

**New York State Bar Association International Section Meeting  
International Commercial Arbitration: Hot topics**

**Restatement of U.S. Law on International Commercial and Investment Arbitration: Vexingly  
difficult topics**

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1. “Gateway” Issues
  - a. Is a choice of institutional rules (e.g. the ICDR Rules of the AAA) that contain a “*Kompetenz-Kompetenz*” clause sufficient evidence of a “clear and unmistakable” decision to allocate authority over jurisdictional questions to arbitrators?
  - b. Are “local remedies” provisions in investment treaties questions of admissibility or of jurisdiction?
  - c. Can the parties in their agreement to arbitrate exclude (or otherwise constrain) the authority of the arbitral tribunal to award damages, especially punitive damages?
  - d. Which choice-of-law rules apply to determine the validity and scope of the agreement to arbitrate?
2. Procedural Matters
  - a. Does 28 U.S.C. § 1782 apply to arbitrations? Is there a difference between commercial and investment arbitrations?
  - b. Should anti-suit injunctions in courts be available to support arbitration?
  - c. Can states include in state arbitration statutes grounds for judicial review of arbitration that the F.A.A. disallows, even though parties may not enhance that review contractually?
3. Set-aside/vacatur issues
  - a. The United States deems awards in arbitrations seated in the United States involving a party that is not a citizen of the United States, or that have other non-U.S. connections, as “Convention” awards for purposes of the New York Convention. What is the standard for set aside or vacatur in those cases? Should the FAA Section 9 apply, or should the New York Convention Article V grounds cover both set aside and enforcement?
  - b. What is the status of manifest disregard of the law?
4. Enforcement Issues
  - a. Are interim measures arbitral awards that can be given effect (or vacated) by courts? Does it matter whether the measure was given by an emergency arbitrator or by the arbitral tribunal itself?
  - b. Can *forum non conveniens* be used to resist enforcement of a New York Convention arbitration award?

- c. In investment arbitrations, must award creditors seeking to enforce an ICSID Convention award proceed under the Foreign Sovereign Immunities Act, or can they enforce the award *ex parte* under the same procedures used to reduce sister-state decisions to local judgments?
- d. Do principles of res judicata and/or collateral estoppel apply when U.S. courts are asked questions about enforcement of awards that have already been answered in another jurisdiction?
- e. What law governs enforcement of non-Convention awards (those covered by neither the New York nor Panama Convention)?