the access model that follows) assumes that the national and state governments have some degree of overlapping authority over arbitration matters. Under the federal preemption model, national law preempts or overrides state law to the extent the two overlap. The preemption (like U.S. preemption doctrine generally) could take several forms. National law could occupy the field of arbitration law, precluding any application of state law whatsoever. Alternatively, national law could preempt state law only when the two conflict, leaving state law unaffected when it does not conflict with national law.[40] In the latter case, identifying when national and state arbitration law actually conflict is an essential but difficult inquiry.

III.3 The Access Model

This model, like the federal preemption model, assumes some degree of overlapping authority over arbitration matters by the national and state governments. But rather than national law superseding state law, the national government provides parties with access to a forum in which national arbitration law applies. Under this model (as applied to the U.S. legal system), the national arbitration law

[39] The United States clearly has not followed this model, since no states enacted legislation to implement the New York Convention contemporaneously with the national government's enactment of Chapter Two of the Federal Arbitration Act. By contrast, it appears that Canada's implementation of the Convention more closely resembles this model. See John D. Gregory, International Commercial Arbitration: Comments on Professor Graham's Paper, 13 Can. Bus. L.J. 42, 43-45 (1987-1988).

[40] See Gade v. National Solid Wastes Mgmt. Assoc., 505 U.S. 88, 98 (1992): Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is "'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it".' [Fidelity Fed. Sav. & Loan Assn. v. De la Cuesta, 458 U.S. 141, 153 (1982)] (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)), and conflict pre-emption, where "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941); Felder v. Casey, 487 U.S. 131, 138 (1988); Perez v. Campbell, 402 U.S. 637, 649 (1971).

would apply in federal courts and state arbitration law would continue to apply in state courts. Parties in matters governed by the convention would be able to bring actions to enforce arbitration agreements and awards in federal court so as to claim the protections of national law.

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These three models (like all models) are, of course, highly stylized and oversimplified. Moreover, the models may apply differently to different issues under the convention. Thus, a country may implement its obligations as to the enforcement of arbitration agreements differently from its obligations as to the enforcement of arbitration awards. The next part considers how well these models describe the implementation of the New York Convention in the United States.

IV Applying the Models to U.S. Implementation of the New York Convention

So which of these models – the exclusive spheres model, the federal preemption model, or the access model – best describes how the United States has implemented its obligations under the New York Convention? This part examines several legal questions central to that analysis. First, how, if at all, does the text of the New York Convention affect implementation of the Convention in a federal system like the United States? Second, to what extent does the implementing legislation (Chapter Two of the FAA) apply in state court? Third, is the New York Convention itself self-executing, such that it constrains state law without regard to the implementing legislation?

IV.1 The Federal-State Clause of the New York Convention

The New York Convention addresses its implementation in federal systems in Article XI (the federal-state clause), which is little known and little studied.[41] Article XI provides as follows:

In the case of a federal or non-unitary State, the following provisions shall apply:

> (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of

[41] For a useful overview of federal-state clauses, see Robert B. Looper, 'Federal State' Clauses in Multi-Lateral Instruments, 32 Brit. Y.B. Int'l L. 162, 196 (1955-1956).

> the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
>
> (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment [...].[42]

The federal-state clause was originally proposed by Australia "to provide for the particular position of federal States, a considerable part of whose legislative powers [were] vested in their constituent units".[43] Because "[t]he subject matter of the proposed arbitration convention was not within the jurisdiction of the central Government of federal States," the Australian representative explained, without such an article "Australia and many other federal States would probably not be able to ratify the convention".[44]

In its Official Report, the U.S. Delegation took the position that Article XI did not apply to countries with a federal system structured like that of the U.S. The U.S. Delegation's view was that the federal-state clause applied only to federal systems "in which there was a clear division of authority between central and local governments in arbitration matters".[45] In the U.S., by contrast, the national and state governments have substantial spheres of overlapping, or concurrent, authority as to arbitration matters. As such, ""practical application" of the Convention's federal-state clause "to the situation of the U.S. is impossible".[46] Essentially, the U.S. Delegation construed Article XI as reflecting the "exclusive spheres" model

[42] New York Convention, supra note 7, art. XI. Subsection (c) of Article XI added: A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action. Id. Article XI of the New York Convention was "substantially the same as Article[] 41 of the Convention relating to the Status of Refugees of 1951". Report of the Committee on the Enforcement of International Arbitral Awards 15, U.N. Doc. E/AC.42/4/Rev. 1 (Mar. 28, 1955); see Ivan Bernier, International Legal Aspects of Federalism 178 (1973).

[43] Committee on the Enforcement of International Arbitral Awards, Summary Record of the Eighth Meeting 5, U.N. Doc. E/AC.42/SR.8 (Apr. 4, 1955), available at https://undocs.org/E/AC.42/SR.8. The representative from the U.S.S.R. opposed the provision on the grounds that (1) "it would produce inequality between unitary States and federal states in respect of the scope of their obligations under the convention"; (2) it would "render the convention ineffective"; and (3) a similar proposal had been rejected in the "draft covenant on human rights". Id. at 6.

[44] Id.; see also United Nations Conference on International Commercial Arbitration, Summary Record of the Twentieth Meeting 6, U.N. Doc. E.CONF.26/SR.20 (Sept. 12, 1958) (statement of Mr. Renouf from Australia), available at https://undocs.org/E/CONF.26/SR.20 (stating that Australia "was strongly in favor of maintaining" the federal-state clause because "[i]n Australia arbitration was within the exclusive competence of the constituent states").

[45] U.S. Delegation Report, supra note 8, at 114.

[46] Id.

of convention implementation, and, as such, inapplicable to the U.S., leaving the obligations of the U.S. under the Convention the same as a unitary State.

By comparison, the description of Article XI attached to the Secretary of State's 1968 letter recommending ratification of the New York Convention is very different. Rather than seeing Article XI as inapplicable to the U.S., that document concluded that arbitration matters were within the authority of the national government, and hence subject to Article XI(a):

> This article recognizes the special situation with respect to jurisdiction in federal or nonunitary States and attempts to accommodate such States. It would, however, run counter to the express provisions of the article for the United States to seek to take advantage of its provisions with respect to foreign arbitral awards arising out of commercial relationships. The Federal Arbitration Act of 1925 (9 U.S.C. 1-14) and the decisions of U.S. Courts relating thereto show that legislation on arbitration is clearly within the competence of the Federal Government.[47]

The result is the same, however, as foreseen by the U.S. Delegation: the U.S.'s obligations under the Convention are the same as a unitary state.[48]

Overall, Article XI illustrates the inapplicability of the exclusive spheres model to U.S. implementation of the New York Convention, but has little other relevance for U.S. obligations under the Convention.[49]

IV.2 To What Extent Does the Federal Arbitration Act Apply in State Court?

The U.S. implemented the New York Convention through Chapter Two of the FAA, as described above.[50] The effect of that implementation on state law depends in important part on the extent to which Chapter Two applies in state court. At least since *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, it has been clear

[47] Discussion of the Provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Attachment 2 to the Letter of Submittal from Nicholas Katzenbach to the President (Apr. 13, 1968), in Message from the President of the United States Transmitting the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Exec. E., 90th Cong., 2d. Sess. 17, 22 (Apr. 24, 1968).

[48] Looper, supra note 41, at 196 (describing application of similar federal-state clause: "Congress would under the Constitution have full power, and subdivision (b) dealing with favorable recommendations to the States would be inoperative": "Thus we had the anomalous situation of Australia, India, and the United States all sponsoring a federal State clause which was inapplicable to them and only really applicable to Canada, where the treaty-implementing power is indeed restricted").

[49] But, as noted supra note 39, the federal-state clause did have some relevance for the implementation of the New York Convention in Canada.

[50] See supra text accompanying notes 25-32. [For a detailed analysis of FAA preemption and state international arbitration laws, see Restatement of the U.S. Law of International Commercial and Investor-State Arbitration §§1.6-1.10, of which I am one of the Reporters].

that the provisions of the FAA preempt inconsistent state laws in cases in federal court.[51] The preemptive reach of the FAA in state court is less clear, however. In *Southland Corp. v. Keating*, the Supreme Court held that section 2 of the FAA – which makes arbitration agreements "valid, irrevocable, and enforceable" –[52] does apply in state court and preempts conflicting state laws.[53] But the Court has subsequently stated that the FAA does not occupy the field of arbitration law,[54] and has suggested on several occasions that other provisions of the FAA (notably sections 3 and 4, which deal with stays pending arbitration and actions to compel arbitration)[55] might not apply in state court.[56]

The differing language of the sections is the most important reason why they might have different effect. By its terms, FAA section 2 applies to written arbitration agreements in "any maritime transaction or a contract evidencing a transaction involving commerce".[57] Nothing in section 2 limits its application to federal courts. By comparison, section 3 by its terms applies to "courts of the United States" –[58] a term that means federal courts –[59] while section 4 applies to "United States district court[[s]".[60] So it would not be surprising if the Court were to hold that those provisions do not apply in state courts.[61]

Similarly, by their terms most of the provisions of FAA Chapter Two apply only in federal court. The exceptions are: (1) section 201, which provides that the New York Convention "shall be enforced in United States courts in accordance

51 388 U.S. 395, 405-06 (1967).

52 9 U.S.C. §2 (2011).

53 465 U.S. 1, 16 (1985).

54 Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 477 (1989) ("The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration").

55 9 U.S.C. §§3-4.

56 Volt, 489 U.S. at 477 n. 6; Southland Corp. v. Keating, 465 U.S. 1, 16 n. 10 (1985); see also Vaden v. Discover Bank, 556 U.S. 49, 71 & n. 20 (2009).

57 9 U.S.C. §2.

58 Id. §3.

59 See Southland Corp., 465 U.S. at 29 n.18 (O'Connor, J., dissenting): In 1954, as a purely clerical change, Congress inserted "United States district court" in §4 as a substitute for "court of the United States". Both House and Senate Reports explained: "'United States district court' was substituted for 'court of the United States' because, among Federal courts, such a proceeding would be brought only in a district court". H. R. Rep. No. 1981, 83d Cong., 2d Sess., 8 (1954); S. Rep. No. 2498, 83d Cong., 2d Sess., 9 (1954). Even without this history, §3's "courts of the United States" is a term of art whose meaning is unmistakable. State courts are "in" but not "of" the United States. Other designations of federal courts as the courts "of" the United States are found, for example, in 28 U. S. C. §2201 (1976 ed., Supp. V) (declaratory judgments); Fed. Rule Evid. 501; and the Norris-La Guardia Act, 29 U.S.C. §104, see Boys Markets, Inc. v. Retail Clerks, 398 U.S. 235, 247 (1970) (Brennan, J.). References to state and federal courts together as courts "in" or "within" the United States are found in the Supremacy Clause ("Judges in every state"). See 11 U.S.C. §306 (1982 ed.); 22 U.S.C. §2370(e)(2); 28 U.S.C. §1738. See also W. Sturges, Commercial Arbitrations and Awards §480, p. 937 (1930).

60 9 U.S.C. §4.

61 Interestingly, a number of state courts apply FAA section 10 as if it does apply in state court, even though by its language it applies only to the "United States court in and for the district wherein the award was made". Id. §10; see Jill I. Gross, Over-Preemption of State Vacatur Law: State Courts and the FAA, 3 J. Am. Arb. 1, 19-27 (2004).

with this chapter";[62] (2) section 202, which defines the arbitration agreements and awards that "fall[] under the Convention";[63] and, of course, section 205, which authorizes removal of New York Convention cases from state courts.[64] The remaining provisions of Chapter Two by their terms apply only to federal courts:

- Section 203, which provides for federal question jurisdiction in the "district courts of the United States";[65]
- Section 204, which establishes venue in "[a]n action or proceeding over which the district courts have jurisdiction";[66]
- Section 206, which authorizes a "court having jurisdiction under this chapter" – i.e., a federal district court under section 203 – to compel arbitration anywhere in the world;[67] and
- Section 207, which addresses the statute of limitations governing an action to enforce an arbitral award in "any court having jurisdiction under this chapter" – again, a federal district court under section 203 – and the grounds for denying recognition or enforcement in such an action.[68]

Based on the plain language of those sections, they apply only in federal court and have no application in state court.[69]

The limited legislative history of Chapter Two likewise contains no indication that its provisions apply in state court. The following exchange between the Chairman of the Senate Foreign Relations Committee and Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law, at the hearing on the implementation of the New York Convention is to the point:

> The CHAIRMAN .... Does this legislation have any effect whatever on State laws?
>
> Mr. KEARNEY. No, Mr. Chairman, it does not. It concerns in effect solely the jurisdiction of the Federal district courts.
>
> The CHAIRMAN. And it does not alter or change a citizen's rights under State laws?
>
> Mr. KEARNEY. Not at all.
>
> The CHAIRMAN. Does it in any way broaden Federal authority?

[62] 9 U.S.C. §201.
[63] Id. §202.
[64] Id. §205.
[65] Id. §203.
[66] Id. §204.
[67] Id. §206.
[68] Id. §207.
[69] Under section 208, the provisions of FAA Chapter One apply to the extent they do not conflict with either Chapter Two or the New York Convention. Id. §208. Given that only FAA Section 2 has been held to apply in state court, the incorporation of Chapter One by section 208 does not change the analysis.

> Mr. KEARNEY. Not basically. It provides for the right of removal to the district court from the State court in a case that falls under the Convention, but what we are dealing with is foreign commerce which is now fully within the ambit of Federal authority.[70]

This view – that FAA Chapter Two does not apply in state court – is consistent with the access model of convention implementation described above.[71] Under this view, Chapter Two does not seek to modify state arbitration laws across the board, but instead provides a federal forum in which parties can seek to enforce arbitration agreements and awards subject to the Convention. The one exception would be state rules that make arbitration agreements unenforceable, which are preempted by FAA Section 2, as incorporated through Section 208.[72]

IV.3 Is the New York Convention Self-Executing?

A self-executing treaty has legal effect within the U.S. (i.e., becomes the supreme law of the land) once it is ratified, without the need for any implementing legislation.[73] Thus, if the New York Convention (or some part of it) is self-executing, it is the Convention itself, rather than FAA Chapter Two, that might apply in state court and preempt state law. In other words, if the New York Convention is self-executing, it provides evidence in favor of the preemption model rather than the access model.

It may seem odd to consider whether the New York Convention is self-executing when Congress has in fact enacted legislation implementing it.[74] And the oddness is reinforced by dicta in *Medellin v. Texas* that could be read as suggesting that the New York Convention is not self-executing.[75] But there is a strong argument that at least one provision of the Convention is self-executing: Article II(3), which provides

[70] Hearing Before the Senate Committee on Foreign Relations (Feb. 9, 1970), in S. Rep. No. 702, 91st Cong., 2nd Sess. 8 (Feb. 13, 1970) (statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law).

[71] See supra Part III.C.

[72] See supra text accompanying notes 51-53.

[73] Medellin v. Texas, 552 U.S. 491, 505 n. 2 (2008) ("What we mean by 'self-executing' is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress".); see also Edward T. Swaine, Does Federalism Constrain the Treaty Power?, 103 Colum. L. REV. 403, 469 (2003) ("Self-executing treaties preempt inconsistent state law").

[74] See supra text accompanying note 17.

[75] *Medellin*, 552 U.S. at 521-22 (citing New York Convention as illustrating the fact that "[t]he judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress") (immediately following statement that "Congress is up to the task of implementing non-self-executing treaties, even those involving complex commercial disputes"); see also Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n. 15 (1974) (not "reaching the issue of whether the Convention would require of its own force that the agreement to arbitrate be enforced in the present case").

that "the court of a Contracting State ... shall refer the parties [to an arbitration agreement] to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".[76] Judge Edith Brown Clement concluded that Article II(3) is self-executing in her concurring opinion in the Fifth Circuit's en banc decision in *Safety Nat'l Casualty Corp. v. Certain Underwriters at Lloyd's* ("*Louisiana Safety*").[77] The U.S. government likewise has taken that position in an amicus brief filed with the U.S. Supreme Court in the case.[78]

Judge Clement makes the argument as follows:

> Of particular concern here is Section 3 of Article II, which provides that domestic courts, upon request of a litigant, shall enforce any arbitration agreement to which that litigant is a party by referring the parties to arbitration. Section 3 is addressed to the courts of Contracting States, not to the States themselves or to their respective legislatures. Further, Section 3 provides that a "court shall refer the parties to arbitration". Referral to arbitration is mandatory, not discretionary. Treaty provisions setting forth international obligations in such mandatory terms tilt strongly toward self-execution.
>
> The text of Article II constitutes "a directive to domestic courts". It leaves no discretion to the political branches of the federal government whether to make enforceable the agreement-enforcing rule it prescribes; instead, that rule is enforceable by the Convention's own terms The terms of Article II do not merely describe arbitration rights which are "of a nature to be enforced in a court of justice," but expressly instruct courts to enforce those rights by referring the parties to arbitration. In short, Article II of the Convention is self-executing and fully enforceable in domestic courts by its own operation.[79]

[76] New York Convention, supra note 7, art. II(3).

[77] 587 F.3d 714, 732 (5th Cir. 2009) (en banc) (Clement, J., concurring), cert. denied, 528 U.S. 827 (2010). But see Stephens v. American Int'l Ins. Co., 66 F.3d 41, 45 (2d Cir. 1995) (holding that "the [New York] Convention is not self-executing, and therefore, relies upon an Act of Congress for its implementation"). The majority in *Louisiana Safety*, 587 F.3d at 722, did not resolve the issue, while the dissent concluded that the issue was not properly before the court. Id. at 737, n. 1.

[78] Brief for the United States as Amicus Curiae 8-11, Louisiana Safety Ass'n of Timbermen – Self Insurer's Fund v. Certain Underwriters at Lloyd's, London (No. 09-945) (Aug. 26, 2010). The Supreme Court had called for the views of the Solicitor General in the case and ultimately denied certiorari. 528 U.S. 827 (2010).

[79] 587 F.3d at 734-35 (Clement, J., concurring) (citations omitted). She adds "that the existence of the Convention Act is not inconsistent with a finding that Article II is self-executing That Congress acted prior to accession taking effect suggests that the Convention Act was intended to establish limitations upon the enforcement of the Convention in domestic courts before it would otherwise take effect". Id. at 735 n. 6 (Clement, J., concurring). But see David A. Rich, Deference to the "Law of Nations": The Intersection between the New York Convention, the Convention Act, the McCarran-Ferguson Act, and State Anti-Insurance Arbitration Statutes, 33 T. Jefferson L. Rev. 81, 107 (2010) (arguing that "Judge Clement's argument fails to account for the interplay between Article II, Section 3, and Article II, Sections 1 and 2 of the New York Convention Section 1 of Article II signifies a discretionary commitment on the part of the United States to take future legislative action").

The Supreme Court has in the past deferred to the State Department on treaty interpretation matters (as the Justice Department reminded the Court in its amicus brief in *Louisiana Safety*).[80] As a consequence, the position taken by the U.S. before the Supreme Court may itself provide further support for finding that Article II(3) is self-executing.

By comparison, the argument is much weaker that the provisions of the New York Convention dealing with the recognition and enforcement of awards are self-executing. Unlike Article II(3), none of those provisions is directed at a court of a Contracting State; rather they are directed at the Contracting State itself.[81] (Conversely, the language is still stronger than the treaty language at issue in *Medellin*, which required U.N. members to "undertake[] to comply with the decision of the [International Court of Justice] in any case to which it is a party".)[82] In addition, Article V permits a "competent authority where the recognition and enforcement of an arbitral award is sought" to deny recognition or enforcement on specified grounds, but without identifying what constitutes the "competent authority".[83] While presumably a national court would qualify as a competent authority,[84] identifying the proper court would seem to require Congress to act before the provision can have effect, thus suggesting that it is not self-executing.[85]

Overall, there is a good argument that Article II(3) of the New York Convention is self-executing and preempts conflicting state laws of its own force.[86] Of course, the Supreme Court already has held that FAA section 2 does much the same.[87] By

[80] Brief for the United States as Amicus Curiae, supra note 78, at 11 (citing Abbott v. Abbott, 130 S. Ct. 1983, 1993 (2010); and *Medellin*, 128 S. Ct. at 1361).

[81] E.g., New York Convention, supra note 7, art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles").

[82] *Medellin*, 552 U.S. at 508.

[83] New York Convention, supra note 7, art. V(1)-(2).

[84] Born, supra note 1, at 2703 n.4.

[85] 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, 1076 (1961) (relying on reference to "competent authority" in Article V to conclude that "[t]he Convention does not require that awards be enforceable in every court of general jurisdiction in the land").

[86] [For an article arguing that "both the Convention's provisions for recognition and enforcement of arbitration agreements (in Article II) and of arbitral awards (in Articles III, IV, V, and VI) should be regarded as self-executing and directly applicable in U.S. (and other national) courts," see Gary B. Born, The New York Convention: A Self-Executing Treaty, 40 Mich. J. Int'l L. 115 (2018).] Based on a survey of Contracting States to the New York Convention (of which 108 of 142 responded), UNCITRAL reported in 2008 that in the "vast majority the New York Convention was considered as 'self-executing,' 'directly applicable' and becoming a party to it put the Convention and all of its obligations in action". See United Nations Commission on International Trade Law, Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 5, U.N. Doc. A/CN.9/656 (June 5, 2008), available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/V08/541/11/PDF/V0854111.pdf?OpenElement. But "[f]or a number of other States, the adoption of an implementing legislation was required for the Convention to gain force of law in their internal legal order". Id. at ¶ 11.

[87] The available defenses to the enforcement of an arbitration agreement may differ between section 2 and Article II, but a detailed examination of that issue is beyond the scope of this article.

comparison, the argument is much weaker that the award enforcement provisions of the New York Convention are self-executing – again consistent with the more limited preemptive effect of the FAA as to such issues.

V Party Autonomy and the Role of State Law Under the New York Convention

The access model described above[88] could be characterized as permitting a party to opt in to the provisions of the New York Convention, either by filing its case in federal court or by removing a state court action to federal court. This section addresses the converse issue of the extent to which parties can contract out of the Convention by agreeing to state arbitration law instead.

The Supreme Court's decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. University* illustrates the issue, albeit in a case not subject to the New York Convention.[89] In *Volt*, the Supreme Court held that parties could incorporate state arbitration law by reference into their contract, thereby making an otherwise-preempted state law part of their arbitration agreement and thus subject to enforcement under the FAA.[90] The state law at issue in *Volt* provided that a court could stay an arbitration proceeding pending resolution of related claims involving third parties in court.[91] By agreeing to California arbitration law, the Supreme Court concluded, the parties had effectively agreed to stay their arbitration in such circumstances.[92] Because the FAA provides for enforcement of arbitration clauses according to their terms,[93] the FAA thus required courts to enforce the parties' agreement, even though it meant that the arbitration proceeding would be stayed.[94]

Courts (and commentators) have construed this holding of *Volt* in two ways. The broader interpretation is that *Volt* permits parties to contract out of the FAA altogether, effectively making the entire Act a default rule.[95] The narrower

88 See supra Part III.C.

89 489 U.S. 468 (1989).

90 Id. at 478-79.

91 See Cal. Civ. Proc. Code §1281.2(c). The California Supreme Court later held that the statute did not conflict with the FAA. See Cronus Invs., Inc. v. Concierge Servs., 107 P.3d 217, 228-29 (Cal. 2005).

92 The California Court of Appeal had held in *Volt* that by including a general choice-of-law clause in their contract, the parties had agreed to the application of California arbitration law. Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 472 (1989). The Supreme Court in *Volt* deferred to that interpretation because contract interpretation is a matter of state law and the California court's interpretation was not so unreasonable as to be preempted by the FAA. Id. at 474. In subsequent cases, the Supreme Court has held that a general choice-of-law clause should not be construed as incorporating state arbitration law, at least not to the exclusion of the FAA. See Preston v. Ferrer, 552 U.S. 346, 363 (2008); Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 63-64 (1995).

93 9 U.S.C. §2 (2011).

94 489 U.S. at 478-79.

95 See the authorities cited in Christopher R. Drahozal, Contracting Around *Hall Street*, 14 Lewis & Clark L. Rev. 905, 919 n. 71 (2010).

interpretation is that *Volt* is an incorporation-by-reference case, in which the parties agreed to incorporate the provisions of state law into their contract.[96] In many cases – in particular those involving state law default rules – the choice between the two interpretations of *Volt* does not matter.[97] Under either interpretation, the parties can contract around FAA default rules by agreeing to state arbitration law.[98]

The choice between the differing interpretations does matter, however, in the case of FAA rules that are mandatory rather than default – i.e., rules that the parties cannot contract around. Under the broader interpretation of *Volt*, parties can contract out of mandatory rules as well by choosing state arbitration law rather than the FAA to govern their arbitration agreement. Under the narrower interpretation, however, the parties' attempt to contract around an FAA mandatory rule would be ineffective. The incorporation of state arbitration law would be treated the same as any other attempt to contract around the rule.

To illustrate the difference, consider parties that want to contract for expanded federal court review of arbitral awards, which the FAA does not permit.[99] Under the broader interpretation of *Volt*, the parties could agree to have their arbitration agreement governed by a state arbitration law that permitted expanded review. Because the parties opted out of the FAA altogether, a federal court could review the arbitral award under the standards provided in state law. Under the narrower interpretation of *Volt*, by agreeing to a state arbitration law permitting expanded review, the parties effectively incorporated an expanded review provision into their contract. But because such provisions are unenforceable under the FAA, regardless of whether the parties expressly include them in their contract or incorporate them by reference, the federal court could still only review the award under the FAA section 10 standards.

I have argued elsewhere in favor of the incorporation-by-reference interpretation of *Volt* and will not repeat that analysis here.[100] Instead, it is sufficient to note that, regardless of the theory followed, the preemptive effect of the FAA Chapter Two and the New York Convention can be altered by contract, to some degree at least.

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96 Drahozal, Federal Arbitration Act Preemption, supra note 4, at 411.

97 For an example, see Rintin Corp. v. Domar Ltd., 766 So. 2d 407, 409 (Fla. Ct. App. 2000) ("The inclusion of this reference is 'clear and unmistakable' evidence of the parties' intent to be governed by the [Florida International Arbitration Act] and its provision requiring the submission of the issue of arbitrability of a dispute to the arbitral panel").

98 Again, how the parties enter into such a contract (e.g., whether a general choice-of-law clause constitutes such an agreement) is a separate issue from the effect of such an agreement. See supra note 92. I am concerned only about the latter question here.

99 Hall Street Assoc. L.L.C. v. Mattel, Inc., 552 U.S. 576, 590 (2008).

100 Drahozal, Contracting Around *Hall Street*, supra note 95, at 918-21; Drahozal, Federal Arbitration Act Preemption, supra note 4 at 411-15; see also Ario v. Underwriting Members of Syndicate 53 at Lloyd's, 618 F.3d 277, 288-89 (3d Cir. 2010) ("[W]hile parties may opt out of the FAA's default rules, they cannot 'opt out' of FAA coverage in its entirety because it is the FAA itself that authorizes parties to choose different rules in the first place").

VI Implications and Conclusions

The relationship between the New York Convention and state arbitration law in the U.S. is not at all settled. This article outlines three models of the implementation of arbitration conventions in a federal system to illustrate how the U.S. might have implemented its obligations under the Convention, and finds two of the models – the federal preemption model and the access model – consistent in part with U.S. implementation of the New York Convention.

The potential implications of this analysis are many.[101] I briefly sketch a few.

First, state courts as well as federal courts are obliged to enforce international (as well as domestic) arbitration agreements. Even if the New York Convention is not self-executing (which it may be, in this respect anyway),[102] FAA section 2 would apply through section 208 and make international arbitration agreements "valid, irrevocable, and enforceable" in federal court and state court.[103]

Second, the obligation of state courts to enforce arbitration awards under the New York Convention is less clear. FAA Chapter Two provides for subject matter jurisdiction in federal court and permits removal of New York Convention cases from state court to federal court, seeming to follow the access model of convention implementation.[104] Nothing in Chapter Two of the FAA expressly makes the Convention grounds for denying recognition or enforcement applicable in state court. Moreover, the provisions of the New York Convention dealing with award recognition and enforcement may well not be self-executing given the need to define what constitutes a "competent authority" under the Convention.[105]

Third, the New York Convention does not regulate the grounds for vacating international arbitral awards (other than possibly through implied limitations resulting from the obligation to enforce arbitration agreements).[106] FAA section 207 by its terms applies only in federal court,[107] as does FAA section 10.[108] Accordingly,

[101] For more comprehensive lists of possible conflicts between the FAA and state arbitration laws, see Sebastien Besson, The Utility of State Laws Regulating International Commercial Arbitration and Their Compatibility with the FAA, 11 Am. Rev. Int'l Arb. 211, 219-39 (2000); Daniel A. Zeft, The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns, 22 N.C. J. Int'l L. & Com. Reg. 705, 719, 734-83 (1997).

[102] See supra text accompanying notes 76-80.

[103] 9 U.S.C. §§2, 208 (2011).

[104] See supra Part III.C.

[105] See supra text accompanying notes 83-85.

[106] Born, supra note 1, at 2554 ("The text of the New York Convention does not impose any express limits on the grounds that may be relied upon to annul an arbitral award in the arbitral seat.... Most national courts and commentators have therefore concluded that the New York Convention imposes no limits on the grounds which may be relied upon to annul an award in the arbitral seat"); see also infra note 109.

[107] 9 U.S.C. §207; see [Restatement of the U.S. Law of International Commercial and Investor-State Arbitration §4.9 (concluding that under FAA Section 207, the grounds set out in Section 10 of the FAA govern in actions to vacate New York Convention awards made in the United States)].

[108] 9 U.S.C. §10; Gross, supra note 61, at 29-33.

states likely can provide for vacatur of awards in state court on grounds other than those in the FAA – subject to an implied constraint from their obligation to enforce arbitration agreements.[109] Although a full exposition of what state vacatur grounds would and would not be permissible is beyond the scope of this article, a good argument could be made that parties can contract for expanded review in state court, as long as the state's arbitration law permits expanded review.[110] Indeed, both the California Supreme Court and the Texas Supreme Court have so held.[111] To the extent the parties are proceeding in state court, the U.S. Supreme Court's suggestion in *Hall Street* that parties may be able to contract for expanded review under state law has been borne out.[112]

Many questions about the scope of FAA preemption – particularly preemption by Chapter Two and the New York Convention – remain to be answered. This analysis suggests, however, that state law may be able to play a bigger role in some international arbitration matters than it has so far.

Informação bibliográfica deste texto, conforme a NBR 6023:2018 da Associação Brasileira de Normas Técnicas (ABNT):

DRAHOZAL, Christopher R. The New York Convention and the American Federal System. *Revista Brasileira de Alternative Dispute Resolution – RBADR*, Belo Horizonte, ano 01, n. 01, p. 37-54, jan./jun. 2019.

[109] If, for example, a state were to make all arbitral awards subject to de novo court review, it would so change the process to which the parties agreed that it surely would be preempted by the FAA. See Drahozal, Federal Arbitration Act Preemption, supra note 4, at 417-18; Born, supra note 1, at 2556-60 (arguing that New York Convention imposes implied limits on authority of arbitral seat to vacate awards).

[110] Drahozal, Contracting Around *Hall Street*, supra note 95, at 922-26.

[111] Cable Connection, Inc. v. DirecTV, Inc., 190 P.3d 586, 595-99 (Cal. 2008); Nafta Traders, Inc. v. Quinn, 339 S.W.3d 84, 97-101 (Tex. 2011).

[112] See supra text accompanying note 5.