

Final Report of the  
New York State Bar Association's

# TASK FORCE ON NEW YORK LAW IN INTERNATIONAL MATTERS



June 25, 2011



# FOREWORD



Task Force Representatives from left: James B. Hurlock; Judith Kaye; Joseph T. McLaughlin; and Steven Younger (seated)

Since the mid-1620s when the Dutch settled in Manhattan, New York City has been a diverse, multi-cultural, international center for trade, commerce and finance. As a result of the role New York has played in the global community for more than three centuries, parties often select, and specify, the law of New York as the governing law in their agreements. Its rationality, consistency and stability provide an invaluable foundation for legal and business relationships the world over.

Frequently resolving matters involving parties from around the globe, New York courts — state and federal — are recognized as fair and impartial regardless of the nationality of the parties before them. New York offers cost efficiency in addition to justice in the resolution of disputes. The New York courts are also “arbitration friendly” and support unequivocally the enforceability of arbitration agreements and awards.

New York plays host to many of the most respected arbitration and alternative dispute resolution institutions, including the International Center for Dispute Resolution, the CPR International Institute for Conflict Prevention and Resolution, JAMS and JAMS International, and the ICC’s U.S. Council for International Business. Thanks to its historical role as a global commercial center, New York is also home to experienced arbitrators and mediators, as well as a significant center for international law firms well versed in every aspect of arbitration. The experience of New York arbitrators includes significant financial and commercial matters. The pages that follow explain the reasons why it is in their interest for parties to choose New York governing law in their cross border agreements and to select New York as the forum for the resolution of international disputes.

Ultimately, parties want predictability and fairness in their business relationships, and neutrality and justice in the resolution of their disputes. In the twenty-first century, as in the seventeenth, that is precisely what New York offers.



## TABLE OF CONTENTS

<b>I.</b>	<b>EXECUTIVE SUMMARY .....</b>	<b>1</b>
A.	Mission.....	1
B.	Formation of the Task Force.....	1
C.	Recognition of the Work by Others .....	2
D.	Task Force Conclusions — Highlights .....	2
<b>II.</b>	<b>THE SUBCOMMITTEES' REPORTS .....</b>	<b>5</b>
A.	New York Law Subcommittee — The Advantages of New York Law as the Governing Law in International Agreements.....	5
B.	New York Courts Subcommittee — The Positive Aspects of the Use of New York Courts to Resolve International Disputes.....	24
C.	New York Arbitration and ADR Subcommittee — The Advantages of New York as a Forum for Arbitration and Alternative Dispute Resolution .....	30
D.	Communications Subcommittee — Communications to Advise on the Advantages of the Use of New York Law and the Use of New York as a Forum to Resolve International Disputes .....	40
<b>III.</b>	<b>THE TASK FORCE RECOMMENDATIONS AND CONCLUSIONS .....</b>	<b>45</b>
A.	Support.....	45
B.	Coordination .....	46
C.	Education .....	47
D.	Study .....	48
<b>IV.</b>	<b>APPENDICES .....</b>	<b>49</b>
A.	Task Force Members, Advisors, Consultants and Law Students.....	50
B.	ADR Providers in New York.....	53
C.	Sample New York Governing Law Clauses .....	54
D.	Sample New York Arbitration and ADR Clauses .....	56
E.	New York Court Systems Chart .....	59
F.	International Disputes Decided in the New York and Other Courts .....	60
G.	Focus Group Summaries and Survey Results .....	63
H.	Research Bibliography .....	78
I.	Treaties Relevant to International Business in New York.....	80
J.	Estimated Revenues Related to International Dispute Resolution in New York .....	84
K.	Why Choose New York Brochure .....	85



## **I. EXECUTIVE SUMMARY**

### **A. Mission**

The increasingly global business community requires accurate and comprehensive information on choice of laws, procedures and legal systems to govern agreements, selection of the best forum in which to resolve their disputes, and the most efficient and equitable means of dispute resolution. New York, as a global financial and commercial capital, plays a critical role in all these choices.

The Task Force's mission was to undertake a systematic review of New York law as an international standard and the use of New York as a neutral forum for resolving international disputes in arbitration and in the courts. The result of that review has been to confirm the continuing desirability of choosing New York law and a New York forum for cross-border agreements and international disputes. As a part of its mission, the Task Force also seeks to educate lawyers, business leaders and investors about the benefits of selecting New York law and a New York forum in order to ensure fairness and predictability in their commercial relationships. To accomplish that goal, the Task Force seeks to encourage and mobilize the intellectual and professional resources of experienced New York attorneys, arbitrators and judges to assist in the continued development and use of New York law and New York as a forum.

### **B. Formation of the Task Force**

The Task Force on New York Law in International Matters was created by the New York State Bar Association President, Stephen Younger, in October 2010. It includes experts in the fields of commercial law, arbitration and mediation, as well as litigation. Representatives of over 30 major law firms, five law schools, four arbitral institutions, lawyers from Canada, Mexico and Germany and several judges have given their time and expertise to researching and preparing this Final Report.<sup>1</sup> The Task Force has also benefitted significantly from the advice of Hon. Judith Kaye, formerly Chief Judge of the State of New York and now a distinguished arbitrator, as well as guidance by Edna Sussman, a well-respected arbitrator and mediator and Chair of the N.Y.S.B.A. Dispute Resolution Section.

The Task Force organized its work through four active Subcommittees,<sup>2</sup> and distributed a questionnaire to business lawyers, and hosted discussions of the issues in various focus groups in New York and London.<sup>3</sup> Draft reports were submitted by each Subcommittee, reviewed and discussed within the Task Force and distilled into this Final Report. Given the Task Force's origin, this Report has been submitted to the New York State Bar Association for approval and dissemination.

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<sup>1</sup> See Appendix A.

<sup>2</sup> See Appendix A.

<sup>3</sup> See Appendix G.

### **C. Recognition of the Work by Others**

The Task Force gratefully acknowledges the invaluable work done by others in the field from which the Task Force has both borrowed and benefitted and with whom the ongoing work will have to be accomplished. In particular, we wish to acknowledge the contributions of:

The N.Y.S.B.A. International Law Section<sup>4</sup>  
The N.Y.S.B.A. Dispute Resolution Section  
The New York City Bar  
— Arbitration Committee  
— Alternative Dispute Resolution Committee  
— International Commercial Disputes Committee  
The New York County Lawyers' Association  
The "I Love New York" Group  
The International Arbitration Club of New York

### **D. Task Force Conclusions — Highlights**

Over the six months of review and analysis by the Task Force, three objective principles became remarkably clear:

1. The use of New York law in international agreements is widespread in the global business community due to its stability, predictability, neutrality and consistent application by New York courts and arbitrators; no issues of material concern came to the attention of the Task Force, but suggestions for improvements in the law will be found in the Recommendations.<sup>5</sup>
2. A significant number of New York bar association sections and committees with highly knowledgeable and experienced international practitioners are constantly at work examining issues related to New York law and New York as a forum for international dispute resolution and preparing thoughtful memoranda and internal reports on pertinent topics. There is no lack of effort in the field, but it might be more efficiently coordinated so as to focus on the accomplishment of important projects and avoid needless duplication. Suggestions for coordination will be found in the Recommendations.<sup>6</sup>
3. Notwithstanding the presence in New York of thousands of experienced international lawyers, arbitrators and mediators and the overwhelming

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<sup>4</sup> This Section's June 5, 2010 Resolution recommended the establishment of this Task Force. The Task Force is especially grateful for the contribution of a number of this Section's members under the overall guidance of Michael W. Galligan.

<sup>5</sup> See Section III, Support and Study.

<sup>6</sup> See Section III, Coordination.

support by New York state and federal courts for international arbitration at every stage from the enforcement of the arbitration agreement to the recognition of the arbitral award, there is an absence of familiarity with the advantages of New York law and New York as a forum for international dispute resolution among lawyers drafting or advising on governing law clauses and dispute resolution provisions in international agreements. A number of detailed suggestions for expanding the knowledge base among the relevant constituencies will be found in the Recommendations.<sup>7</sup>

No one group could effectively carry out the Task Force Recommendations. The intention is to identify projects and issues that call for coordination, education, study or support and to encourage the continued, but focused, efforts of the many experienced international practitioners, arbitrators and mediators, and knowledgeable judges in New York.

The expansion of global business and trade is the foundation of both developed and developing economies. The importance of providing legal support for the continuation of that expansion cannot be overemphasized — indeed, it is the absence of the rule of law that often leads to political instability and economic distress. New York is at the forefront of providing that legal support for global business expansion through the use of its law and its choice as a forum for arbitration and judicial dispute resolution.

The establishment of a permanent center for hearings in international arbitration, the development of state court specialized chambers to assist with appropriate international arbitration matters, the promotion of both domestic and overseas continuing legal education programs on drafting international agreements primarily for transactional lawyers and in-house counsel, and coordination of the many group and individual efforts to advance New York law and a New York forum are among the principal recommendations of the Report. Detailed proposals may be found in Section III.

In addition, the business of international dispute resolution in New York, as reflected in the related activities of New York lawyers, is strong as measured by firm revenues and profits. Cornerstone Research, a highly respected economic consulting firm, conducted research and provided data from publicly available sources that were used to prepare estimated revenues, profits and taxes related to international dispute resolution in New York, which is only one part of the broader international practice.<sup>8</sup>

Without attempting to project the increased revenues which would be generated for hotels, restaurants, court reporters, economic experts and the like, if the business of dispute resolution in New York were to increase by 10%-20%, it could produce approximately \$200 to \$400 million in incremental revenues annually for law firms in New York.

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<sup>7</sup> See Section III, Education and Support.

<sup>8</sup> See Appendix J.

It is significant that jurisdictions around the world, many with government support, are taking steps to increase their arbitration case load. New arbitration laws were enacted in 2010 and 2011 in France, Ireland, Hong Kong, Scotland, Ghana and other nations to enhance their attractiveness as seats of arbitration. Maintaining New York's position, which already generates hundreds of millions of dollars in revenues for law firms and related businesses and millions of dollars of tax revenues, and which complements and reinforces New York's position as a center of commerce and finance, requires that attention be directed to the measures discussed in this Report.

In 2010, at least three jurisdictions established specialized courts to handle international arbitration matters — Australia, India and Ireland. Several other jurisdictions well-known for international arbitration, including France, the United Kingdom, Switzerland, Sweden and China, have designated certain courts or judges to hear cases to challenge or enforce arbitration awards. Among the cited reasons for this focus on arbitration is the governments' recognition of the importance of arbitration to their economies and to their position in today's world of global commerce.

Thus, in addition to the economic benefit derived from the international dispute resolution business in New York, there is the desire, shared by the legal and business community, to preserve New York's historic role as an international commercial and financial center and its well-deserved reputation as a home for experienced, impartial and fair arbitrators and judges.

## **II. THE SUBCOMMITTEES' REPORTS**

### **A. Report of the New York Law Subcommittee — The Advantages of New York Law as the Governing Law in International Agreements**

New York law stands in the great tradition of the common law, with its emphasis on factual circumstance, practical application and incremental development. Contractual relationships can be established for a wide range of objects and goals. Respect for private decision-making and private ordering of civil and commercial relationships, as illustrated many times in this Report, is a hallmark of New York law.

The New York Law Subcommittee has examined New York substantive and procedural law with the goal of determining what aspects of New York law are valued by international commercial parties, as well as whether there are areas that could be changed to enhance New York's standing in the international legal marketplace.

#### **1. What characteristics are desirable in a governing law for international transactions and how does New York law reflect those characteristics?**

The Subcommittee has examined a series of characteristics that the members believe, based upon their experience and upon discussions with prominent practitioners, are relevant to the decision regarding governing law in international commercial contracts. Many of the factors discussed below were developed based on previous work done by the New York State Bar Association International Section.

The results of the Subcommittee's analysis show that New York is a favorable venue for international transactions and that New York law is well suited to international transactions in most relevant substantive areas. New York law is already being used in a large number of complex commercial transactions both domestically and internationally. New York is a frequent choice as a forum for dispute resolution, for both arbitration and litigation. New York law has been developed with the goal of ensuring a stable, fair and predictable commercial law, due to New York's position as a major international financial center.

Parties in some instances choose foreign law or enforcement venues due to a relationship to the other law or for geographic reasons notwithstanding the belief that New York commercial law is sound. It has, however, been reported that there is resistance overseas to the use of New York courts due to a distaste by some parties for American litigation discovery. While a discussion of that issue is beyond the scope of the work of the Subcommittee, we comment that parties desiring it can establish control over discovery by choosing to arbitrate their disputes. There is nothing in New York law that would prohibit parties from choosing to limit (or even forbid) prehearing disclosure in arbitration. The International Bar Association's Rules and the New York State Bar Association's recently adopted "Guidelines for The Arbitrator's Conduct of

The Pre-Hearing Phase of International Arbitrations”<sup>9</sup> are a helpful tool for parties seeking to limit such disclosure. Further, discovery in court proceedings may also be limited by sophisticated parties when entering into international agreements.

A discussion of the characteristics examined by the Subcommittee is set forth below.

**a. An established and well-developed commercial law equipped to deal with complex transactions**

New York is widely recognized as having an established, well-developed contractual commercial law equipped to deal with complex transactions. An empirical study recently published by Professors Theodore Eisenberg and Geoffrey Miller concludes that New York is the favored choice of law in contracts of sufficient significance to be included in corporate securities filings.<sup>10</sup> Professors Miller and Eisenberg also conclude in a companion article that “New York attracts contracts by offering a menu of substantive rules that are desired by the contracting parties and by providing prompt, efficient, and reliable procedures and institutions for resolving disputes.”<sup>11</sup> While a focus on United States securities filings may provide only a limited view of the attitude of international parties toward New York law, the standards for making a contract disclosable under the securities laws would tend to limit the contracts disclosed to more sophisticated contracts having more at stake and support the consensus that New York commercial law is very highly regarded.

The focus groups conducted and questionnaires circulated by the Task Force tend to reinforce the conclusions reached by Professors Miller and Eisenberg. The focus group participants and questionnaire respondents were generally in agreement that New York law provides overall certainty and predictability on business issues and is comprehensive and sophisticated. *See Appendix G.*

Since New York is a major commercial and financial center and because so many parties, whether or not based in New York themselves, choose New York law to govern commercial transactions, New York law has become extraordinarily well-developed in the commercial arena. The New York Legislature and its courts have developed New York law with the policy in mind of ensuring predictability in commercial transactions.<sup>12</sup> In addition, because New York is a common law jurisdiction, the law is developed in part by published judicial decisions that clearly articulate established law on which businesses can rely.

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<sup>9</sup> Available at <http://www.nysba.org/Content/NavigationMenu42/November62010HouseofDelegatesMeetingAgendaItems/internationalguidelines.pdf>.

<sup>10</sup> Eisenberg & Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies’ Contracts*, 30 CARDOZO L. REV. 1475, 1478 (2009).

<sup>11</sup> Miller & Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2073-74 (2009).

<sup>12</sup> *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Limited*, 37 N.Y. 2d 220, 227(1975) “[New York] is a financial capital of the world, serving as an international clearinghouse and marketplace for a plethora of international transactions, such as to be so recognized by our decisional law. . . . In order to maintain its preeminent financial position, it is important that the justified expectations of the parties to the contract be protected.”).

**b. Qualified bar with experience in complex commercial transactions and the business practices in many industries**

New York City is the world's financial center and home to many of its largest and most sophisticated law firms. A significant segment of the New York bar is exposed routinely to the world's most complex and sophisticated international commercial transactions as part of their daily practice. New York is a deep, highly competitive legal market and businesses are able to choose from among a large number of expert practitioners with experience in the substantive law and business aspects of many areas of commerce to assist them with any complex commercial matter.

To be admitted to the New York Bar, an attorney generally must be awarded a *Juris Doctor* degree (a three-year post-graduate degree) from an American Bar Association-approved law school and have passed the challenging, two-day-long New York State bar examination. Many New York attorneys have additional post-graduate degrees in areas relevant to their specialty. New York is also a well-known center of international arbitration and has many lawyers experienced in international arbitration.

**c. Stability of New York law**

New York offers a stable body of law that provides a reliable platform for commercial transactions and adjudicating business disputes. Disruptive changes in the law are rare because, as discussed above, the underlying policy goals of the New York courts and the Legislature are predictability and stability. For example, contracts for the sale of goods in New York are governed by the New York Uniform Commercial Code, a statutory scheme that courts interpret "with an eye toward business realities and the predictable consequences of legal rules."<sup>13</sup> In an effort to promote stability and predictability, New York courts thus "reject a statutory interpretation that conflicts with reasonable business practices."<sup>14</sup> Institutional characteristics, such as the common law system, guarantee that changes in the law occur only after careful consideration of precedent. As the Court of Appeals has put it, "[p]arties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents."<sup>15</sup>

**d. A highly qualified professional judiciary**

Both in the federal and state court systems, litigants have access to a highly qualified professional judiciary.

Complex commercial litigation in the New York Supreme Court system is likely to be handled by justices in the specialized Commercial Division, made up of dedicated judges — experienced members of the New York State Supreme Court — assigned to the Commercial Division. The Commercial Division serves as a vehicle for resolution of complicated

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<sup>13</sup> *Regatos v. North Fork Bank*, 5 N.Y.3d 395, 405 (N.Y. 2005).

<sup>14</sup> *Id.*

<sup>15</sup> *Holy Properties Ltd., L.P. v. Kenneth Cole Prods.*, 87 N.Y.2d 130, 134 (N.Y. 1995).

commercial disputes requiring particular expertise across the broad and complex expanse of commercial law. Cases are accepted in accordance with published standards. Among the categories of eligible cases are commercial contract disputes, cases involving commercial finance or commercial banking transactions, claims of commercial misrepresentation or unfair competition, matters arising out of commercial property transactions, major insurance matters and Uniform Commercial Code cases. With dockets limited to this discrete area of law, these judges regularly face the same issues and have developed a consistent and comprehensive body of decisional commercial law, which is publicly available to practitioners through the regularly published *Commercial Division Law Report*. The Commercial Division is widely recognized as a forum of choice for business litigation. The Commercial Division also adjudicates all matters involving applications to stay or compel arbitration, affirm or vacate arbitration awards and grant related injunctive relief. There is additional administrative authority within the state court system for the Chief Judge to effect systemic change where that is appropriate. The Commercial Division itself is a product of cooperation between the Bench and the Bar.

Federal judges in New York are appointed by the President and confirmed by the United States Senate. They come from the top echelons of the bar and are highly sophisticated in commercial matters. Federal judges have life tenure and many have decades of experience adjudicating commercial cases. There is, moreover, the New York State-Federal Judicial Council, composed of state and federal judges, that is attentive to systemic reform to improve the operation of the courts where appropriate.

The U.S. Bankruptcy Court for the Southern District of New York is a highly specialized business court for administration and decision making required by all sizes of commercial corporations, as well as individuals, experiencing unplanned credit or cash flow crises. Given its location at the epicenter of United States financial activity, its in-depth experience with making timely and effective legal decisions of a business nature makes it a natural venue for major corporate reorganization (“Chapter 11”) cases and litigation within those cases which have an effect on world markets. For example, in the past several years this court has presided over the reorganization cases of General Motors, Chrysler, Adelphi, Enron, World Com, Lehman and Madoff; each of these cases includes within it hundreds of significant commercial cases. The decisions emanating from this bankruptcy court in New York reflect a respect for non-U.S. law and an interest in promoting cross-border parallel reorganization cases with non-U.S. courts.

### e. Freedom of contract and party autonomy

New York places few limits on parties' ability to structure their arm's-length transactions in negotiated agreements. First, with respect to the choice of New York law itself, New York enforces a choice of New York law in contracts that bear no connection to New York. Section 5-1401 of the New York General Obligations Law provides that parties to a commercial contract can choose to have the contract governed by New York law whether or not the contract "bears a reasonable relation" to New York. New York courts will enforce this choice. General Obligations Law Section 5-1402 provides that any person can sue a foreign party in New York courts where the lawsuit relates to a contract for more than \$1 million which chooses New York law pursuant to Section 5-1401 and contains a provision submitting to New York jurisdiction. Similarly, CPLR § 327(b) prohibits New York courts from dismissing on forum non conveniens grounds any action brought on a contract subject to GOL § 5-1402 and choosing New York law.

Importantly, New York also respects parties' choice of foreign law to govern a transaction even if the parties choose New York as a venue for dispute resolution. New York law is unambiguous in the area of express choice of law provisions in a contract; absent fraud or violation of public policy, contractual selection of governing law is generally determinative so long as the foreign law selected has sufficient contacts with the transaction.<sup>16</sup> The public policy exception is interpreted quite narrowly and is generally limited to consumer adhesion contracts or where the law would violate a fundamental principle of justice, a prevalent conception of good morals, or a deep-rooted tradition of the common wealth.

Having chosen New York law, the parties are also free to allocate contractual risk among the parties to commercial contracts as the parties determine is appropriate under the circumstances. A contractual provision that limits damages is valid under the New York law unless a special relationship beyond the contract exists between the parties or a statute or public policy imposes extra liability despite the contractual restriction.<sup>17</sup> New York courts are reluctant to disturb commercial

### CASE STUDY

#### Sphere Drake Insurance PLC

(U.K.) v. Marine Towing, Inc. (U.S.), 16 F.3d 666 (5th Cir. 1994) (U.K. party sued to stay the litigation initiated by U.S. party and to compel arbitration under the 1958 New York Convention. The court held in favor of the U.K. party since the parties were required to arbitrate by the New York Convention which compels parties to arbitrate whether the arbitration agreement is in a contract signed by the parties or in an exchange of letters or telegrams).

Tennessee Imports, Inc. (U.S.) v. P.P. Filippi & Prix Italia S.R.L.(Italy), 745 F.Supp. 1314 (M.D. Tenn. 1990) (Italian party moved to dismiss Tennessee litigation, citing a forum selection clause in the contract between the parties requiring arbitration in the Arbitration Court of the Chamber of Commerce in Venice (Italy). The court granted the Italian party's motion and referred the parties to arbitration, noting that "The [Federal Arbitration] Act, the Convention and the case law interpreting them clearly establish a strong federal policy favoring arbitration.")

<sup>16</sup> *Int'l Materials and Resources, S.A. v. Int'l Shipping Co., S.A.*, 96 F.3d 586, 592 (2d Cir. 1996) (finding English law governed contract when chosen by the parties).

<sup>17</sup> See e.g., *Duane Reade v. 405 Lexington, LLC*, 22 A.D.3d 108, 111 (1st Dep't 2005); *Metropolitan Life Ins. Co. v. Nobel Lowndes Intern., Inc.*, 84 N.Y.2d 430, 436 (N.Y. 1994).

agreements and will enforce limitation of liability clauses generally.<sup>18</sup> “Parties to a contract have the power to specifically delineate the scope of their liability at the time the contract is formed.”<sup>19</sup>

Parties are also free in New York to vary procedural aspects of New York law. For example, there is no bar to waiving the right to a jury trial in a negotiated commercial contract in New York should the parties choose to do so, provided the waiver is clear and unambiguous.<sup>20</sup> Likewise parties are free to choose arbitration and New York courts enforce arbitration agreements.

Similarly, New York law allows parties to provide for attorney-fee shifting in contractual litigation if the parties so desire. If parties are silent in their contract as to allocation of fees, the so-called American rule applies and parties bear their own attorneys’ fees.<sup>21</sup> However, if the parties agree to shift fees to the prevailing party, that agreement will be enforced in negotiated commercial contracts.<sup>22</sup> This may be varied in an arbitration based on the governing rules. This ability by the parties to make their own decision before the fact as to the allocation of fees distinguishes New York from a number of other commercial centers in which the law requires fee shifting or makes it very difficult to avoid.<sup>23</sup>

One issue of New York practice that has presented concern to parties overseas is litigation discovery.<sup>24</sup> Both federal and state

## CASE STUDY

National Broadcasting Company Inc v. Bear Stearns & Co Inc., 165 F. 3d 184 (2d Cir. 1999) (U.S. party sought third-party discovery in New York in connection with an ICC arbitration in Mexico. The federal court denied the discovery on the grounds that “. . . opening the door to the type of discovery sought by NBC in this case likely would undermine one of the significant advantages of arbitration. . .”).

Dynegy Midstream Servs. (U.S.) v. Trammochem (U.S.), 451 F.3d 89 (2d Cir. 2006) (Party to arbitration obtained a documents-only subpoena from an arbitration panel sitting in New York directed to a Texas-based entity. The appellate court held that the lower court lacked personal jurisdiction over the Texas company to enforce the subpoena noting that “Congress...could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law.”).

<sup>18</sup> *Metropolitan Life Ins. Co.*, 84 N.Y.2d at 438-39 (N.Y. 1994); see also *Long Island Lighting Co. v. Imo Delaval, Inc.*, 668 F. Supp. 237 (S.D.N.Y. 1987).

<sup>19</sup> *Board of Educ. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 29 (N.Y. 1987).

<sup>20</sup> *Uribe v. Merchants Bank of New York*, 227 A.D. 2d 141 (1st Dep’t 1996); *National Market Share, Inc. v. Sterling National Bank*, 2001 U.S. Dist. LEXIS 9868 (S.D.N.Y. 2001).

<sup>21</sup> *Baker v. Health Mgmt. Sys., Inc.*, 98 N.Y.2d 80, 88 (N.Y. 2002).

<sup>22</sup> *Erie Petroleum, Inc. v. County of Chautauqua*, 730 N.Y.S.2d 470 (4th Dep’t 1980).

<sup>23</sup> See, e.g., Art. 60, English Arbitration Act of 1996.

<sup>24</sup> Some members of the Subcommittee expressed a concern on the part of construction contractors that the shift of indemnity obligation covering liability to third parties among parties in contracts relating to real property makes New York law less desirable for construction contracts. It is not clear to the Subcommittee that this restriction presents a significant barrier to the use of New York law in commercial construction contracts. However, it may be worth studying whether this is the case, and if so, whether the policy rationale underlying New York General Obligations Law § 5-322.1 outweighs any detrimental effect it might have on parties’ decision to choose New York law for their contracts. N.Y. G.O.L. § 5-322.1 (providing that parties to construction contracts cannot seek indemnity for liability for physical injury or property damage arising from their own negligence).

courts in New York provide American-style discovery to litigants. However, parties wishing to limit discovery may choose arbitration and provide in the arbitration agreement, as discussed elsewhere in this Report, for limited discovery. Court proceedings ancillary to arbitration or in support of arbitration do not typically involve discovery. Further, even outside arbitration, New York courts are, we believe, likely to enforce agreements in international contracts between sophisticated parties to limit discovery. A list of sample discovery-limiting clauses that can be used in agreements is attached as Appendices C and D.

#### **f. Adherence to international commercial standards**

As much as any jurisdiction in the world, New York realizes the importance of predictability and consistency in the realm of international trade and commerce. This is why New York law permits the consideration of international custom and practice in resolving disputes arising from cross-border transactions. For example, in a case concerning what conditions are necessary in order to renew a revolving letter of credit, New York's highest court recognized “[t]he importance of letters of credit in international trade and finance” and acknowledged that various international model laws had been developed to govern their use.<sup>25</sup> New York State also has a tradition of conforming its statutory law to international trade practice.<sup>26</sup> Additionally, the U.S. Supreme Court has established that, where international parties are involved, courts may exercise “sensitivity to the need of the international commercial system for predictability in the resolution of disputes.”<sup>27</sup>

No jurisdiction better appreciates the value of uniform trade standards when it comes to “minimizing uncertainties in dealing with unfamiliar laws in several foreign jurisdictions.”<sup>28</sup> Inevitably, international commercial standards continue to evolve as new business practices develop. New York law must remain on the forefront of those changes because as a primary financial center and a clearinghouse of international transactions, New York has “a strong interest in maintaining [our] preeminent financial position and in protecting the justifiable expectation of the parties who choose New York law.”<sup>29</sup>

#### **g. Accession to and compliance with relevant international treaties**

Due to the nature of our federalism, New York State cannot enter into treaties even if doing so would facilitate international financial and commercial transactions. Furthermore, New York law must comply with those international agreements entered into at the federal level. The Supremacy Clause provides that “all Treaties made, or which shall be made, under the Authority

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<sup>25</sup> *Nissho Iwai Eur. v. Korea First Bank*, 99 N.Y.2d 115, 120 (N.Y. 2002).

<sup>26</sup> See, e.g., *Banco Nacional De Mexico, S.A. v. Societe Generale*, 34 A.D.3d 124, 130 (1st Dep’t 2006) (discussing the adoption of Section 5-116 of New York’s Uniform Commercial Code).

<sup>27</sup> *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985).

<sup>28</sup> *Corcoran v. Ardra Ins. Co.*, 77 N.Y.2d 225, 230 (N.Y. 1990).

<sup>29</sup> *J. Zeevi & Sons v. Grindlays Bank [Uganda]*, 37 N.Y.2d 220, 227 (NY 1975).

of the United States, shall be the supreme Law of the Land.”<sup>30</sup> Therefore, any federal or state law that “prevents the Federal Government from ‘speaking with one voice’ in international trade” will be preempted by the federal law or policy.<sup>31</sup>

In view of these restrictions, New York State is fortunate to belong to a nation that is deeply committed to the liberalization of global trade and finance. The United States enjoys the benefits of free trade agreements with seventeen countries in addition to numerous bilateral investment and multilateral treaties intended to stimulate the market and protect private investment. Perhaps most important, from the perspective of businesses drafting international contracts, the United States is party to a number of treaties that harmonize private transnational transactions. Chief among these agreements are the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Evidence Convention), the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention).

New York Courts consistently and impartially enforce those treaties which the United States has ratified. In a recent case, for example, the New York State Court of Appeals ruled that the requirements of the Hague Convention on the Service Abroad of Judicial Documents had been satisfied and thereby upheld a foreign money judgment rendered in France.<sup>32</sup> Where international conventions do not exclusively govern the relevant legal issue, New York courts will decide issues consistent with sound canons of interpretation and the rule of law in light of principles of international comity.<sup>33</sup>

A list of relevant treaties to which the United States is a party (not including trade agreements) is attached as Appendix I. Appendix I also includes a list of additional treaties that have not yet been signed or ratified by the United States and suggestions by the New York State Bar Association International Section regarding whether the New York State Bar Association should promote adoption of these treaties. Finally, Appendix I includes suggestions by the International Section for changes to treaties to which the United States is already a party.

#### **h. Accessibility of courts to foreign parties**

There are minimal restrictions on the ability of a foreign corporation to sue in New York State Courts. As long as it does not conduct unauthorized business in New York,<sup>34</sup> a foreign corporation need only satisfy the requirements of personal jurisdiction over the defendant and

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<sup>30</sup> U.S. Const., art VI, cl. 2.

<sup>31</sup> *Japan Line v. Los Angeles*, 441 U.S. 434, 453-54 (1979).

<sup>32</sup> *John Galliano, S.A. v. Stallion, Inc.*, 15 N.Y.3d 75 (N.Y. 2010).

<sup>33</sup> See, e.g., *Morgenthau v. Avion Resources Ltd.*, 11 N.Y.3d 383, 390-91 (N.Y. 2008) (noting that both the United States and Brazil are signatories to the Inter-American Convention on Letters Rogatory, but holding that the treaty does not mandate the exclusive means of service on a party in Brazil).

<sup>34</sup> N.Y. Bus. Corp. Law § 1312(a).

subject matter jurisdiction over the claims and issues in order to bring an action. Although there are certain limitations to obtaining personal jurisdiction over potential defendants pursuant to N.Y. C.P.L.R. § 301, 302, obtaining subject matter jurisdiction “is rarely a problem in state court.”<sup>35</sup> This is because, under the New York State Constitution, “[t]he Supreme Court is a court of general jurisdiction, and it is competent to entertain all causes of actions unless its jurisdiction has been specifically proscribed.”<sup>36</sup> New York courts recognize a wide variety of causes of action related to commercial disputes, any one of which could give rise to subject matter jurisdiction.

Moreover, as discussed in Section 1(e) above, should foreign parties contractually specify New York as the forum for a potential dispute, New York courts will honor such forum selection clauses as “an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”<sup>37</sup> General Obligations Law Section 5-1402 specifies that if a foreign party chooses New York law and contractually agrees to submit to the jurisdiction of the New York courts, the party will be subject to personal jurisdiction.

### i. Respect for parties’ choice of arbitration

Both the state and federal courts sitting in New York manifest the highest respect for the decision of the parties to submit their disputes to arbitration. The New York Court of Appeals has repeatedly emphasized the “the long and strong public policy in favor of arbitration,” and reiterated that “New York courts interfere as little as possible with the freedom of consenting parties to submit disputes to arbitration.”<sup>38</sup> The U.S. Supreme Court has been equally steadfast in asserting the federal policy in favor of arbitration, applicable where the parties have agreed to arbitration in all disputes arising from transactions linked to interstate or foreign commerce.<sup>39</sup>

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<sup>35</sup> 1-2 LexisNexis Answer Guide New York Civil Litigation § 2.01.

<sup>36</sup> *Thrasher v. United States Liability Ins. Co.*, 19 N.Y.2d 159, 166 (N.Y. 1967).

<sup>37</sup> *International Packaging Co. v. China Nat'l Cereals, Oils & Foodstuff Import & Export Corp.*, 159 A.D.2d 190, 195 (1st Dep’t 1990).

<sup>38</sup> *Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (N.Y. 2007).

<sup>39</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52 (2003).

## j. Enforcement of foreign judgments and arbitration awards

The United States is party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).<sup>40</sup> The New York Convention, which has been enacted as Chapter 2 of the Federal Arbitration Act, establishes that commercial arbitral awards issued in any of the 144 countries that have ratified the treaty can be enforced in the United States. The Panama Convention which has been enacted as 9 U.S.C. 301, *et seq.* provides similar protection for awards issued in any of the 19 signatory nations in Latin America.

The enforcement of foreign court judgments in New York is not governed by the New York Convention. Rather, New York’s version of the Uniform Foreign Country Money-Judgments Recognition Act (“the Act”), requires New York’s courts to recognize and enforce foreign tribunals’ monetary judgments, excepting judgments in the areas of tax, penal and family law. N.Y. CPLR § 5301(b). The Act applies to all judgments that are final, conclusive and enforceable where rendered.<sup>41</sup> A judgment that is subject to appeal or that has an appeal pending, may nevertheless be considered final for the purposes of the Act.<sup>42</sup> Whether the New York court has personal jurisdiction over the judgment debtor is immaterial to recognition and enforcement of a foreign judgment when the debtor has been afforded due process, and requiring some jurisdictional nexus would unduly protect the debtor by enabling him to escape the judgment of the rendering court.<sup>43</sup>

Although the recognition of foreign judgments remains an important issue in international policy, New York’s attitude was clearly defined in 1918 by Judge Cardozo: “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.”<sup>44</sup> The New York Court of Appeals no doubt had those words in mind a few years ago when it stated “New York has traditionally been a generous forum in which

### CASE STUDY

*Yusuf Ahmed Alghanim & Sons (Kuwait) v. Toys “R” Us, Inc. (U.S.)*, 126 F.3d 15 (2d Cir. 1997) (Kuwaiti business sued to confirm an international arbitration award in international licensing agreement dispute. The court confirmed the arbitration award in favor of the Kuwaiti party under the 1958 New York Convention, noting that “[i]nterpretation of [a] contract term [ ] is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation” and that “[t]his court has generally refused to second guess an arbitrator’s resolution of a contract dispute.”).

*Parsons and Whittemore Overseas Co. (U.S.) v. Societe Generale de L’Industrie Du Papier (Rakta) (Egypt)*, 508 F.2d 969 (2d Cir. 1974) (Egyptian company sought to enforce foreign arbitration award against U.S. company which resisted enforcement under Article V(2) of the 1958 Convention since the award was “contrary to the public policy of the United States.” The court concluded that the Convention’s public policy defense should be construed narrowly. “This provision was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’ Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis”).

<sup>40</sup> See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974).

<sup>41</sup> *Id.* at § 5302.

<sup>42</sup> *Id.*

<sup>43</sup> See *Lenchyshyn v. Pelko Elec., Inc.*, 281 A.D.2d 42, 47, 50 (4<sup>th</sup> Dep’t 2001).

<sup>44</sup> *Loucks v. Standard Oil Co. of New York*, 120 N.E. 198, 201 (1918).

to enforce judgments for money damages rendered by foreign courts.”<sup>45</sup> Despite New York’s efforts, this is a problem that can only be fully addressed by a multilateral treaty. In order to protect the judgments of our own courts, the Subcommittee recommends continued support for the ratification of the Hague Convention on Choice of Court Agreements as further described in Appendix I.<sup>46</sup>

#### **k. Finality of litigation and arbitration results**

Litigation results in New York are final upon exhaustion of a defined appeal process. It is not possible in a report such as this one to explore all the potential procedural avenues in litigation. Generally, however, a case that has proceeded through judgment in the trial court can be appealed based only on the established record. Parties cannot, as is possible in some civil law jurisdictions, introduce new evidence at the appellate level. Generally, in both federal courts and New York state courts, the losing party in trial court is entitled to one level of appeal as of right with a second level of appeal at the discretion of the high court. Cases from the federal district courts in New York are appealable to the Second Circuit, and the Second Circuit’s decision are reviewable by writ of certiorari to the United States Supreme Court. Likewise, decisions of the New York Supreme Court are reviewable by the Appellate Division followed by a discretionary review by the New York Court of Appeals. Arbitration awards are subject only to very limited review by the courts, as discussed later in this Report.

#### **l. Enforceability of judgments abroad**

Section 5302 of the New York’s CPLR states that it applies to “any foreign country judgment which is final, conclusive and enforceable where rendered.” CPLR § 5303 declares that such judgments are enforceable except as provided in CPLR § 5304. CPLR § 5304 (a) (1) codifies our state’s common-law jurisprudence that a foreign judgment is not conclusive if “rendered under a system which does not provide impartial tribunals or procedures.”<sup>47</sup> These legislative changes have made New York’s court system one of the most accepting and transparent in the world. While the reciprocity of foreign courts may not be perfect or automatic, these changes have given New York’s judgments the best possible chance for recognition and enforcement abroad.

#### **m. Availability of provisional remedies**

Provisional remedies are available in New York contract matters in both the litigation and arbitration context. In the state courts, with respect to litigation, CPLR § 6001 provides for attachment, preliminary injunction, receivership and *lis pendens*. For arbitration, CPLR § 7502(c) provides for attachment and preliminary injunction from a court to assist both domestic and international arbitration. Similar remedies are available in the federal courts. Rules 64, 65, 66, 67 and 69 of the Federal Rules of Civil Procedure provide guidelines for

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<sup>45</sup> *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 100 N.Y.2d 215, 221 (N.Y. 2003).

<sup>46</sup> HAGUE CONFERENCE OF PRIVATE INTERNATIONAL LAW, CONVENTION ON CHOICE OF COURT AGREEMENTS, June 30, 2005, 44 I.L.M. 1294.

<sup>47</sup> See *Sung Hwan Co., Ltd. v. Rite Aid Corp.*, 7 N.Y.3d 78, 82 (N.Y. 2006).

seizing a person or property, injunctions and restraining orders, proceedings against a surety, receivers, deposit into court and execution of judgments, respectively. New York courts can also be called upon to assist in the appointment of arbitrators if the arbitration agreement does not provide for a method of appointment, if the agreed upon method fails, or if an arbitrator fails to fulfill his or her responsibilities and a successor has not been appointed.<sup>48</sup>

#### **n. Availability of cross-examination**

Cross-examination of witnesses is standard practice in the United States and in New York and helps ensure veracity and completeness of witness testimony. In court, unreliable testimony that is not subject to cross-examination is excluded as hearsay. This distinguishes New York from many civil law systems where cross-examination of witnesses is not a standard practice. While parties in arbitration are free to set their own procedures, as is now the case in many international arbitrations throughout the world, cross-examination of witnesses is frequently part of New York-based international arbitration proceedings. Often in arbitration in New York, parties submit written statements of their direct testimony with cross-examination at the arbitration hearing.

#### **o. Protection of security interests**

In New York, the Uniform Commercial Code (“UCC”) governs the rights of parties in secured transactions. (N.Y. U.C.C. Article 9.) Under the UCC, the local law of the jurisdiction in which the debtor is “located” governs “perfection, the effect of perfection or nonperfection and the priority of a security interest in collateral.”<sup>49</sup> The New York UCC provides that a security agreement is effective “between the parties, against purchasers of the collateral and against creditors.”<sup>50</sup> New York law is applied neutrally whether the lender is a resident or a foreign person. A recent decision from the Eastern District of New York demonstrates the fairness with which New York law is applied to controversies involving national and foreign parties.

In *United States ex rel. Solera Constr. v. J.A. Jones Constr. Group*, a U.S. company and judgment creditor attempted to enforce its lien against a New York subsidiary of a Canadian corporation.<sup>51</sup> A Canadian bank with a secured interest superior to that of the U.S. creditor intervened in the case. The facts made clear that some of the collateral at issue was property of the debtor’s Canadian parent company. The federal district court held that the debtor was in fact located in Quebec, and the New York rule mentioned above pointed to Quebec’s civil code as controlling the dispute. The court observed that New York’s rule points “to the substantive law of a particular jurisdiction … and applies whether the debtor is foreign or domestic.”<sup>52</sup> Accordingly, the court found that the Canadian bank had priority over the U.S. company, since

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<sup>48</sup> CPLR § 7504.

<sup>49</sup> N.Y. U.C.C. § 9-301(a).

<sup>50</sup> *Id.* § 9-201.

<sup>51</sup> 2010 U.S. Dist. LEXIS 34065 (E.D.N.Y. 2010).

<sup>52</sup> *Id.* at 21-22.

the Canadian bank had perfected security interests in the assets of both the U.S. subsidiary and the Canadian parent company.<sup>53</sup>

This case not only shows the neutrality of New York's law, but also demonstrates the quality of the local courts and their willingness to apply foreign law when the facts of the case so require. New York is a hub of international finance and it is understood that secured transactions accelerate the mobilization of credit and that the growth of credit allows large and small businesses alike to flourish. As the market for cross-border credit continues to advance and grow, New York must secure its place at the center of international finance. The only way to accomplish this goal is to closely monitor and adapt to significant developments in this area globally while continuing to show the world that "the law of credit is directly related to the freeing up of markets and the expansion of trade."<sup>54</sup>

**p. Enforceable rules requiring party and attorney confidentiality**

New York law upholds contractual confidentiality agreements among parties. In the arbitration context, confidentiality can be assured through agreement. While litigation in the United States is presumptively public, state and federal courts in New York routinely issue protective orders to protect confidential business information and trade secrets. Violation of such orders by any party of counsel can have severe consequences, including contempt of court. In federal court protective orders are available. Rule 26(c) of the Federal Rules of Civil Procedure enables the court to issue a protective order requiring that a trade secret or other confidential research, development or commercial information not be revealed or be revealed only in a specified way. Likewise, CPLR § 3103 permits the court, upon a motion or *sua sponte*, to issue a protective order.

New York attorneys are bound to protect client confidentiality as an ethical obligation. Rule 1.6 of the New York Rules of Professional Conduct provides that, except under certain restrictive circumstances, a lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person without informed consent. These ethical requirements are carefully observed and strictly enforced with respect to New York practitioners and to lawyers practicing before New York courts.

**2. Suggestions for Further Study and Reform**

As a substantive matter, the Subcommittee has not identified significant issues with the state of New York law. As discussed above, New York's commercial law is stable and well-respected around the world. The most significant concerns that some international parties appear to have with the choice of New York law for transactions appear to be connected to the availability of discovery in United States courts if the disputes were to be adjudicated in a New York court. These concerns can generally be addressed through providing a specifically tailored

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<sup>53</sup> *Id.* at 26.

<sup>54</sup> Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 130 (2004).

arbitration clause as discussed in more detail in other Subcommittee reports, as well as in international agreements in which the parties agree in advance to limit the scope of discovery in a judicial proceeding or waive jury trial and punitive damages.

The Subcommittee makes the following recommendations, each of which is discussed briefly below:

- The Subcommittee recommends that the N.Y.S.B.A. continue to advocate for adoption of the Uniform Fraudulent Transfer Act.
- The Subcommittee recommends that the N.Y.S.B.A. continue to support updating New York's arbitration law with the Revised Uniform Arbitration Act in the form that has been previously submitted to the New York Legislature.
- The Subcommittee recommends that the N.Y.S.B.A. consider whether it would be appropriate to adopt a form of the UNCITRAL Model Law to govern international arbitrations venued in New York for which parties choose state arbitration law.
- The Subcommittee recommends that the N.Y.S.B.A. establish a group, perhaps under the leadership of the Intellectual Property Section, to examine whether it should be N.Y.S.B.A. policy to recommend to the Legislature that New York adopt the Uniform Trade Secrets Act.
- As discussed above in Section 1(e), the Subcommittee recommends the further consideration of whether the N.Y.S.B.A. should study the benefits and burdens of the statutory limitations on risk allocation for third-party injury in construction contracts under New York General Obligations Law § 5-324.
- The Subcommittee recommends that the N.Y.S.B.A. study whether to recommend that the New York Legislature adopt the 1996 UNCITRAL Model Law on Electronic Commerce.

**a. Continue to Support the Uniform Fraudulent Transfer Act (“UFTA”)**

The Uniform Fraudulent Transfer Act (“UFTA”) has been endorsed by the American Bar Association and has been adopted in 44 states — but not yet in New York.<sup>55</sup> In 2007, the New York State Bar Association recommended adoption of UFTA to the New York Legislature.<sup>56</sup>

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<sup>55</sup> Overview: <http://uniformlaws.org/Act.aspx?title=Fraudulent%20Transfer%20Act>.

<sup>56</sup> See <http://www.nysba.org/Content/ContentFolders/Legislation/LegislativeMemoranda20072008/RPLSMemorandum14.pdf>.

The New York Law on Fraudulent Conveyances was adopted in 1925 and can still be traced back to the previous Model Act, the Uniform Fraudulent Conveyance Act (UFCA) from 1918, which has been superseded by UFTA in 1984. The reasons for adopting UFTA are manifold: “The terminology of the UFCA had become considerably archaic, and needed to be modernized. The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it important to reconsider state law. And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. . . . [T]he UFTA is ready to promote the modernization of this subject area of law.”<sup>57</sup> It thus seems that the New York law on fraudulent conveyances, which affects all kinds of business transactions, has become outdated in terminology and methodology, and out of sync with most of the USA — a legal situation that can be improved by adopting UFTA.

In 2006, the New York City Bar Association recommended the adoption of UFTA to the New York Legislature, stating that it believes “that the UFTA is better suited to today’s complex business transactions than the aging UFCA presently in force in New York and adding that: “New York’s enactment of a fraudulent transfer statute based on the UFTA would promote uniformity among the states and, in so doing, create a more predictable, and therefore more favorable, business environment.”<sup>58</sup> Uniformity is exceptionally desirable because choice of law issues arising with regard to fraudulent transfers are unusually uncertain and ambiguous. In addition, such enactment would promote uniformity with the Bankruptcy Code and, in so doing, enhance predictability by reducing the likelihood that a transaction would be treated differently for this purpose before and after the commencement of a bankruptcy case.

“By enacting the UFTA in New York, the Legislature would modernize New York’s fraudulent conveyance laws and make New York law consistent with that of the vast majority of other states and the Bankruptcy Code. The result would be a welcome simplification of the law and an increase in certainty for debtors and creditors.”<sup>59</sup> Among other things, the New York City Bar specifically pointed out that:

- (a) UFTA contains a clear and uniform statute of limitations;
- (b) Unlike the UFCA, the UFTA clarifies when the transferor’s financial condition and the value of consideration provided by the transferee are to be measured and when the statute of limitations begins to run;
- (c) The UFTA cleans up and rationalizes the provisions of the UFCA that define how bad a transferor’s financial condition must be in order to render a transfer for less than equivalent value susceptible to avoidance on the basis of constructive fraud;

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<sup>57</sup> See <http://uniformlaws.org/ActSummary.aspx?title=Fraudulent%20Transfer%20Act>.

<sup>58</sup> See <http://www.nycbar.org/pdf/report/uploads/20061311-UniformFradulentTransferAct.pdf>.

<sup>59</sup> *Id.*

- (d) The “insider preference” rule created by the UFTA provides for heightened scrutiny to transfers to insiders;
- (e) The UFTA expands the remedies available to creditors of a debtor who has committed a fraudulent transfer; and
- (f) The UFTA clarifies the defenses available to transferees in general and strengthens the defenses available to those who act in good faith.<sup>60</sup>

As the New York State Bar Association stated when it also recommended adoption of UFTA to the New York Legislature, “[m]ore broadly, the UFTA also clears up ambiguities in the UFCA, conforms the UFCA more directly to the Bankruptcy Code and the Uniform Commercial Code, and, in the words of the City Bar, ‘is clearer, more consistent with other laws, and more modern and practical.’”<sup>61</sup> The Subcommittee recommends that the New York State Bar Association continue to promote adoption of the UFTA as a legislative priority.

**b. Continue to Support the Revised Uniform Arbitration Act (“RUAA”)**

New York’s venerable CPLR Article 75, originally enacted in 1920, was the pioneering prototype of all the state arbitration statutes and served as the model for the Federal Arbitration Act (“FAA”), enacted by Congress in 1925. New York courts have recently taken constructive steps in shifting their focus from CPLR Article 75 to the FAA. In 2006, the New York Court of Appeals held that in an arbitration case arising from transactions linked to interstate commerce, New York State courts should apply, not CPLR Article 75, but the FAA in adjudicating any challenge to the arbitration award.<sup>62</sup> The Appellate Division’s First Department has similarly held that the FAA applies to discovery disputes in an interstate commerce-related arbitration.<sup>63</sup> Despite U.S. Supreme Court cases suggesting that the FAA does not preempt state arbitration law in this context,<sup>64</sup> it appears that New York state courts have applied the FAA in arbitration cases across the board where a linkage to interstate commerce is shown. The linkage may be very slight, as the Supreme Court has held that the Congressional policy in favor of enforcement of arbitration agreements extends to the outer limits of the commerce power.<sup>65</sup> The result is that New York state courts are applying the FAA in many or most major cases, the exception being cases where the parties have agreed on the application of New York arbitration law or have employed language in their arbitration clause that is deemed equivalent to such an agreement.<sup>66</sup>

<sup>60</sup> *Id.*

<sup>61</sup> New York State Bar Report, *supra*.

<sup>62</sup> *Wien & Malkin v. Helmsley-Spear, Inc.*, 6 N.Y.3d 471.

<sup>63</sup> *Imclone Systems Inc. v. Waksal*, 802 N.Y.S.2d 653 (1<sup>st</sup> Dept. 2005).

<sup>64</sup> See e.g., *Buckeye Check Cashing, Inc. v. Cardega*, 546 U.S. 440 (2006); *Volt Information Science v. Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989); *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>65</sup> *The Citizens Bank v. Alafabco*, 539 U.S. 52 (2003).

<sup>66</sup> *Diamond Waterproofing Sys. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247 (N.Y. 2005).

Despite the close ancestral kinship between New York's arbitration statute and the FAA, the New York statute does have important differences tending largely to restrict the power of the arbitrator in such matters as award of attorneys' fees, imposition of sanctions, award of punitive damages and reservation of statute of limitations issues to the courts.

Based on the issues with New York arbitration law, as described above, the New York State Bar, New York City Bar Association and New York County Lawyers Association all recommended in 2007 that the New York State Legislature enact a New York version of the Revised Uniform Arbitration Act ("RUAA"), the updated uniform arbitration statute that the National Conference of Commissioners on Uniform State Laws ("NCCUSL") had proposed for enactment by the states in 2000. The bill was introduced in the New York Senate and Assembly, but did not move forward, based in part on generalized opposition to arbitration by the New York State Trial Lawyers Association ("NYSTLA") and some consumer groups. (The Subcommittee notes that New York State's section 399 (c) of the General Business Law already bars mandatory arbitration in the consumer context, a disposition that would not be changed by enactment of the RUAA, although this provision of state law is currently pre-empted by section 2 of the FAA in the context of consumer disputes linked to interstate commerce, such as those involving credit cards or telephone bills.)

It is the view of the Subcommittee that modernization of New York's arbitration law would serve the interest of promoting the choice of New York law for complex business transactions. It could also induce parties to choose New York State law over the FAA to govern arbitration agreements in certain instances. The Subcommittee recommends that the New York State Bar Association continue to make passage of the RUAA a legislative priority.

**c. Study Whether to Adopt UNCITRAL Model Law on International Commercial Arbitration**

Some bar groups have commenced study of possible enactment in New York of the UNCITRAL model law for use by parties who choose to apply it to international arbitrations sited in New York. Some 67 countries have already adopted the Model Law for international arbitration, as have all seven of the states other than New York that are home to large American cities usually considered as potential venues for international arbitration: California, Texas, Florida, Illinois, Louisiana, Oregon and Connecticut.

The Subcommittee believes that an analysis of the adoption of the UNCITRAL Model Law is worth pursuing. For example, Oregon, has already gone forward in enacting both the RUAA for domestic use and the UNCITRAL Model Law for international use, where chosen by the parties to an international arbitration. The Subcommittee recommends that the New York State Bar Association study whether it would be beneficial to take a similar approach by adopting the RUAA for domestic arbitration and the UNCITRAL Model Law for International Arbitration.

**d. Study Whether to Adopt the Uniform Trade Secrets Act (“UTSA”)**

Trade Secret protection provides an important supplement to patent and copyright and is an important area of concern for international businesses of all kinds, but particularly for technology-based businesses. Unlike patent and copyright, trade secret protection is a creature of state law and by adopting a modern trade secret act, New York can help ensure that its laws are at the forefront of U.S. law for technology companies. The Uniform Trade Secrets Act (“UTSA”) has been endorsed by the American Bar Association and has been adopted in 41 states, although it has not yet been adopted in New York.<sup>67</sup> In 2011, two more states (New Jersey and Massachusetts) have introduced the UTSA as pending legislation. The ULC describes the reason to adopt the UTSA as follows: “At the common law, misappropriation of a trade secret could give rise to a remedy. However, the existing law contains many uncertainties and ambiguities. The Uniform Trade Secrets Act is an effort to codify the common law with proper clarification of rights and remedies. . . . The law must respond to a technological society. The Uniform Trade Secrets Act is the means to relieve the difficulties.”<sup>68</sup>

New York Law still applies common law to determine trade secret claims. For example, to determine whether a matter is a trade secret, New York looks to the common law: “To assess whether information constitutes a trade secret, courts in this circuit have looked to the Restatement of Torts, which defines a trade secret as ‘any formula, pattern device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.’”<sup>69</sup> “New York Courts consider the following factors relevant to a determination of whether a trade secret exists: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.”<sup>70</sup>

In contrast, UTSA Sec. 1 (4) provides a test for identifying a trade secret having less ambiguity and clear terms:

*Trade secret means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:*

*(i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable*

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<sup>67</sup> <http://uniformlaws.org/Act.aspx?title=Trade%20Secrets%20Act>.

<sup>68</sup> <http://uniformlaws.org/ActSummary.aspx?title=Trade%20Secrets%20Act>.

<sup>69</sup> *Softel, Inc. v. Dragon Med. & Scientific Communications*, 118 F.3d 955, 968 (2d Cir. 1997) (quoting Restatement Of Torts § 757 cmt. b at 5 (1939)).” *Nycomed US, Inc. v. Glenmark Generics, Inc.*, No. 08-CV-5023, 2010 WL 889799 at 5-6 (E.D.N.Y. 2010).

<sup>70</sup> *In re Cross Media Marketing Corp.*, Case No. 06 Civ. 4228(MBM), 2006 WL 2337177 at \* 4 (S.D.N.Y. 2006) (citing *Integrated Cash Mgmt. v. Digital Trans., Inc.*, 920 F.2d 171, 173 (2d Cir. 1990)).

*by proper means by, other persons who can obtain economic value from its disclosure or use, and*

*(ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>71</sup>*

The UCL explains that the UTSA can improve over the common law approach by making the law more adaptable to the high-tech economy. “In these times of fast-breaking and highly profitable technological advances — the kind that spur intense competition and can rapidly stimulate a region’s economic growth — no state can afford to be without modern comprehensive law protecting trade secrets. In fact, recent innovations in such fields as electronics, chemicals, opticals and the bio-tech industries make the wrongful appropriation of commercially valuable information more frequent and much more costly to business. Trade secrets law must be sophisticated enough to keep pace with the development of technology in the private sector, yet simple enough to be of broad use . . .”<sup>72</sup>

The Subcommittee recommends that the New York State Bar Association initiate further study of whether adoption of the UTSA would be beneficial for New York.

**e. Study Whether to Adopt the 1996 UNCITRAL Model Law on Electronic Commerce**

New York does not currently have a comprehensive law that deals with legal issues arising from the proliferation of electronic documents and communication. The Uniform Electronic Transactions Act (“UETA”) is based on the 1996 UNCITRAL Model Law and has been adopted by other American states. The Subcommittee recommends that the N.Y.S.B.A. study whether New York’s adoption of UETA should be a priority as it will bring New York into conformity with national and global standards and help to reduce costs for those businesses that handle interstate and international businesses in New York.

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<sup>71</sup> See <http://www.law.upenn.edu/bll/archives/ulc/fnact99/1980s/utsa85.htm>.

<sup>72</sup> See <http://uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UTSA>.

**B. Report of the New York Courts Subcommittee — The Positive Aspects of the Use of New York Courts to Resolve International Disputes, Including the Recognition and Enforcement of Foreign Judgments and Awards**

International disputes frequently are resolved in New York courts. The New York State courts include a Commercial Division in New York County (the borough of Manhattan) composed of eight judges selected for their commercial expertise. Nine other counties in New York also have such Commercial Divisions. International commercial disputes, including arbitration matters that lead to ancillary litigation in state courts, are heard by these experienced judges. The commercial and financial sophistication of the judges who sit in the New York federal courts, including in particular those in the Southern and Eastern Districts in New York City, is also well recognized. Both state and federal courts in New York continue to be seen as the leading American tribunals involved in development of commercial law.<sup>73</sup>

New York courts are attractive to litigants internationally because of their development and application of the “Gold Standard” New York law that deals in detail with commercial and particularly financial matters. No doubt because of New York’s role as an international financial center, this body of law has been developed by the legislature and the courts as entirely neutral, favoring neither sellers nor buyers and giving no preference to any particular financial interests. Foreign parties regularly acknowledge that New York courts apply this law to provide a high standard of justice to all who came before them, regardless of their nationality.<sup>74</sup>

New York courts apply state and federal rules of discovery that enable parties to explore and develop their cases in more detail than does judicial discovery available in courts outside of the United States. While this sometimes is a source of criticism because of the time and expense that U.S.-style discovery may involve, litigants recognize that in many instances there is disequilibrium in the parties’ knowledge of the facts underlying a dispute and that carefully administered discovery may be appropriate. Both the Commercial Division and the judges of the federal courts administer individual dockets of cases assigned to them for all matters and are in position to monitor and control discovery. While suggestions are made regularly for improvements in the discovery process, foreign parties continue to agree to litigate before New York courts because they believe they will receive an opportunity for an appropriate scope of discovery when it is needed.<sup>75</sup>

New York and other American courts accord parties rights to a trial by jury in certain circumstances, including in many cases the right to jury trial of contractual commercial disputes. The right to have a claim tested by a lay jury can be a valuable asset for a party. Conversely, the

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<sup>73</sup> See Mitchell L. Bach & Lee Applebaum, *A History of The Creation of Business Courts in The Last Decade*, 60 BUS. LAW. 147, 158—59 (2004) (explaining that the “experience and expertise” of its judges has contributed to the success of the New York’s Commercial Division, as well as its influence in other jurisdictions).

<sup>74</sup> See Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 49 (2008) (concluding that “there can be little doubt that New York is the leading forum for commercial dispute resolution in the United States . . . [because of] the perceived quality of its law and courts”).

<sup>75</sup> See John Fellas, *Strategy in International Litigation*, 14 ILSA J. INT’L & COMP. L. 317, 320 (2008) (suggesting that plaintiffs may choose to bring suit in U.S. courts for the availability of broad discovery procedures).

American legal system sometimes is criticized because of its continuing use of civil juries. As is discussed below, parties are free to waive jury trial, and commercial entities often do so as part of their contracts. Such contractual waivers generally are enforced by New York courts, as are waivers of claims for punitive damages.<sup>76</sup>

In addition, parties may provide in the drafting of their clauses that the process of litigation be tailored to their particular needs. While courts control cases before them according to their individual circumstances, they generally enforce agreements by the parties to limit time specified for particular steps in litigation, including in particular timing and other limits on discovery. Examples of such clauses are contained in Appendices C and D to this report.<sup>77</sup>

Both state and federal courts in New York made available court-annexed alternative dispute resolution in the form of special masters and mediators to assist the parties in possible resolution of disputes before court resolution is required. These programs are very successful in avoiding expense and delay that would occur should litigation be pursued.<sup>78</sup>

Federal and state courts in New York regularly enforce foreign court judgments and foreign arbitral awards. The United States is not a party to any international judgment enforcement convention. However, the United States has signed, but not yet ratified, the new Hague Convention on Choice of Courts, which provides for the recognition of foreign judgments. Additionally, New York courts find no difficulty in enforcing most judgments under principles of comity.<sup>79</sup> Arbitral awards are enforced under the U.N. Convention on Recognition and Enforcement of Foreign Arbitral Awards, known throughout the world as the “New York” Convention, which requires courts to enforce such awards unless one of the defenses specified in the New York Convention is available.<sup>80</sup> U.S. law on enforcement of arbitral awards applies to the New York Convention.<sup>81</sup>

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<sup>76</sup> See Geoffrey P. Miller, *Bargains Bicoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475, 1513 (2010) (explaining that New York courts will enforce waivers of jury trial in the “absence of fraud, oppression, or overreaching”).

<sup>77</sup> Examples of such provisions are also contained in the International Institute for Conflict Resolution and Prevention’s publication, “Economical Litigation Agreement for Commercial Contracts as a Means for Reducing Civil Litigation Costs” (2010). The portion of that agreement that essentially sets up a private arbitrator to deal with discovery may not be enforceable before many judges.

<sup>78</sup> See FED. R. CIV. P. 53 (providing for the appointment of masters in federal court proceedings); New York Commercial Division: Guide to the Commercial Division Alternate Dispute Resolution Program, NY COURTS.GOV, available at [http://www.nycourts.gov/courts/comdiv/adr\\_guide.shtml](http://www.nycourts.gov/courts/comdiv/adr_guide.shtml) (describing the New York State ADR program).

<sup>79</sup> 19A N.Y. JUR. 2D *Conflict of Laws* §§ 12-14 (describing the doctrine of comity).

<sup>80</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2157, 330 U.S.T.S. 3 (entered into force in the U.S. Dec. 29, 1970), available at <http://treaties.un.org/doc/Publication/UNTS/Volume%20330/volume-330-I-4739-English.pdf>.

<sup>81</sup> See 9 U.S.C. § 207 (2011) (requiring U.S. courts to confirm foreign arbitration awards unless they find “one of the grounds for refusal or deferral” specified in the New York Convention).

Courts in most jurisdictions throughout the world reserve the possibility of refusing to enforce awards that either offend due process or violate public policy. Normally these unusual awards may be challenged under one or more of the grounds found in the New York Convention.<sup>82</sup> Some U.S. courts also have permitted challenges to domestic awards on the basis of “manifest disregard of law.” New York courts, however, have invoked this ground rarely. The United States Supreme Court has not yet finally determined whether there is such a basis for resisting enforcement of an award outside the grounds specified in the Federal Arbitration Act.<sup>83</sup> A detailed report on the subject is being prepared by the New York City Bar’s International Commercial Disputes Committee.

Most international arbitrations do not require court intervention prior to the enforcement stage, but for those that do, New York law applicable in both federal and state courts provides the possibility of pre-judgment attachments and injunctions against transfer of assets that might be used to satisfy a judgment or arbitral award.<sup>84</sup>

In summary, the courts in New York are hospitable to and are experienced in resolving international disputes and, in particular, support international arbitration.

## 1. Proposals for Improvement

The Task Force Subcommittee has considered a variety of proposals for potential improvement of the processing of international disputes in New York courts. The first of these is for the creation of a degree of judicial specialization. Courts in some jurisdictions have designated particular judges or groups of judges as specialized chambers to deal with

<sup>82</sup> See, e.g., *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992) (citing *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L’Industrie Du Papier (RAKTA)*, 508 F.2d 969, 975 (2d Cir. 1974)) (equating U.S. due process standards with a defense against arbitral enforcement provided by the New York Convention).

<sup>83</sup> *Hall Street Assoc. v. Mattel Inc.*, 552 U.S. 576, 585(2008). The Court of Appeals for the Second Circuit, in New York, has termed manifest disregard merely “a judicial gloss on the specific grounds for vacatur enumerated in the Federal Arbitration Act.” *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008); *overruled on other grounds by Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

<sup>84</sup> See N.Y. C.P.L.R. § 5229 (McKinney 2011) (authorizing pre-judgment restraint as if occurring after judgment); see also *Loew v. Kolb*, No. 03CIV.5064, 2003 WL 22077454, at \*2 (S.D.N.Y. Sept. 8, 2003) (restraining assets pursuant to C.P.L.R. § 5229 pending final judgment in a court action to confirm an arbitration award).

## CASE STUDY

Brandeis Int’l Limited (U.K.) v. Calabrean Chemicals Corp. (U.S.), 656 F.Supp 160 (S.D.N.Y.1987). U.K. company sued in New York federal court to enforce an arbitration award rendered in London by the London Metal Exchange. Defendant resisted on the grounds that the award was in “manifest disregard of the law” and its enforcement would violate the public policy of the U.S. under Article V(2)(b) of the New York Convention. The court confirmed the award noting that “American courts are unreceptive, to say the least, to arguments that arbitral awards should be vacated for manifest disregard of the law.” The court held that “manifest disregard” does not contravene U.S. public policy under Article V of the New York Convention.

international arbitrations.<sup>85</sup> This has been viewed generally as a helpful development in those jurisdictions, and there are steps that might be taken to facilitate the use of such specialized expertise in New York.

While all of the judges in the Commercial Division of the New York Supreme Court in New York County are particularly seasoned in commercial matters, one possibility is the designation of one or more judges in the existing Commercial Division to hear all matters that come before that court involving international and other commercial arbitration issues,<sup>86</sup> including procedures promulgated for the special matters judges to expedite these procedures.<sup>87</sup> This and other productive changes could be considered by the New York State-Federal Judicial Council, a group of federal and state judges approved by their respective Chief Judges that has indicated its willingness to be of assistance in considering systemic improvements.

Although the designation of specific judges to act on international arbitration matters in federal courts is a theoretical possibility, traditionally those courts have avoided specialization of particular judges.<sup>88</sup> In addition, any such change probably would require attention at a national level and should not be limited to particular jurisdictions.

A second proposal would involve a type of “rocket docket” in the Commercial Division for expedited litigation that might be attractive to parties to international commercial disputes who do not wish to use the full array of procedures available under New York civil procedure law. Such parties might elect, through a clause in their contracts or otherwise, procedures modeled on those available generally in international arbitration, such as use of written witness statements in place of affirmative testimony at trial, limitation of pre-trial discovery procedures (including generally an absence of oral depositions), waiver of jury trial and possibly limitations on grounds for appeal. Alternatively, the “rocket docket” concept might be applied to matters related to international arbitration.

Third, the Subcommittee has considered the possibility that judges of the New York State courts might be authorized to sit as arbitrators in international commercial matters, in the same way that judges of the Delaware Court of Chancery now may serve as arbitrators in business disputes where more than \$1 million is in dispute and at least one party is organized under

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<sup>85</sup> Hon. Marilyn Warren, Chief Justice of Victoria, Remarks at the Australian Centre for International Commercial Arbitration Reception at the Melbourne Office of Mallesons Stephen Jacques (May 13, 2010) *available at* <http://www.commercialcourt.com.au/PDF/Speeches/Speech%20By%20Chief%20Justice%20May%2013.pdf>.

<sup>86</sup> See Robert M. Sherwood, Symposium: *The Economic Importance of Judges*, 9 Fed. Circuit B. J. 619, 629 (2000) (noting that designating a few judges to handle intellectual property management would be helpful in management of the court’s docket and allow the designated judges to “gain experience from repeated exposure to this subject matter.”)

<sup>87</sup> Other procedural improvements might be explored, for example, an opportunity for oral argument in the Appellate Divisions of the New York State courts.

<sup>88</sup> See Edward K. Chang, *The Myth of the Generalist Judge*, 61 Stan. L. Rev. 519 (2008) (noting the strong preference for generalist judges and how the structure of the federal courts reflects this distaste for specialization.)

Delaware law or has its principal place of business there.<sup>89</sup> However, the Delaware procedures remain relatively untested and are controversial. Any substantial reallocation of resources from the other business before the New York courts would have serious implications, especially in these days of budget restrictions.

A fourth proposed area for potential change is the use of “judicial referee” decisions by New York judges on issues presented to them by foreign courts, rather than by litigants, that require interpretation of New York law. The New York Court of Appeals and the Supreme Court of New South Wales, Australia, entered into a Memorandum of Understanding in 2010 permitting such judicial referee decisions,<sup>90</sup> and the courts of other common law nations are parties to considerable numbers of such bilateral agreements.<sup>91</sup> New York could participate in this network of agreements among courts through further memoranda of understanding. In the longer term, Article VI, §3 of the New York Constitution might be amended to permit a formal procedure for such certified questions of law from foreign courts.<sup>92</sup>

Fifth, on a more limited topic, the Subcommittee is aware of proposals that procedures be established for use in New York State and/or federal courts for the execution of awards rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”). No such procedures presently are specified, and individual courts in New York and elsewhere occasionally have been presented with such awards and have been required to establish procedures.<sup>93</sup> The New York City Bar’s International Commercial Disputes Committee is considering a report and proposals on this subject.

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<sup>89</sup> See DEL. CODE ANN. tit. 10, §349 and DEL. CH. CT. R. 96-98. See also Kevin F. Brady and Francis G.X. Pileggi, Practitioner Note: *Recent Key Delaware Corporate and Commercial Decisions*, 6 NYU J. L. & Bus, 421, 455, (2010) (describing the key aspects of Delaware’s new “rocket docket.”)

<sup>90</sup> See Press Release, New York State Unified Court System, First of Its Kind Memorandum of Understanding Signed Between U.S. State Court and Australian Court (Oct. 28, 2010) available at [http://www.nycourts.gov/press/pr2010\\_14.shtml](http://www.nycourts.gov/press/pr2010_14.shtml) and Announcements, MOU Between the Chief Justice of New South Wales and the Chief Judge of the State of New York on References of Questions of Law (Dec. 20, 2010) available at [http://www.ipc.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/pages/538](http://www.ipc.nsw.gov.au/practice_notes/nswsc_pc.nsf/pages/538) for the text of the MOU (providing the text of the Memorandum of Understanding.)

<sup>91</sup> For example, the Supreme Court of New South Wales, Australia, has signed a Memorandum of Understanding similar to that signed with New York, with Singapore. See Announcements, MOU Between the Supreme Court of Singapore and the Supreme Court of New South Wales on References of Questions of Law (Sept. 14, 2010) available at [http://www.ipc.nsw.gov.au/practice\\_notes/nswsc\\_pc.nsf/6a64691105a54031ca256880000c25d7/33cfadb586532d46ca25779e00171f9a?OpenDocument](http://www.ipc.nsw.gov.au/practice_notes/nswsc_pc.nsf/6a64691105a54031ca256880000c25d7/33cfadb586532d46ca25779e00171f9a?OpenDocument).

<sup>92</sup> See Joel Stashenko, *N.Y. Judges to Exchange Views with New South Wales High Court*, New York Law Journal, Nov. 1, 2010 available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202474180646> (noting Chief Judge Jonathan Lippman’s intent to prepare an amendment to New York State’s Constitution to “permit the New York judges to accept certified questions from the courts of other nations as well.”)

<sup>93</sup> See *Siag v. Arab Republic of Egypt*, Slip Copy, 2009 WL 1834562 (SDNY 2009) and Edward Baldwin, Mark Kantor and Michael Nolan, *Limits to Enforcement of ICSID Awards*, Journal of International Arbitration, (2006) available at [http://www.milbank.com/NR/rdonlyres/CF3F1236-AA39-405F-8086-A1E60AD104B2/0/0106\\_Nolan\\_Journal\\_of\\_Intl\\_Arbitration.pdf](http://www.milbank.com/NR/rdonlyres/CF3F1236-AA39-405F-8086-A1E60AD104B2/0/0106_Nolan_Journal_of_Intl_Arbitration.pdf).

## **2. Proposals for Action**

The Subcommittee views the following suggestions as most appropriate for study and proposed action, where appropriate: (i) designation of judges of the Commercial Division of the Supreme Court in New York County to act as Arbitration Matters Judges; (ii) development of rules for a “rocket docket” for commercial disputes (including international disputes) in the Commercial Division and in federal court; (iii) consultation with the New York State-Federal Judicial Council regarding possible future steps; and (iv) the negotiation of further memoranda of understanding for judicial referee decisions on interpretation of New York law at the request of foreign courts.

**C. Report of the New York Arbitration and ADR Subcommittee — The Advantages of New York as a Forum for Arbitration and Alternative Dispute Resolution to Resolve International Disputes**

While New York has long been recognized as a prime venue for international arbitrations, we recommend that a number of steps be taken to make it still better and to encourage its selection by parties to cross-border agreements. Our recommendations fall into two categories.

First, we recommend that specific points about international arbitral practice in New York be better communicated — especially within both the international and domestic legal communities — in order to promote a much enhanced understanding of the realities of the practice. Very excellent examples of what needs to be done are the attached Brochure with respect to International Arbitrations in New York, prepared by the Dispute Resolution and International Sections (*see Appendix K*), and the well thought out plan in the Report of the Communications Subcommittee of this Task Force, which follows this section of the Report.

Second, we recommend for consideration a series of actions to reinforce and improve the practice.

**Gathering Information**

In our effort to determine what recommendations should be made with respect to New York as a venue for international arbitrations, the ADR Subcommittee conducted what proved to be five very valuable focus groups. Each was an informal, off-the-record discussion that lasted about two hours, in which the issues considered in this report were discussed. Each group consisted of up to 15 lawyers composed consecutively of: (1) experienced arbitration practitioners based in New York; (2) experienced transaction lawyers from various New York law firms; (3) in-house counsel from major U.S. corporations; (4) in-house counsel, transaction lawyers and experienced arbitration practitioners together in London; and (5) experienced lawyers familiar with Latin American practice. We thank Paul Saunders, who organized them, and we thank those who participated, but will not identify them because the discussions were off the record.

Our findings from the focus groups drove or buttressed many of the recommendations in this Report and also helped us to see far better what needed to be communicated as to New York international arbitration practice. It was particularly important to focus on the fact that for transaction lawyers at the point of trying to close deals the issue of dispute resolution venue is in most transactions not of paramount importance. Since it is not typically a primary concern for them, we recognize that it will be a challenge to communicate to them some of the points as to New York international arbitrations discussed below.

In addition to conducting the focus groups, we were also able to collaborate with the Communication Subcommittee and then rely on the information that was provided by the excellent Questionnaire distributed by that Subcommittee. While that data was in many respects consistent with our focus group findings, in important instances it gave us additional insights beyond what we learned from the focus groups.

We also consulted a range of relevant writings that had been prepared by various New York bar association committees and by Members of the New York Bar.<sup>94</sup> Mindful of the very fine work those writings represented, we have tried to avoid needless duplication of effort.

## **I. Recommendations as to Enhanced Communication with Respect to International Arbitration in New York**

### **A. Advantages to New York as an Arbitral Forum That Are Widely Known and Appreciated**

Where the geographical location of the parties makes it a practical choice, New York has widely recognized advantages that favor its selection.

Two of the most important of those advantages are especially well known and, when communicated, appear to be readily accepted in the international and domestic legal communities. We believe that in communications with respect to New York as a venue, special emphasis should be placed on these advantages.

First, it is widely accepted that there are important advantages to having New York Law as the law of the contract. As to both commercial and financial matters especially, New York law is especially well developed and clear, and the availability of extensive and well-developed case law offers greater certainty than in civil law jurisdictions. Among other things, that makes it easier to come to conclusions in resolving disputes. The common law also brings with it the important right to cross-examine witnesses in contested matters. The choice of the law of the contract, of course, often drives the choice of the forum for resolution of disputes.

A second significant and readily accepted advantage to New York as an arbitral forum is the quality and number of experienced lawyers, whether as arbitrators, mediators or advocates, who are available to handle matters. It is appreciated that, just as New York transaction lawyers, New York arbitrators and advocates are not only experienced and skilled as arbitration practitioners but also have extensive experience in dealing with the most complex commercial and financial matters. New York also has significant numbers of highly skilled maritime arbitrators and advocates.

Many of those same lawyers are bilingual or multilingual and have a sophisticated understanding of other legal systems. Many are at leading international law firms based in New York that have the capacity to render services throughout the world. We believe that it may

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<sup>94</sup> 28 U.S.C. § 1782 as a Means of Obtaining Discovery in Aid of International Commercial Arbitration - Applicability and Best Practices <http://www.nycbar.org/pdf/report11782Report.pdf> (2008); Proof of Foreign Law after Four Decades with Rule 44.1 FRCP and CPLR 4511; <http://www.abcnyc.org/pdf/report/InternationalCommercialDispute.pdf> (2005); Obtaining Evidence from Non-Parties in International Arbitration in the United States (2010); <http://www.nycbar.org/pdf/report/uploads/20071980ObtainingEvidencefromNon-PartiesinInternationalArbitrationintheUS.pdf>; Amendment of New York Civil Practice Law and Rules Section 7502(c) to Permit Attachments and Preliminary Injunctions in Connection with National and International Arbitrations (2005) [http://www.nycbar.org/pdf/report/international\\_arb\\_rpt\\_on\\_equit\\_remedies.pdf](http://www.nycbar.org/pdf/report/international_arb_rpt_on_equit_remedies.pdf); Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards (2005); <http://www.nycbar.org/pdf/report/ForeignArbitral.pdf>.

fairly be said that New York offers more arbitrators with direct personal experience handling complex commercial and financial matters and with greater knowledge of the law and business practices specific to a broad range of businesses than any seat for arbitration in the world.

Beyond those central reasons for selection of New York, the City is also perceived as a very suitable place to stay for the time of an arbitration, with accommodating institutional facilities, offices of counsel, excellent hotels and restaurants and outstanding cultural opportunities and tourist attractions. The fact that English has become the world's commercial language and translators are readily available are further undeniable advantages. In addition, counsel from other countries may represent their clients and are always welcome in arbitral proceedings in New York.

## **B. Advantages to New York as an Arbitral Forum That Should Be Better Understood**

Beyond those recognized advantages, there are, unfortunately, other characteristics of New York as an arbitral venue that are not as well known or appreciated and which, if better known and understood, would likely lead to New York's being more often selected as an arbitral forum. We strongly encourage efforts to better communicate those characteristics.

### **Cost Effectiveness in New York Arbitrations**

There is an erroneous perception — broadly held, and in many cases incorrectly — that the selection of New York as an arbitral forum will automatically plunge the parties into runaway United States litigation style procedures. The assumption is that sweeping disclosure, multiple depositions and endless motion practice, will necessarily be imported into international arbitrations if they are conducted here.

In fact, there is today, and has been for years, a strong commitment and recognized practice among international arbitrators in New York of assuring cost efficiency. Experienced New York arbitrators follow practices common to international practice in other venues with which the world's lawyers and parties are comfortable.

As set out in the Guidelines for Arbitrators' Conduct of the Discovery Phase of International Arbitrations adopted by the New York State Bar Association on November 6, 2010:

“...unless the parties agree otherwise, international arbitration in New York is conducted in accordance with internationally accepted practices.”<sup>95</sup>

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<sup>95</sup> ARBITRATION COMMITTEE OF DISPUTE RESOLUTION SECTION, NEW YORK STATE BAR ASSOCIATION, NEW YORK BAR ASSOCIATION GUIDELINES FOR ARBITRATORS' CONDUCT OF THE DISCOVERY PHASE OF INTERNATIONAL ARBITRATIONS 1 (unanimously approved by NYSBA Executive Committee and House of Delegates, November 2010). Available at

<http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=47302&TEMPLATE=/CM/ContentDisplay.cfm>.

There is a commitment in international arbitrations conducted in New York to: (1) streamlining pre-hearing disclosure to assure that it focuses on matters that are directly material and for which there is a demonstrable need; (2) assuring that pre-hearing disclosure does not include depositions or production of extraneous electronic information; (3) requiring that the parties focus their claims and defenses early in a proceeding; (4) limiting motion practice to that which is necessary and helpful; (5) holding hearings on consecutive days; (6) taking witnesses out of order where that serves to assure greater convenience and to focus arguments; (7) often employing written witness statements; and (8) limiting hearing to documents and testimony that are directly relevant.

Sound case management skills are very often a key ingredient to selection of arbitrators in New York, with what are called “muscular” arbitrators favored by many parties. Where parties want and need extensive pre-hearing disclosure and hearing time, the practice will accommodate that, but that is an option not the rule.

It is especially important that the parties, often through in-house counsel, make their own preferences clear to the arbitrators.

It should be better known that this Bar Association has adopted Guidelines which are available to and may be readily adopted by parties in their agreements to assure that New York international arbitration proceedings are consistent with international practice. In addition, the International Bar Association (“IBA”) and numerous provider organizations<sup>96</sup> and organized groups of arbitrators<sup>97</sup> have published Protocols, Rules and Guidelines focused on increasing arbitration efficiency. While certain of the Protocols, Rules and Guidelines do not specifically focus on international arbitration, they can easily be adapted and adopted for use in an international context.

It should be communicated broadly to in-house counsel and transaction lawyers especially that, by adopting in contracts specific arbitration provisions that embrace such Protocols, Guidelines and Rules, they may guarantee that their disputes will be arbitrated in accordance with international practice. For example, parties to international arbitrations can adopt in their contracts or arbitration agreements this Bar Association’s International Guidelines

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<sup>96</sup> CPR Protocol on Disclosure of Documents and Presentation of witnesses in Commercial Arbitration <http://www.cpradr.org>; JAMS, RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES (Jan. 6 2010), *available at* [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Arbitration\\_Discovery\\_Protocols.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf); NEW YORK STATE BAR ASSOCIATION DISPUTE RESOLUTION SECTION ARBITRATION COMMITTEE, REPORT ON ARBITRATION DISCOVERY IN DOMESTIC COMMERCIAL CASES (June 2009), *available at* <http://www.NYSBA.org/Content/NavigationMenu42/April42009HouseofDelegatesMeetingAgendatems/DiscoveryPreceiptsReport.pdf>; INTERNATIONAL BAR ASSOCIATION, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (May 29, 2010) *available at* [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx); AMERICAN ARBITRATION ASSOCIATION, AAA COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES, SECTION E: EXPEDITED PROCEDURES (June 1, 2009), *available at* <http://www.adr.org/sp.asp?id=22440>; ICDR *available at* <http://www.adr.org/icdr>.

<sup>97</sup> College of Commercial Arbitrators Protocols for Expedited, Cost Effective Commercial Arbitration. Available at <http://www.thecca.net/>.

or the IBA's evidentiary rules.<sup>98</sup> The IBA Rules, which were developed with input from both Common Law and Civil Law practitioners, are particularly suitable for disputes involving lawyers from civil law jurisdictions.

Adherence to the IBA Rules will assure that a proceeding in New York is conducted in a manner wholly consistent with what they regard as familiar international arbitral practice. Since those Rules were designed by both Common Law and Civil Law practitioners, they will very often be acceptable to those on the Continent.

Also, there are excellent examples of clauses directly limiting the scope of dispute resolution proceedings that the parties may adopt. The following is but one example of such a clause that has been suggested for use by the Dispute Resolution and International Sections:

“The parties agree that pre-hearing disclosure shall be limited to documents that each side will present in support of its case, and non-privileged documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need.”

Other examples of clauses providing for application of such limiting rules or guidelines appear in Appendix I.

An effort should be made to make it part of a transaction lawyer's customary list of steps in a transaction to consider use of such limiting clauses.

Consistent with these party options, we believe that there should be continuing broad support by this Association, other New York Bar Associations and, most importantly, members of the New York Bar, for practices in New York that appropriately emphasize cost efficiency. The Guidelines adopted by this Bar Association for international arbitral practice in New York in November 2010 are an excellent summary of how arbitration should be conducted in New York to ensure that it is consistent with international norms. The reality of cost effective practice should over time be the best antidote for erroneous perceptions as to the threat of runaway litigation being imported automatically into international proceedings.

### **The Importance of Mediation**

The international community should also be made more aware that mediation has become an integral and very beneficial component of New York litigation and arbitration, significant to clients and litigators alike. Many courts now provide regularly for court appointed or court recommended mediation, and the efficiency that results can often be very beneficial to the parties. For example, settlement is achieved in the United States District Court for the Southern District mediation program 88% of the time and in the Commercial Division of Supreme Court New York County over 50% of the time.

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<sup>98</sup> IBA Rules on the Taking of Evidence in International Arbitration adopted by The IBA Council of the International Bar Association on May 29, 2010.

Many skilled mediation specialists are available in New York, and it is a recognized practice for parties to agree to mediation in advance of or during arbitration. Among other resources, CPR, JAMS, AAA and ICDR are significant providers of such services in New York. With or without a prior agreement, mediation can be undertaken by the parties to see if costly proceedings can be sensibly curtailed.

It is, of course, important to assure that there are time limits for mediation so that the mediation itself does not become a drag on the proceedings. If the parties appear to be moving successfully toward a settlement, the mediation time may be extended. If not, the arbitration proceedings, which should themselves be cost efficient, may proceed promptly.

### New York Courts Support Arbitration

We believe too that it should be more widely understood that New York courts, both state and federal, are very much committed to and supportive of arbitration. Internationally, there appears to be a much exaggerated fear of New York Courts' supposed willingness to overturn arbitration awards based on "manifest disregard" of the law. Notwithstanding debate that has arisen over the exact meaning of "manifest regard," the fact is that the Supreme Court holding on the subject states that domestic awards under the Federal Arbitration Act ("FAA") may be overturned only on the following grounds, which are rarely, if ever, present:

1. Where the award was procured by corruption, fraud or undue means;
2. Where there was evident partiality or corruption in the arbitrators, or either of them;
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
4. Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award

### CASE STUDY

Pepsico Inc. (U.S.) v. Oficina Central De Asesoria y Ayunda Tecnica, C.A. (Venezuela), 945 F.Supp. 69 (S.D.N.Y.1996) (U.S. party moved to compel arbitration and enjoin Venezuelan party from further litigation in Venezuela. Venezuelan party asked court to dismiss action or stay arbitration to allow Venezuelan court to proceed and decide question of Venezuelan law. Court held that it would retain jurisdiction, but would stay proceedings in the U.S. for a limited period to allow Venezuelan court to determine validity of arbitration agreement, citing legal economy, international comity and the reasonable expectations of the parties).

Baker Marine (Nig.) Ltd. (Nigeria) v. Chevron (Nig.) Ltd. (Subsidiary of U.S. company), 191 F.3d 194 (2d Cir. 1999) (Chevron prevailed in two international arbitrations held in Nigeria, then Nigerian courts set aside awards. Chevron then sought to enforce the awards in New York under the 1958 New York Convention. Baker resisted enforcement on the grounds that the Nigerian Federal High Court had vacated the awards. The U.S. court declined to enforce the awards under Article V(1)(e) of the New York Convention. There was no showing the Nigerian courts acted contrary to Nigerian law and no adequate reason for refusing to recognize the Nigerian court judgment).

upon the subject matter submitted was not made.<sup>99</sup>

Contrary to what appears to have become an exaggerated concern, very few awards are, in fact, overturned.<sup>100</sup> As the Supreme Court has stressed: there is “a national policy in the United States favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightforward.”<sup>101</sup> Wholly consistent with that policy, courts in New York are especially strict in granting anti-suit injunctions and enforcing awards in favor of non-U.S. parties.<sup>102</sup> New York courts broadly interpret language and apply arbitral rules to allow arbitrators to decide issues as to their own jurisdiction.<sup>103</sup>

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<sup>99</sup> *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396 (2008)

<sup>100</sup> See, e.g., *Westminster Securities Corp. v. Petrocom Energy Ltd.*, Case No. 10-07893 (S.D.N.Y. 2011) (panel did not lack the authority to adjudicate unjust enrichment claim); *Dufenco Int'l Steel Trading v. T. Klaveness Shipping AIS*, 333 F.3d 383 (2d Cir. 2003) (between 1960 and 2003 the Second Circuit only vacated some part or all of an arbitral award for manifest disregard in four out of at least 48 cases); *Westerbeke Corp. v. Daihatsu Motor.*, 304 F.3d 200, 217 (2d Cir. 2002); *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 28 (2d Cir. 2000); *Merrill Lynch, Pierce, In Matter of Arbitration between Continental Grain Company and Foremost Farms Inc.*, 1998 WL 132805 (S.D.N.Y. 1998) (copy of the award and agreement certified by attorney sufficient); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 25 (2d Cir. 1997) (an award will not be vacated based on interpretation of a contract term); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (2d Cir. 1997) (vacatur requires an egregious impropriety on the part of the arbitrators; awards will be confirmed as long as there is a “barely colorable justification” even if the panel is wrong on the law); *Folkways Music Publishers Inc. v. Weiss*, 989 F.2d 108 (2d Cir. 1993) (for vacatur an arbitrator must have intentionally denied or “willfully flouted” a clear governing principle); *Matter of Arbitration Between Avraham and Shigur Exp. Ltd.*, 1991 WL 177633 (S.D.N.Y. 1991) (arbitrator’s use of personal knowledge not violative of U.S. public policy); *International Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Indus. y Comercial*, 745 F. Supp. 172, 182 (S.D.N.Y. 1990) (New York lacked jurisdiction to vacate an arbitral award issued in Mexico based on New York substantive law and Mexican procedural law); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1990) (for vacatur an arbitrator must know of a well-defined, explicit and clearly applicable legal principle and willfully ignore it); *Gov’t of India v. Cargill Inc.*, 867 F.2d 130, 133 (2d Cir. 1989) (review under the doctrine of manifest disregard is severely limited and highly deferential to the arbitral award; obtaining judicial relief from an arbitration award is rare); *Siegel v. Titan Indus. Corp.* 779 F.2d 891 (2nd Cir. 1985) (the award was not overturned even though the arbitrators did not apply generally accepted accounting principles or provide precise mathematical calculations as required by the agreement); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 1983 A.M.C. 1960 (2d Cir. 1983) (court will not refuse to enforce or vacate an award based on minor procedural defects); *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L’Industrie Du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974) (arbitrators awarded a specific amount for loss of production even though contract provided that neither party would be liable for loss of production).

<sup>101</sup> *Hall Street Associates v. Mattel, Inc.*, 128 S. Ct. 1396, 1405 (2008).

<sup>102</sup> See, e.g., *China Nat'l Chartering Corp. v. Pactrans Air & Sea, Inc.*, 2009 WL 3805596 (S.D.N.Y. Nov. 13, 2009) (enforcing arbitral award in favor of Chinese entity); *R.J. Wilson & Assocs., Ltd. v. Underwriters at Lloyd's London*, 2009 WL 3055292 (E.D.N.Y. Sep. 21, 2009) (granting United Kingdom defendant’s motion to compel arbitration against a U.S. corporation); *Gas Natural Aprovisionamientos, SDG, S.A. v. Atl. LNG Co. of Trinidad & Tobago*, 2008 WL 4344525 (S.D.N.Y. Sep. 16, 2008) (confirming arbitral award in favor of company organized under the laws of the Republic of Trinidad and Tobago); *Telenor Mobile Commc'n AS v. Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007) (enforcing arbitration award in favor of Norwegian company); *Gabriel Capital, L.P. v. Caib Investmentbank Aktiengesellschaft*, 814 N.Y.S.2d 66 (App. Div. 1st Dep’t 2006); *Seetransport Wiking Trader Schifffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navală*, 989 F.2d 572, 1993 A.M.C. 2693 (2d Or. 1993) (court enforced award that was time barred, but that had been confirmed by Paris court

In addition to the forgoing, it would, we believe, be good to encourage the New York judiciary to consider taking a strong hand with parties challenging arbitration awards on evidently frivolous grounds and award sanctions more frequently. Such meritless challenges can delay enforcement and create the erroneous impression that overturning final New York awards is a serious threat, when it is not.

### **Elimination of Exposure to Punitive Damages**

A commonly stated concern of those outside the United States is that in United States arbitrations punitive damages may be awarded. In response to that concern, it would be beneficial to communicate more broadly that such awards can be wholly eliminated as a risk by contract. Such a model contract provision eliminating punitive damages by agreement appears in Appendix C. Certain institutional arbitration rules and New York's state arbitration law also bar the award of punitive damages.

### **Availability of Appeal**

We believe too that there should be better communication of the trend that has developed within arbitral provider organizations of offering the option of an appeal mechanism for agreeing parties. CPR, JAMS and ICSD offer that option — with a separate qualified reviewing panel<sup>104</sup> — and other providers may do so.

Providing the option of an appeal within the arbitration processes addresses the concern of some that, absent an appeal, a runaway panel could reach an unsound result. Making such a procedure only an option for the parties gives due recognition to the fact that many parties prefer finality with the initial award and often select arbitration for the speed and certainty that it can bring.

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of appeals); *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.), cert. denied, 363 U.S. 843 (1960).

<sup>103</sup> *Painewebber Incorporated v. Bybyk*, 81 F.3d 1193, 1199-1200 (2d Cir. 1996) (holding that the language “[a]ny and all controversies” was sufficiently broad to evidence an intent to arbitrate issues of arbitrability); *see also Shaw Group Inc. v. Triplefine Intern. Corp.*, 322 F.3d 115, 121-22 (2d Cir. 2003) (suggesting that the reference to “all disputes” in the arbitration clause is sufficient to evidence the parties’ intent to arbitrate arbitrability); *Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39 (CANY 1997) (language providing for “[a]ny and all controversy” between the parties to be settled by arbitration is sufficiently “plain and sweeping” to indicate an intent to arbitrate arbitrability). Note that institutional rules that accord jurisdiction to the arbitrators to decide their own jurisdiction are honored by the courts.

<sup>104</sup> CPR available at <http://www.cpradr.org/>, ICDR available at <http://www.adr.org/icdr> and JAMS available at <http://www.jamsadr.com/>.

## **II. Possible Changes in New York Law and Practice that Could be Beneficial**

### **The Assignment of Arbitration Related Issues to Designated Commercial Division Judges**

As the Courts Subcommittee has also recommended, it would be beneficial if there were to be assignment of one or more Supreme Court New York County Commercial Division judges to handle arbitration matters regularly and to assure that that change is widely known. While all of the judges sitting in that Division are excellent, other jurisdictions — among them Australia, India and Ireland — have gained from identification of special courts to handle arbitrations because such measures indicate that the jurisdiction favors and supports arbitration. Such a step in New York would likely have a similar effect. Although we do not see inconsistency as a problem, it should also tend to encourage consistent and supportive court decisions and support greater expedition in resolution of arbitration related proceedings in court.

### **Consider Adoption of the UNCITRAL Model Law on Commercial Arbitration**

We believe too that it would be beneficial to continue our consideration of adopting the UNCITRAL Model Law for international arbitrations.<sup>105</sup> Since the Model Law is designed expressly for Commercial Arbitrations and is familiar to parties worldwide, it would offer to those from outside the United States a greater comfort level in selecting New York. Other states (*e.g.*, Florida) have already adopted the Model Law in order to make those from the international community more comfortable with their process. Certainly adoption of the Law deserves careful study.<sup>106</sup>

### **Steps to Provide Greater Assurance of Confidentiality**

A concern has been expressed as to the potential problems posed by perceived and, in some instances, actual lack of confidentiality. While confidentiality appears often to be respected by arbitral participants, because there is no confidentiality requirement in arbitrations that is legally imposed, there is concern that there could be unwanted publication of an award and testimony or other statements made during an arbitration or mediation. Greater assurance on that score could well be provided by adoption of a provision causing confidentiality to be presumed absent waiver by the parties. It could be adopted as a stand alone provision, not necessarily as part of an act with multiple provisions. A contract provision assuring

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<sup>105</sup> UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, United Nations document A/40/17, Annex I (as adopted by the United Nations Commission on International Trade Law on 21 June 1985 with amendments adopted in 2006). Available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

<sup>106</sup> Two additional matters appear to be worthy of study. First, we are aware that some non-U.S. parties are concerned that participating in arbitrations in the United States could result in their submitting to our jurisdiction. To the extent that such concerns could appropriately be relieved, it could lead parties to a greater comfort level in choosing New York as an arbitration venue. We also understand that occasionally parties have difficulty obtaining visas when they need to come to the United States solely for arbitrations. Consideration of ways to alleviate such problems appears to be warranted.

confidentiality can also be readily adopted by the Parties. Different jurisdictions around the world handle this differently, and the issue should be further reviewed.

### **A Center for Arbitration in New York**

It would also be very useful to have a dedicated Center for International Arbitration in New York. While there are suitable facilities available through the providing organizations in New York City and in the various New York law firms and other facilities, we believe that it would nevertheless be a helpful and appropriate response to steps taken in other centers such as London, Zurich and Singapore for New York to have such a facility. As with the assignment of judges in the Commercial Division, a Center would strongly buttress a showing of New York's support for International Arbitration.

**D. Report of the Communications Subcommittee — Communications to Advise on the Advantages of the Use of New York Law in International Agreements and the Use of New York as a Forum to Resolve International Disputes**

The Task Force's Communications Subcommittee was asked to gather information and formulate proposals to assist in communicating the Task Force's conclusions to relevant constituencies, both in the short term and on an ongoing basis.

**1. Information Gathering**

To supplement the work of the Task Force's focus groups, the Communications Subcommittee developed a questionnaire seeking input from in-house and outside counsel regarding the advantages and disadvantages of New York as a governing law, and as a forum for both international arbitration and litigation. The questionnaire was distributed to (1) in-house counsel subscribers to the publication *Metropolitan Corporate Counsel*; (2) members of the International Section of the N.Y.S.B.A.; and (3) managing partners of New York law firms with significant international practices. The Communications Subcommittee also conducted a forum to solicit input from the eight justices of Commercial Division of the New York County Supreme Court.

**a. The Questionnaire**

Respondents to the survey were uniformly of the view that New York law had well-developed precedent which promoted interpretations of contracts in a manner consistent with their language and the intention of the parties. New York law was considered by one respondent to provide:

comprehensive guidance for a broad range of commercial disputes, which enables a large degree of certainty to the parties and contract negotiators (who can with confidence interpret how a particular provision will be interpreted and enforced) and to litigators (who can with confidence help determine likely outcomes and guide settlement). Importantly, New York law provides wide latitude to parties in a transaction to craft and agree upon provisions that meet their needs — there is relatively little public policy that would trump and supersede the parties' clear intentions. In general, the parties are free to agree upon terms as they see fit, and those terms will be enforceable. Also, there is a minimum level of formality needed for most contracts [and] New York generally supports contracts that are formed through electronic communications, which is essential in today's business environment.

New York law was considered to be stable, and relatively predictable, and was viewed to have addressed a wide variety of international, financial and commercial issues. Respondents felt that international lawyers were likely to be familiar with New York law. The reservations expressed with respect to New York law related more to litigation procedures as opposed to any specific concerns with the substantive law itself.

New York was generally considered to be a desirable venue for international arbitration owing to availability of experienced arbitrators and counsel who were familiar with international issues and arbitration procedures. New York's status as a global financial center and ease of international access were also considered to be significant advantages. New York arbitrators were viewed as being generally unbiased, unlikely to have any bias against foreign entities, and highly competent. The fact that New York courts were extremely familiar with arbitration procedures and supportive of the enforcement of arbitration clauses was also deemed to be of value. Factors cited as making New York less desirable for arbitration included expense, although several respondents noted that this was not an issue by any means limited to New York. Some respondents felt that some New York arbitrators had limited familiarity with other legal systems, although generally there was great satisfaction with the large size of the skilled New York lawyer talent pool.

New York was considered to have a well-respected judiciary familiar with international, financial and arbitration issues. There was strong praise for the judges in the Commercial Divisions of the New York Supreme Court, and the judges of the Southern District of New York, among others. Judges were deemed to be competent and trustworthy, faithful to precedent, familiar with complex litigation and unlikely to exhibit any bias against foreign litigants.

Concerns expressed by some about New York courts included U.S.-style discovery procedures, punitive damages, jury trials and expense and delays. Suggestions to improve New York courts included limitations on discovery, jury trials and punitive damages, and loser pays attorneys' fee provisions. It was noted by some that punitive damages and jury trials could be eliminated by contract of the parties, and that there were ongoing efforts to streamline discovery procedures. As discussed below, at a forum sponsored by the Communications Subcommittee — which included the eight justices of the New York County Commercial Division — it was suggested that sophisticated parties could by agreement include in their contracts provisions providing for the prevailing party to obtain attorneys' fees, as well as waiver provisions for, *e.g.*, jury trials and punitive damages, and limits on discovery.

New York judges were considered superior to some civil law judges since New York judges typically had legal experience prior to commencing their judicial careers and are accustomed to having litigants from all parts of the world appearing before them.

Respondents were asked about certain specific ideas for improvement. About half of them thought that New York's adoption of UNCITRAL Model International Arbitration Law and establishment of a New York center for arbitration would be a positive step. Most respondents were of the view that the development of model contract language with respect to the application of New York law, and the selection of New York as a forum for either arbitration or litigation, would be a positive step.

#### **b. Commercial Division Justices Focus Group**

Ten counties in New York have Commercial Divisions that handle complex commercial cases, including the original Commercial Division located in Manhattan (New York County). The matters handled by the Commercial Divisions include all matters involving applications to stay or compel arbitration, affirm or vacate arbitration awards, and grant related injunctive relief.

On February 28, 2011, all eight justices of the New York County Commercial Division participated in a focus group to provide input to members of the Task Force. The focus group included, in addition to the judiciary, in-house and outside counsel, including the president of the N.Y.S.B.A., and was moderated by Bob Haig. The judges, along with the other participants in the focus group, made a number of helpful comments which the Task Force has taken into account in making its recommendations. The participants in the focus group expressed pride in New York commercial law, and felt that New York offered international litigants a predictable body of jurisprudence, and a respected judiciary, both state and federal, with extensive experience in resolving international disputes.

## **2. Presentation of Task Force Conclusions and Recommendations**

The Communications Subcommittee suggests wide distribution of the Task Force report, along with the brochure prepared by the N.Y.S.B.A. Dispute Resolution and International Sections concerning international arbitration in New York.<sup>107</sup> Specifically, we suggest distribution of these materials to U.S. and foreign law firms with significant international practices, the Association of Corporate Counsel and similar groups, New York bar associations and the international sections of other state bar associations, international and foreign bar associations, business groups and associations, the judiciary and international journals at law schools. We also strongly encourage law firms and others to distribute the report to their clients, and to other law firms and other members of the bar. In addition to distribution of printed copies of these materials, we recommend broad distribution of the Task Force's report via the internet, including posting a link to the Task Force's report. We would hope that law firms and bar associations would post these materials on their websites.

Through these efforts we hope to be able to highlight the distinctive qualities and advantages of New York substantive law, to encourage greater study and knowledge of New York law in its own right and in comparison with the law of other leading jurisdictions in the international marketplace for governing law and choice of forum, and to solicit suggestions and ideas to make New York law and a New York forum even more hospitable to litigants in resolving international disputes. To that end, we are pleased that the Task Force's report is being accompanied by a brochure describing the advantages of New York as a venue for international arbitration and the advantages of New York law generally. We believe it appropriate to highlight the fact that the New York international arbitration community abides by the "international standard" with regard to discovery and how arbitration allows parties to fix the appropriate mix of common law and civil law characteristics that may be desired. The Communications Subcommittee also believes that New York offers distinct advantages as a forum for resolution of international litigations, especially in the Commercial Divisions of the New York Supreme Court and in the Southern and Eastern Districts of New York.

The Communication Subcommittee suggests that the N.Y.S.B.A., in conjunction with other bar groups, conduct live presentations and webcasts to target audiences to present the conclusions of the report and to solicit further input. Audiences could include foreign and

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<sup>107</sup> See Appendix K.

international bar associations, in-house counsel organizations, transactional lawyers, international law firms, American Chambers of Commerce abroad and business organizations, particularly those interested in civil litigation issues. We also suggest that there be coordination with governmental bodies, such as the New York State Economic Development Corporation and the Office of the U.S. Trade Representative in publicizing and implementing the conclusions of the Task Force.

We believe that the judiciary is willing to assist with these efforts as evidenced at our focus group with the New York County Commercial Division Justices and the positive indication from the New York State-Federal Judicial Council. Jurists and attorneys should educate international audiences about the advantages of New York as a governing law and forum when involved in panels and meetings of domestic and foreign bar associations.

We also believe that there should be better coordination within the various sections of N.Y.S.B.A. itself with respect to these issues, including the International, Business Law, Commercial and Federal Litigation, Corporate Counsel and Dispute Resolution Sections. Likewise, there should be coordination and cooperation with the New York City Bar Association, the New York County Lawyers' Association, and other New York bar associations interested in this effort. Outreach to legal and mainstream press would also, we think, be advantageous in communicating our message.

### **3. Ongoing Efforts to Communicate Task Force's Conclusions and Recommendations**

We believe that there should be an ongoing program to communicate the message of the Task Force. This should include the creation of one or more ongoing entities to promote this effort, either through the N.Y.S.B.A. (including its international chapters) or as part of a joint effort with other New York bar associations. Another possibility is the creation of a "Council of New York International Law Firms" affiliated with the N.Y.S.B.A., but also with independent status, to promote and advance New York law. Such an organization would no doubt be able to commit greater financial resources to this objective than could a bar association.

We also believe that Continuing Legal Education ("CLE") can be a useful tool in promoting the objectives of the Task Force. To that end, we suggest the development of two kinds of CLE programs. The first would be a CLE program to train New York lawyers about the substance and culture of international law and practice (the N.Y.S.B.A. as a "School of International Practice"). This program, which could build on the N.Y.S.B.A. International Section's "Fundamentals" of International Practice, could offer "Fundamentals" in various areas of international practice. More advanced programs could also be developed, possibly in connection with the Practising Law Institute, and perhaps other bar associations, such as the American Bar Association.

Second, CLE programs should also be developed to highlight the uses and advantages of New York law in international matters. Programs could be presented to foreign lawyers in New York, as well as in major international business and legal centers. Individuals should also be encouraged to incorporate these into existing CLE programs.

CLE programs could also be presented to out-of-state lawyers in locations where there are substantial international practices and to attorneys in other countries where New York law is not well understood. Material should be developed for CLE programs that will be easily available to and designated for distribution by lawyers to help them promote use of New York law to clients and opposing parties, *e.g.*, PDF documents that can easily be downloaded from a N.Y.S.B.A. website and attached to e-mails.

Finally, the use of “ambassadors” to continue spreading the message of the Task Force should be encouraged. Such ambassadors could include the President and other officers of the N.Y.S.B.A. and other New York bar associations. Coordination with New York Trade Representatives abroad (currently 16 countries) and with commercial officers of U.S. consulates abroad should be considered, along with outreach to American Chambers of Commerce abroad, international and local business groups, international bar and law associations and international meetings of jurists. Active participation of N.Y.S.B.A. representatives in meetings of UNCITRAL, UNIDROIT, Hague Conference and similar groups should also be undertaken.

### **III. THE TASK FORCE RECOMMENDATIONS AND CONCLUSIONS**

As a result of the questionnaire responses,<sup>108</sup> the focus group discussions<sup>109</sup> and the research of the Task Force members, advisors, consultants and law school students,<sup>110</sup> listed below are the Task Force recommendations.

#### **A. Support**

There are specific projects and proposals where the Association should lend its direct support in the near term and follow up on progress with other interested groups as appropriate. This Association should:

1. Continue to investigate with New York City officials and support the establishment of a permanent Center for International Arbitration in New York.
2. Support the joint proposal by JAMS and the ICDR to make available for international arbitration proceedings in New York approximately 50 hearing rooms in their respective offices.
3. Distribute the Task Force Report (via paper copies and the internet), and encourage recipients to further distribute the Task Force Report to: (a) U.S. and foreign law firms with significant international practices; (b) the Association of Corporate Counsel; (c) New York bar associations; (d) international sections of other state bar associations; (e) international and foreign bar associations; (f) business groups and associations; (g) the judiciary; and (h) international journals at law schools.
4. Support establishing a dedicated reporter to publish, periodically and in an accessible format, decisions by New York courts in international business disputes and matters of significance to international arbitration.
5. Encourage institutions in New York providing arbitration services (*e.g.*, JAMS, CPR, ICDR and ICC) to make better known their internal appeal mechanism for parties who agree upon the procedure.
6. Support the creation of an independent “Council of New York International Law Firms” affiliated with the N.Y.S.B.A. to promote and advance New York law, which could possibly commit greater financial resources to the Task Force’s objectives than a bar association.

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<sup>108</sup> See Discussion of questionnaires in Section II.D and the survey results in Appendix G.

<sup>109</sup> See focus group summaries in Appendix G.

<sup>110</sup> See Appendix A for a full list of the Task Force members, advisors, consultants and law school students.

7. Support the adoption of:
  - a. the Uniform Fraudulent Transfer Act; and
  - b. the Revised Uniform Arbitration Act for domestic arbitration.

**B. Coordination**

The work of others in certain areas would be further enhanced through efforts by this Association to coordinate and encourage increased communications concerning this Report. This Association should:

8. Recommend and encourage better coordination between and among various sections of N.Y.S.B.A. as well as organizations such as the New York State-Federal Judicial Council, the New York City Bar Association, the New York County Lawyers' Association, the International Arbitration Club of New York and other New York bar associations interested in this effort.
9. Work with governmental bodies such as the New York State Economic Development Corporation and the Office of the U.S. Trade Representative in publicizing the conclusions of the Task Force domestically and overseas.
10. Explore with the New York Judiciary policies, practices and rules to improve the administration of justice in relation to international disputes, including but not limited to:
  - a. The creation of a degree of judicial specialization, such as a designation of particular judges as specialized chambers to deal with international arbitration matters;
  - b. The creation of a “rocket docket” in the Commercial Division for expedited litigation for international arbitration-related disputes; and
  - c. The use of “judicial referee” decisions by New York judges on issues presented to them by foreign courts, rather than by litigants, that require interpretation of New York law. For example, New York and New South Wales, Australia, entered into a Memorandum of Understanding in 2010 permitting such judicial referee decisions.

### C. **Education**

Seeking to publicize more broadly the advantages of New York law and a New York forum, while also dispelling any misconceptions in that regard, by focusing educational efforts at targeted groups would be an effective way to accomplish the goals of the Task Force. This Association should:

11. Encourage international bar association sponsors to invite New York judges to conferences abroad to speak about New York law and the New York courts.
12. Develop programs to highlight that the New York international arbitration community follows the “international standard” with regard to discovery, the mix of common law and civil law characteristics that arbitration allows, the financial and commercial expertise of New York arbitrators and advocates, the significant advantages of mediation, the stability of New York law and the advantages of New York as a forum for resolution of international litigation.
13. Support, in conjunction with other bar groups, conferences, programs, presentations and webcasts to present the conclusions of the Report and to discuss the advantages of New York law and New York as a forum for dispute resolution, involving (a) the state judiciary, (b) New York federal judges, (c) the general counsels of multinational corporations based in the New York area, (d) transactional lawyers in global law firms in New York, (e) foreign and international bar associations, (f) in-house counsel organizations and (g) American Chambers of Commerce abroad.
14. Recommend and develop, in conjunction with overseas chapters of the International Section and other New York bar associations, Continuing Legal Education (CLE) programs to promote the Task Force objectives and should explore at least two broad CLE programs:
  - a. First, a CLE program to train New York lawyers in the substance and culture of commercial international law and practice (N.Y.S.B.A. as a “School of International Practice”), built on the N.Y.S.B.A. International Section’s “Fundamentals” of International Practice; and
  - b. Second, programs that highlight the advantages of New York law in international agreements as well as the benefits of selecting New York as the forum for international dispute resolution.
15. Recommend and endorse CLE programs for international and out-of-state lawyers in locations where there are substantial international practices, *e.g.*, London, Paris, Geneva, Rio de Janeiro, São Paulo and Hong Kong.

16. Investigate and develop the use of “ambassadors” (such as the President and officers of the N.Y.S.B.A. and other New York bar associations) to continue spreading the message of the Task Force. On this front, the N.Y.S.B.A. should coordinate with (a) New York Trade Representatives abroad (currently 16 countries), (b) commercial officers of U.S. consulates abroad, (c) the American Chambers of Commerce abroad, (d) international and local business groups, (e) international bar and law associations, and (f) international meetings of jurists; and N.Y.S.B.A. representatives should participate in meetings of UNCITRAL, UNIDROIT, Hague Conference and similar groups.

**D. Study**

A number of relevant topics and proposals were discussed by Task Force Subcommittees. They are worthy of further consideration and review. This Association should:

17. Investigate with the New York Legislature amending Article VI, § 3 of the New York Constitution to permit responding to certified questions of law from foreign courts and should give further consideration to whether it would be useful to enact a statutory provision as to the confidentiality of evidence and awards in international arbitration.
18. Investigate with the New York Legislature New York’s adoption of the UNCITRAL Model Law on International Arbitration.
19. Study, through the appropriate N.Y.S.B.A. Sections, whether to recommend the adoption of:
  - a. the Uniform Trade Secrets Act;
  - b. the 1996 UNCITRAL Model Law of Electronic Commerce;
  - c. a modification to New York General Obligations Law § 5-322.1 to create statutory limitations on risk allocation in construction contracts.

This report, based on New York law, is intended to inform, not advise. No one should try to interpret or apply any law without an attorney’s help. Produced by the New York State Bar Association in cooperation with the Task Force on New York Law in International Matters.

#### **IV. APPENDICES**

- A. Task Force Members, Advisors, Consultants and Law Students
- B. ADR Providers in New York
- C. Sample New York Governing Law Clauses
- D. Sample New York Arbitration and ADR Clauses
- E. New York Court Systems Chart
- F. International Disputes Decided in the New York and Other Courts
- G. Focus Group Summaries and Survey Results
- H. Research Bibliography
- I. Treaties Relevant to International Business in New York
- J. Estimated Revenues and Taxes Related to International Dispute Resolution in New York
- K. Why Choose New York Brochure

## **Appendix A**

### **Task Force Members, Advisors, Consultants and Law School Students**

#### **TASK FORCE CO-CHAIRS**

James B. Hurlock  
Joseph T. McLaughlin

#### **SUBCOMMITTEE MEMBERS**

##### **Subcommittee 1 — New York Legislative and Caselaw Review Subcommittee (“New York Law Subcommittee”)**

George A. Bermann (Academic Advisor, Columbia Law School)  
Albert L. Bloomsbury  
Tom H. Braegelmann  
Binta N. Brown  
William J.T. Brown  
Hon. Barry A. Cozier  
Michael W. Galligan  
John Hanna, Jr.  
Adam Hunt  
Sherman W. Kahn (Chair)  
Julian B. Perez  
James D. Redwood (Academic Advisor, Albany Law School)  
Andrew Walker  
John Wilkinson

##### **Subcommittee 2 — Use of New York Courts to Resolve International Disputes Subcommittee (“New York Courts Subcommittee”)**

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Chehrazade Chemcham  
Jeffrey Dodge (Academic Advisor, Hofstra University School of Law)  
Michael W. Galligan  
Hon. Karla Moskowitz  
Lawrence Newman  
Peter J.W. Sherwin  
Jonathan P. Taber  
Henry S. Weisburg

##### **Subcommittee 3 — Use of New York as a Forum for Arbitration and Alternative Dispute Resolution Subcommittee (“ADR Subcommittee”)**

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Sherman W. Kahn  
Daniel F. Kolb (Chair)  
Luis M. Martinez (ICDR liaison)  
María D. Meléndez  
Hon. E. Leo Milonas  
Lawrence Newman  
Jacqueline Nolan-Haley (Academic Advisor, Fordham University School of Law)  
Sandra K. Partridge (AAA liaison)  
Donna Ross  
Kathleen M. Scanlon  
Paul C. Saunders  
Peter J.W. Sherwin  
Jonathan P. Taber

Irene C. Warshauer  
Richard Weill  
John H. Wilkinson (JAMS liaison)

**Subcommittee 4** — Communications to Promote Use of New York Law and New York as a Forum Subcommittee (“Communications Subcommittee”)

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Michael W. Galligan  
Sheryl Mintz Goski (Academic Advisor, Rutgers School of Law)  
Robert L. Haig  
Robert A. Schwinger  
Dr. Christof Siefarth

ADVISORS

Hon. Judith Kaye  
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David M. Lindsey — Chaffetz Lindsey LLP  
Rajpattie Persaud-Billette — Rajpattie Persaud-Billette, Esq.  
Michael J. Pisani — Michael J. Pisani, Esq.  
William Plapinger — Sullivan & Cromwell (London)  
Victoria Shannon — ICC (New York)  
Dustin P. Smith — Hughes Hubbard & Reed LLP  
Daniel Weitz — Office of Court Administration (OCA)

LAW SCHOOL STUDENTS

- Albany Law School  
Melissa Nunziato
- Fordham Law School  
Natasha Petrukhin  
Patrick McKegney  
Elliott Nathanson
- Hofstra Law School  
Alexander R. Zwillinger  
Lauren C. Montes
- Rutgers Law School  
Michael J. Duffy  
Emeka Nwani

## LAW FIRMS

<b>Law Firm</b>	<b>Attorney</b>
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Bingham McCutchen LLP	Joseph T. McLaughlin, Katherine Dobson
Boies, Schiller & Flexner LLP	Richard E. Weill
Chadbourne & Parke LLP	Robert A. Schwinger
Chaffetz Lindsey LLP	David M. Lindsey
Cravath, Swaine & Moore LLP	Paul C. Saunders
Davis Polk & Wardwell, LLP	Daniel F. Kolb
Dewey & LeBoeuf LLP	James Carter
Epstein Becker & Green, P.C.	Hon. Barry A. Cozier
Fulbright & Jaworski LLP	Chehrazade Chemcham
Fulton, Rowe, Hart & Coon	John H. Wilkinson
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Kirkland & Ellis LLP	Binta N. Brown
Law Office of Albert L. Bloomsbury	Albert L. Bloomsbury
Law Offices of Kathleen M. Scanlon	Kathleen M. Scanlon
Law Offices of Sanjay Chaubey	Sanjay Chaubey
McLaughlin & Stern, LLP	Tom H. Braegelmann
Milbank Tweed Hadley McCloy LLP	Andrew Walker
Morrison & Foerster LLP	Sherman W. Kahn, Adam Hunt, Julian B. Perez
Phillips Lytle	Jonathan P. Taber
Phillips Nizer LLP	Michael W. Galligan
Pillsbury Winthrop LLP	Hon. E. Leo Milonas
Proskauer Rose LLP	Peter J.W. Sherwin
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Shearman & Sterling LLP	Henry S. Weisburg
Sidley Austin LLP	María D. Meléndez
Skadden, Arps, Slate, Meagher & Flom LLP	Hon. Judith Kaye
Sussman ADR LLC	Edna Sussman
White & Case LLP	James B. Hurlock
Whiteman Osterman & Hanna LLP	John Hanna, Jr.

## **Appendix B**

### **Arbitration and ADR Providers in New York**

- International Center for Dispute Resolution (ICDR), a division of the American Arbitration Association

The Paramount  
1633 Broadway, 10th Floor  
New York, N.Y. 10019  
212-484-3266  
[PatridgeS@adr.org](mailto:PatridgeS@adr.org)  
[www.adr.org/icdr](http://www.adr.org/icdr)  
Attention: Luis Martinez, Esq.

- International Chamber of Commerce (ICC)

1212 Avenue of the Americas  
New York, N.Y. 10036  
212-575-06327  
[www.iccwbo.org](http://www.iccwbo.org)  
Attention: Victoria Shannon, Esq.

- International Institute for Conflict Prevention & Resolution (CPR)

575 Lexington Avenue, #21  
New York, N.Y. 10022  
212-949-6490  
[www.cpradr.org](http://www.cpradr.org)  
Attention: Helenda Tavares Erickson, Esq.

- JAMS and JAMS International

620 Eighth Avenue  
34th Floor  
New York, N.Y. 10018  
212-751-2700  
[www.jamsadr.com](http://www.jamsadr.com)  
Attention: Elizabeth Carter, Esq.

- Society of Maritime Arbitrators, Inc.

7th Floor  
30 Broad Street  
New York, N.Y. 10004  
212-344-2400  
[www.smany.com](http://www.smany.com)  
Attention: Austin L. Dooley

## **Appendix C**

### **Sample New York Governing Law and Submission to Jurisdiction Clauses; Waiver of Jury Trial and Punitive Damages.**

Dispute resolution agreements and clauses are found across a wide spectrum of transactional contracts — from complex merger documents, to royalty agreements, oil exploration contracts and joint venture agreements.

At its best, dispute resolution clause drafting is the convergence of the business lawyer's negotiating skills and ability to foresee difficulties for his or her client, and the arbitration/litigation lawyers' insights about what clauses work best in what types of agreements and circumstances. At its worst, drafting is a haphazard, last-minute guessing exercise by transaction lawyers at the 11th hour of a deal's closing — which down the road can cost the client significantly in terms of outcome and costs.

Assuming the parties wish to submit any disputes to the New York courts, and provided the parties want their contract to be governed by New York law, the following are suggested provisions that could be adapted to the circumstances of a particular international agreement.

#### **1. GOVERNING LAW**

This Agreement shall be governed by and construed in accordance with the laws of the State of New York, not including the conflict or choice of law rules.

#### **2. SUBMISSION TO THE NEW YORK COURTS**

The parties submit irrevocably to the exclusive jurisdiction of the New York State Supreme Court, New York County or the United States District Court for the Southern District of New York in connection with any dispute, claim or controversy arising out of or relating to this Agreement, or the breach, termination, enforcement, termination or validity thereof and the parties irrevocably waive any objections based on lack of personal or subject matter jurisdiction or the doctrine of *forum non conveniens*.

#### **3. OPTIONAL ADDITIONAL CLAUSES**

Having included the provisions of paragraph 2 above (with or without paragraph 1), the parties may wish to add some or all of the following:

- a. The parties to this Agreement hereby irrevocably waive the right to trial by jury.
- b. In any action arising out of or related to this Agreement, the parties waive the right to recover punitive or exemplary damages and the court is not empowered to award any such damages.
- c. In any action arising out of or related to this Agreement, the parties waive the right to discovery as follows:

- (i) There shall be no interrogatories or requests to admit;
- (ii) There shall be no discovery depositions except for good cause shown and, in the event such depositions are permitted by the court, there shall be no more than three depositions per side with no deposition to exceed six (6) hours in length;
- (iii) Documents requested by the parties shall be limited to those relevant to a claim or defense in the action and shall be restricted in terms of time frame, subject matter and persons or entities to which the requests pertain and shall not include broad phrases such as “all documents directly or indirectly related to . . .”

#### 4. E-DISCLOSURE

Given the special considerations that may be required with respect to any request by a party for electronic records, the parties may wish to tailor the following provisions to the circumstances of the action.

In any action arising out of or relating to this Agreement,

- a. There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other such media.
- b. Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties need not produce metadata, with the exception of header fields for email correspondence.
- c. The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.
- d. Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the court will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final judgment.

## **Appendix D**

### **Sample New York Arbitration and ADR Clauses**

International agreements most frequently contain arbitration clauses for the resolution of disputes since parties generally wish to avoid the risk of litigating in the courts of an unfamiliar jurisdiction. Arbitral institutions offer “standard” arbitration clauses for inclusion in such contracts that are effective and have withstood court scrutiny. However, sophisticated users of arbitration may wish to adapt arbitration clauses to the particular circumstances of the business relationship reflected in the overall agreement. The following provisions are a starting point for the adaptation process.

#### **1. SIMPLE AGREEMENT — ARBITRATION**

Any and all disputes, controversies and claims arising out of or relating to this Agreement, including the formation, interpretation, breach or termination thereof, and also including whether the claims asserted are arbitrable, shall be finally determined by arbitration [and administered by (insert institution)] in accordance with the [insert institutional arbitration rules]. The Tribunal shall consist of [one/three] arbitrator[s]. The place of the arbitration shall be New York, New York. The language of the arbitral proceeding, including the parties’ written submissions, shall be English. Judgment upon the award rendered by the arbitrator[s] may be entered in any court having jurisdiction thereof.

#### **2. ADDITIONAL PROVISIONS — MORE COMPLEX ARBITRATION AGREEMENT**

- Allocation of Costs and Fees

In any arbitration arising out of or related to this Agreement, the arbitrators may [shall] include in their award an allocation to the prevailing party of such costs and expenses, including attorneys’ fees and expert witness fees, as the arbitrators shall deem reasonable.

- Punitive Damages

In any arbitration arising out of or related to this Agreement, the arbitrators are not empowered to award punitive or exemplary damages, and each party hereby waives any right to seek or recover punitive or exemplary damages with respect to any dispute resolved by arbitration.

- Disclosure — Exchange of Evidence

The parties shall be entitled to reasonable production of relevant and material, nonprivileged documents carried out expeditiously. If the parties are unable to agree on such production, the arbitral tribunal shall have the power, upon application of any party, to make all appropriate orders for production of relevant and material, nonprivileged documents by any party. There shall be no other form of disclosure or discovery, including prehearing depositions upon oral examination [nor shall there be any disclosure or discovery requests to any third parties].

- E-Discovery
  1. There shall be production of electronic documents only from sources used in the ordinary course of business. Absent a showing of compelling need, no such documents are required to be produced from backup servers, tapes or other media.
  2. Absent a showing of compelling need, the production of electronic documents shall normally be made on the basis of generally available technology in a searchable format that is usable by the party receiving the e-documents and convenient and economical for the producing party. Absent a showing of compelling need, the parties shall not produce metadata, with the exception of header fields for email correspondence.
  3. The description of custodians from whom electronic documents may be collected shall be narrowly tailored to include only those individuals whose electronic documents may reasonably be expected to contain evidence that is material to the dispute.
  4. Where the costs and burdens of e-discovery are disproportionate to the nature of the dispute or to the amount in controversy, or to the relevance of the materials requested, the arbitrator will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production to the other side, subject to the allocation of costs in the final award.
- Confidentiality

The parties and the arbitrators shall keep confidential all awards in the arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party or arbitrator by court order, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a court or other judicial authority.

- Provisional Measure — Interim Relief

Nothing in this Agreement shall prevent either party from seeking provisional measures, including, but not limited to, preaward attachments and injunctive relief, from any court of competent jurisdiction and any such request shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

- Time Limits

Notwithstanding any provision to the contrary in the Rules otherwise applicable to any arbitration arising out of or related to this Agreement, the parties shall complete all necessary steps in any arbitration, including the hearing on the merits, within [12] months of the commencement of the proceeding. The arbitrators shall render a final award within [30] days of the close of the hearings. The arbitrators may determine that the interest of justice or the complexities of the arbitration requires that these time limits be extended.

- Multi-Step or Phased Dispute Resolution,  
Including Negotiation, Mediation and Arbitration

The parties shall promptly attempt to resolve amicably by negotiation between party representatives with authority to settle the dispute, any dispute arising out of or related to this Agreement, including the existence, validity, termination or breach thereof. If the dispute has not been resolved within [30] calendar days after any party requests in writing negotiation under this provision, then the parties shall promptly proceed to mediation as described below.

The parties shall promptly attempt to resolve amicably by mediation any dispute, not resolved by negotiation as described above, arising out of or related to this Agreement, including the existence, validity, termination or breach thereof, under the [designated] Mediation Rules in New York, New York. If the dispute has not been resolved within [60] calendar days after any party requests in writing mediation under this provision, then the parties shall promptly proceed to arbitration as described below.

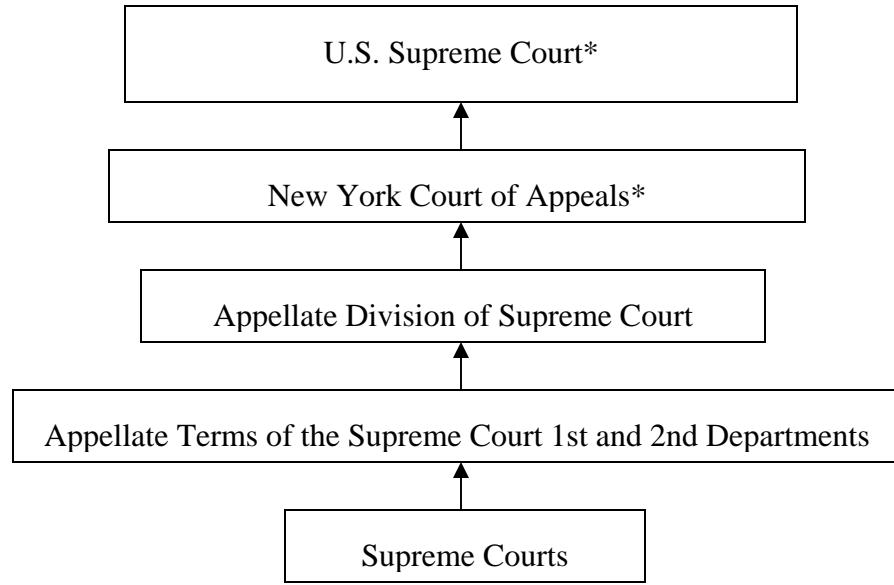
All communications during the negotiation and mediation described above shall be treated as made in the course of compromise and settlement negotiations for purposes of any applicable rules of evidence and any additional confidentiality and professional secrecy protections provided by applicable law or agreed by the parties.

[For arbitration agreement, insert simple or more complex clauses included above].

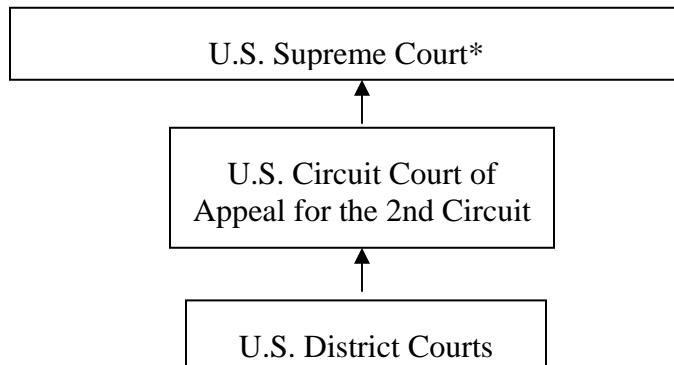
## Appendix E

# NEW YORK COURT SYSTEM

## NEW YORK STATE COURTS



## U.S. FEDERAL COURTS



\* Review at this level is discretionary, and not generally a matter of right.

## **Appendix F**

### **Examples of International Disputes Decided in the New York and U.S. Courts**

#### **1. ENFORCEMENT OF ARBITRATION AGREEMENT**

Sphere Drake Insurance PLC (U.K.) v. Marine Towing, Inc. (U.S.), 16 F.3d 666 (5th Cir. 1994). U.K. party sued to stay the litigation initiated by U.S. party and to compel arbitration under the 1958 New York Convention. The court held in favor of the U.K. company since the parties were required to arbitrate by the New York Convention, which compels parties to arbitrate whether the arbitration agreement is in a contract signed by the parties or in an exchange of letters or telegrams.

Tennessee Imports, Inc. (U.S.) v. P.P. Filippi & Prix Italia S.R.L.(Italy), 745 F. Supp. 1314 (M.D. Tenn. 1990). Italian party moved to dismiss Tennessee litigation, citing a forum selection clause in the contract between the parties requiring arbitration in the Arbitration Court of the Chamber of Commerce in Venice (Italy). The court granted the Italian party's motion and referred the parties to arbitration, noting that "The [Federal Arbitration] Act, the New York Convention and the case law interpreting them clearly establish a strong federal policy favoring arbitration."

#### **2. DISCOVERY**

National Broadcasting Company Inc v. Bear Stearns & Co. Inc., 165 F.3d 184 (2d Cir. 1999). U.S. party sought third-party discovery in New York in connection with an ICC arbitration in Mexico. The federal court denied the discovery on the grounds that "... opening the door to the type of discovery sought by NBC in this case likely would undermine one of the significant advantages of arbitration. . . ."

Dynegy Midstream Servs. (U.S.) v. Trammochem (U.S.), 451 F.3d 89 (2d Cir. 2006). Party to arbitration obtained a documents-only subpoena from an arbitration panel sitting in New York directed to a Texas-based entity. The appellate court held that the lower court lacked personal jurisdiction over the Texas company to enforce the subpoena noting that "Congress...could well have desired to limit the issuance and enforcement of arbitration subpoenas in order to protect non-parties from having to participate in an arbitration to a greater extent than they would if the dispute had been filed in a court of law."

Republic of Kazakhstan v. Biedermann Intern. (U.S. company), 168 F.3d 880 (5th Cir. 1999). Foreign nation engaged in arbitration in Stockholm with U.S. corporation sued in federal court in Texas for discovery assistance. The court denied the discovery, noting that "[e]mpowering arbitrators, or, worse, the parties, in private international disputes to seek ancillary discovery through the federal courts does not benefit the arbitration process."

#### **3. ATTACHMENT**

Sojitz Corporation (Japan) v. Prithvi Information Solutions Ltd. (India), 891 N.Y.S.2d 622 (N.Y. 2009). Under New York law (CPLR § 7502(c)) an order of attachment in aid of providing security in an international arbitration may be granted to a creditor attaching the New York

assets of the debtor even though neither creditor nor debtor is from New York and their underlying contract dispute is subject to international arbitration outside of New York. As such, parties with contracts providing for international arbitration may be able to take advantage of the courts in New York to obtain provisional security for any award, where the other party conducts separate business, or has other assets, in New York.

In re Faiveley Transport Malmo, 522 F. Supp. 2d 639 (S.D.N.Y.2007), appeal dismissed, 2008 U.S. App. LEXIS 9518 (2d Cir. May 2, 2008). License agreement did not prohibit foreign party from suing in the U.S. court for injunctive relief, despite clause providing that any dispute arising out of or in connection with the agreement “shall be finally settled by arbitration without recourse to the courts”; injunction would have merely maintained status quo and still would have allowed ICC arbitration panel in Sweden to finally settle the underlying contractual dispute.

#### 4. ASSISTANCE TO ARBITRATION

Pepsico Inc. (U.S.) v. Oficina Central De Asesoria y Ayunda Tecnica, C.A. (Venezuela), 945 F. Supp. 69 (S.D.N.Y. 1996). U.S. party moved to compel arbitration and enjoin Venezuelan party from further litigation in Venezuela. Venezuelan party asked court to dismiss action or stay arbitration to allow Venezuelan court to proceed and decide question of Venezuelan law. Court held that it would retain jurisdiction, but would stay proceedings in the U.S. for a limited period to allow Venezuelan court to determine validity of arbitration agreement, citing legal economy, international comity and the reasonable expectations of the parties.

Baker Marine (Nig.) Ltd. (Nigeria) v. Chevron (Nig.) Ltd. (Subsidiary of U.S. company), 191 F.3d 194 (2d Cir. 1999). Chevron prevailed in two international arbitrations held in Nigeria; however, Nigerian courts set aside awards. Chevron then sought to enforce the awards in New York under the 1958 New York Convention. Baker resisted enforcement on the grounds that the Nigerian Federal High Court had vacated the awards. The U.S. court declined to enforce the awards under Article V(1)(e) of the New York Convention. There was no showing the Nigerian courts acted contrary to Nigerian law and no adequate reason for refusing to recognize the Nigerian court judgment.

#### 5. ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Yusuf Ahmed Alghanim & Sons (Kuwait) v. Toys “R” Us, Inc. (U.S.), 126 F.3d 15 (2d Cir. 1997). Kuwaiti business sued to confirm an international arbitration award in international licensing agreement dispute. The court confirmed the arbitration award in favor of the Kuwaiti party under the 1958 New York Convention, noting that “[i]nterpretation of [a] contract term [ ] is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation” and “[t]his court has generally refused to second guess an arbitrator’s resolution of a contract dispute.”

Parsons and Whittemore Overseas Co. (U.S.) v. Societe Generale de L’Industrie Du Papier (Rakta) (Egypt), 508 F.2d 969 (2d Cir. 1974). Egyptian company sought to enforce foreign arbitration award against U.S. company that resisted enforcement under Article V(2) of the 1958 New York Convention since the award was “contrary to the public policy of the United States.”

The court concluded that the New York Convention's public policy defense should be construed narrowly.

"This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the [New York] Convention's framers and every indication is that the United States, in acceding to the [New York] Convention, meant to subscribe to this supranational emphasis."

Flexible Manufacturing Systems Pty. Ltd. (Australia) v. Super Products Corp. (U.S.), 86 F.3d 96 (7th Cir. 1996). U.S. party moved to vacate international arbitration award, claiming that arbitrators failed to enforce agreement and manifestly disregarded the applicable law. The court confirmed the arbitration award in favor of the Australian party, finding the U.S. party's attempt to vacate the award frivolous and awarding costs and other damages to the Australian party, noting "[t]he promise of arbitration is spoiled if parties disappointed by its results can delay the conclusion of the proceeding by groundless litigation...we have said repeatedly that we would punish such tactics and we mean it."

Brandeis Int'l Limited (U.K.) v. Calabrean Chemicals Corp. (U.S.), 656 F. Supp. 160 (S.D.N.Y. 1987). U.K. company sued in New York federal court to enforce an arbitration award rendered in London by the London Metal Exchange. Defendant resisted on the grounds that the award was in "manifest disregard of the law" and its enforcement would violate the public policy of the U.S. under Article V(2)(b) of the New York Convention. The court confirmed the award noting that "American courts are unreceptive, to say the least, to arguments that arbitral awards should be vacated for manifest disregard of the law." The court held that "manifest disregard" does not contravene U.S. public policy under Article V of the New York Convention.

Northrop Corp. (U.S.) v. Triad International Marketing, S.A. (Saudi Arabia), 811 F.2d 1265 (9th Cir. 1987). Saudi Arabian company sought enforcement of international arbitration award rendered in California requiring payment of commissions for services in connection with armaments contracts for the Saudi Air Force. The appellate court reversed the lower court and confirmed the arbitration award in favor of the Saudi company, finding that the Saudi Arabian law prohibiting payment of commissions on armaments contracts was not a part of U.S. public policy or the public policy of California, and the arbitration award, therefore, could not be vacated on those grounds.

## Appendix G

### Focus Group Summaries

Below is a summary of topics covered with different focus groups and the reactions to those topics by the focus groups. The focus groups consisted of (a) experienced New York arbitrators, (b) transactional attorneys, (c) in-house counsel, (d) United Kingdom attorneys, (e) New York Commercial Division judges and attorneys and (f) attorneys with practices focused on Latin America.

#### **1. Positive Aspects of New York Litigation and Arbitration**

##### *a. Experienced New York Arbitrators*

###### i. Body of Arbitrators

- New York has diverse and international professional arbitrators.
- New York has arbitrators with expertise in many areas of commerce and law.

###### ii. Arbitration Procedures

- New York has adopted expedited procedures.
- Discovery issues have been regularly limited by clauses in contracts.
- New York arbitration is able to handle complex issues and resolve them faster than other jurisdictions.
- New York firms offer arbitrations consistent with international norms.

##### *b. Transactional Attorneys*

###### i. Body of Arbitrators

- Significant numbers of New York arbitrators have business/commercial experience.

###### ii. Arbitration Procedures

- New York is the center of global finance and center of arbitration in financial services.

##### *c. In-House Counsel*

###### i. Body of Arbitrators

- New York arbitrators have experience in complex financial markets.

##### *d. U.K. and U.S. Attorneys*

###### i. Litigation and Arbitration Procedures

- New York law provides overall certainty and predictability as to business issues, and is comprehensive and sophisticated. Article 2 of UCC is very helpful.

ii. Mediation

- New York experience in mediation is advanced and unmatched by other countries and jurisdictions.

iii. Time Limits

- Impressed in New York that judges impose time limits for oral arguments.

e. *New York Commercial Division Judges and Attorneys*

i. Litigation Procedures

- New York Commercial Division Courts uphold contractual provisions allowing parties to limit discovery and jury trials.
- Litigation in the New York Commercial Division is advantageous due to parties' ability to appeal.
- Some parties prefer New York law because of the perceptions of larger damages and interested in expansive discovery for some cases.

f. *Latin American Attorneys*

i. Body of Arbitrators

- New York is a leader among global arbitration seats.
- Many New York arbitrators are comfortable with the CPLR.
- New York arbitrators have specialized financial knowledge that is important for many types of transactions.
- New York arbitrators are perceived as neutral, as opposed to a panel of local arbitrators who have developed local/regional reputations that may intimidate the parties.

ii. Litigation and Arbitration Procedures

- New York has a rich case law history and predictability.
- New York state and federal courts have experience ruling on New York Convention.
- For most types of transactions, New York law is highly predictable and strongly developed.
- Choosing New York as the governing law may be the precursor to choosing New York as the seat for arbitration. This encourages transactional lawyers to choose New York as the governing law in drafting contracts.
- Increasing global familiarity with New York law is leading more non-U.S. parties to choose New York law and New York as a forum.
- Note: Adoption of UNCITRAL model law may have unintended effect of alienating those in Latin America who are pleased with the status quo.

## **2. Perceived Limitation of New York Litigation and Arbitration**

### *a. Experienced New York Arbitrators*

#### i. Discovery

- It is important to address the concerns of non-U.S. parties that New York lawyers will push for U.S.-style discovery as a cultural practice. To address such concerns, limits on scope of discovery can be agreed upon by the parties.

#### ii. Cost of Proceedings

- Common law favors live testimony and more extensive document collection than civil law.

#### iii. Application of governing law

- Important to address concerns that losing party may go to New York courts to vacate award based on “manifest disregard” doctrine, increasing risk, costs and time to achieve final resolution.
- Important to address concerns about possible punitive damages.

#### iv. Confidentiality in ADR in the U.S.

- Because confidentiality is not implied, companies may want to adopt procedures to assure three levels of confidentiality as to: (1) publishing the award; (2) publishing arbitration information in 10K filings; and (3) documents and testimony that may reveal sensitive business-level information.
- In New York there is implied confidentiality among the parties who exchange documents and sensitive information.

#### v. Space:

- No facility dedicated to or identified for arbitrations. ICDR/JAMS have facilities (49 rooms total) but do not promote choosing New York as the seat of the arbitration over other U.S. cities.

### *b. Transactional Attorneys*

#### i. Discovery

- Parties are concerned about U.S.-style discovery and lawyers’/arbitrators’ proclivity for wide-ranging discovery.

### *c. In-House Counsel*

#### i. Neutral Forum

- Perception of “home court advantage” when non-U.S. companies negotiate with U.S. companies as to New York law.
- Inconvenient for parties to travel to U.S. from Asia.

*d. U.K. Attorneys*

i. Neutral Forum

- London perceived to be a neutral forum for international arbitration, and is marketing itself as such, where New York is not necessarily perceived by U.K. attorneys in the same way as London.

ii. Document Production

- Don't like fact that people memorialize everything.
- Concern about post-hearing briefs.
- Document production and depositions in U.S. arbitration.

*e. New York Commercial Division Judges and Attorneys*

i. Litigation Procedures

- There is a perception of U.S. litigation as expensive and including large amounts of discovery.
- There are concerns about the perceptions held by some of inefficiency due to staff shortages and fiscal issues.

*f. Latin American Attorneys*

i. Litigation Procedures

- Perception of U.S. litigation including expensive discovery process.
- Brazil generally practices limited discovery within parameters of standard international rules (e.g. IBA Rules).

**3. Marketing (in U.S. and Abroad)**

*a. Experienced New York Arbitrators*

i. Discovery

- Clients can be effective in limiting the scope of discovery.
- The following measures can be taken to limit discovery:
  - adoption of a clause as to the scope of discovery in the contract, binding on clients and arbitrators, subject to revision by agreement of the parties.
  - adoption of a clause stating that clients should participate in any agreements regarding discovery, to rein in scope of discovery.
  - in-house counsel can advise clients to supervise the discovery requests proposed by their New York-based counsel.

ii. Proposals for Establishing Arbitration and ADR facilities in New York

- Dedicated, permanent facility for arbitrations in New York (Manhattan) supported by Mayor Bloomberg and New York Economic Development Corp.
- Primary disadvantages: administration of facility not profitable, may generate political opposition; difficult to rent space when not in use for arbitrations

- Could rent space from ICDR/JAMS.
- New York Port Authority constructing a new building downtown.
- Advantages to using hotels: (a) can readily and immediately adapt space to other uses; (b) hotels will benefit from demand for overnight rooms and catering/amenities by international lawyers/clients; (c) can pitch optics of “international arbitration” to international hotel chain; (d) arbitrators/lawyers will have little travel time/expense if staying in same hotel.

iii. Market and Competitors

- Europe:
  - New York unlikely to attract two European companies engaged in an arbitration.
  - European companies with U.S.-branches or in arbitration with non-European countries may choose seat in New York.
- South America:
  - New York preferred over Miami for its sophistication, status as capital of global finance. For Brazil, New York also offers language neutrality.
- Asia:
  - Japanese parties often chosen New York as a neutral site due to perception that they will receive a hostile reception in other Asian countries (*i.e.*, Hong Kong and Singapore).
  - For the Chinese, seat depends on whether China has greatest bargaining power. China likely to choose New York if dealing with companies from regions other than Asia; otherwise, Chinese parties are likely to elect a seat in Hong Kong or Singapore.
  - New York’s main competitors for Asian clients are Singapore and Hong Kong.
- Africa:
  - New York seat has been chosen in arbitrations with European companies.
  - Regional arbitration facility opened in Mauritius.

b. *Transactional Attorneys*

i. Supplying Helpful Information for Transaction Lawyers During Negotiations

- Comparisons between arbitration rules across arbitration institutions.
- Compilation of practices to assist smaller firms that cannot call upon their litigation colleagues for advice/knowledge/experience.

ii. New York-Based Arbitration Facility

- Never comes up.

iii. Principal Concerns and/or Characteristics of Transaction Lawyers

- Do not have page-space or negotiating capital to insert discovery proscriptions into arbitration clause. Prefer a standard, short clause.
- Little personal knowledge of different arbitration rules or how situs can shift outcome of arbitration; often turn to litigation colleagues for advice.

- Potentially useful statistics to gather: length of international arbitration in New York vs. other locations.
- Adoption of UNCITRAL model law may improve perception of New York as conducting arbitrations with limited discovery and court interference.

c. *In-House Counsel*

i. New York-Based Arbitration Facility

- Never comes up.
- Might be seen by some to increase costs from perspective of in-house counsel.
- Does not impact perception of choice of situs in other locations.

ii. Principal Concerns and/or Characteristics of In-House Counsel

- Can be seen as giving U.S. company home-court advantage, especially in New York, financial capital of the world.

iii. Market and Competitors

- African entities in dispute with European/Asian entities may see New York as neutral. Need more research (local attitudes on colonial histories, culture, etc.).
- For Latin Americans, New York has the advantage of being in the same time zone, but competing with Brazil for arbitration business.
- Need to inform U.S. litigators (especially in firms/corporations with global reach) who are consulted by transaction lawyers at negotiation stage.
- African contacts/litigators — push New York as neutral ground.

d. *U.K. Attorneys*

i. Specific International Agreements

- There are particular international agreements that are more likely to be the source of disputes requiring arbitration (e.g., sale of a business, insurance agreements, construction, joint ventures).
- Look more carefully at the existing body of arbitration rules for some of those specific areas and consider them for study and possible promotion.

ii. Mediation

- Emphasize the availability of experienced mediators in New York given the concession by several of the U.K. participants that the U.S. is “way ahead” in the use of mediation.

iii. Market and Competitors

- Must have confidence in system.
- Arm U.S. lawyers abroad with reasons why New York law is great so they can use that information in negotiations.
- Concrete examples why you’re not exposing yourself to greater risk (i.e., discovery), fear of class actions, etc.

e. *New York Commercial Division Judges and Attorneys*

i. Proposed Initiatives

- Increased communication with international companies, judges and attorneys.
- Commercial Division Law Report — include sections dealing with international law issues and provide examples of representative cases concerning international parties and issues.
- Publicize on quarterly basis recent decisions dealing with international issues and distribute information internationally.
- Presentations in competing countries by judges from New York Commercial Division and New York federal judges discussing the positive aspects of New York law and promotion of the rule of law.
- Educational conferences in New York and internationally regarding New York law.
- Encourage international judges and attorneys to visit New York Commercial Division Court, Southern District of New York Court and Eastern District of New York Court and to meet with judges.
- Educate New York and international attorneys and parties about sealing rules to promote confidentiality of information.

ii. Market and Competitors

- Provide information with respect to positive aspects of New York law for international matters to in-house attorneys, international organizations and foreign bar associations.

f. *Latin American Attorneys*

i. Market and Competitors

- In-house counsel can be divided into two types:
  - those who choose only ICC or ICDR rules; and
  - those who have a pre-approved list of several cities but are flexible as to what city to choose as the situs of arbitration. These are the people who can be swayed.
- New York should provide accessible, easy-to-understand information on the advantages of New York, including information on clauses, cities, governing institutions, etc.

ii. Proposed Initiatives

- A New York Arbitration Center would generate a certain level of energy and (psychological) comfort for parties traveling from abroad for arbitration who want assurance that the arbitration operation will run smoothly.
- Create delegation of N.Y.S.B.A., New York City Bar and City of New York to attend major international law events, make pitches to corporate clients and their transaction counsel and build relationships with people who have influence over where arbitrations are sited and which governing law is chosen. Market to 10 biggest law firms and to the client community through the firms.

Make presentations, set up booths at arbitration conventions/major events (*e.g.* U.S.-Brazil judicial meeting in May).

- Send a delegation to Latin America (Brazil, Colombia, Peru, Chile and Argentina) to build relationships with transaction lawyers and clients who use the arbitration system.
- In Brazil: Explosive growth in domestic transactions. Perhaps best to target certain sectors with growth potential in international transactions, *e.g.*, oil and gas. Other growing sectors such as venture capital are largely local and efforts to market New York law may be less fruitful there.

#### 4. Choice of Law and Situs Considerations

##### a. *Experienced New York Arbitrators*

###### i. Considerations When Choosing Situs and Choice of Law

- Procedure.
- Governing law.
- Enforceability.
- Involvement of the courts.
- Courts' attitude to arbitration.
- Note: Transaction lawyers rarely consider courts' attitude because they are focused on completing the contract. A handful of arbitration institutions are well-known (*e.g.*, ICDR, ICC, LCIA). Convenience of location is often a bigger factor.
- Location of skilled and diverse body of arbitrators.
- New York offers diverse and skilled professional arbitrators.
- Some retired federal judges may be chosen as arbitrators given their experience with FRCP.
- Availability of time.
- Physical facilities.
- There is concern about subjecting foreign clients to U.S./New York laws/jurisdiction (*i.e.*, clients could be served in other lawsuits while arbitrating in New York).

##### b. *Transactional Attorneys*

###### i. Considerations When Choosing Situs and Choice of Law

- Relative negotiating strength (parties usually push for own law).
- Location of counterparty.
- Location of assets.
- Politics/chauvinism (*e.g.*, French insistence on own law vs. Italy's greater willingness to compromise).
- Clients' priorities (*e.g.*, lenders do not opt for local laws since they can be changed, affecting their obligations; local laws preferred for speedy resolution of certain issues).

- Whether there is clear choice of law between counterparties' local laws. If too biased, then more neutral (i.e., U.S. or English) law commonly chosen for long history of commercial law and predictability.
- Contracts are all about protecting what clients bargain for in the contract. Choice of law subject to this overarching consideration and location/relative strength of counterparty.
- Enforcement of award.
- Speed of decision.
- Interference in arbitral process.
- Convenience (geo-political considerations).
- Pool of arbitrators: clients want neutral, professional arbitrators. Expertise and specializations sometimes considered during negotiation stages and choice of arbitral institution may depend on transaction lawyers' perception of collective experience of institution's pool of arbitrators.
- Availability of provisional/injunctive relief if needed.
- Concern about discovery.

*c. In-House Counsel*

i. Considerations When Choosing Situs and Choice of Law

- Predictability/certainty of ADR procedures, outcomes, and methods of appeal.
- Enforceability.
- Speed of decision.
- Expertise in foreign litigation procedures (increasing comfort with practicing in foreign courts can lead to choosing overseas litigation over arbitration).
- Nature of the transaction.
- Convenience of the parties (geographically and politically).
- Expectation of being a plaintiff or defendant; relative bargaining strength.
- Court interference not perceived to be big deterrent in New York.
- Descriptions of arbitrators sometimes included, especially in commodities, accounting and commercial disputes. Narrows pool of potential arbitrators, increasing certainty of arbitral procedures/outcomes.
- Often, choice of law already decided by the time it gets to senior in-house counsel. Not often a major part of deal, and may not be huge point of dispute if trying to gain business.
- Concern about discovery.

*d. U.K. Attorneys*

i. Considerations When Choosing Situs and Choice of Law

- Heavy reliance on English ICE forms in Hong Kong and Asia.
- Americans haven't had the exposure that U.K. has in Malaysia, Singapore, India and English-speaking Africa, Australia and New Zealand, the Commonwealth countries.

- New York arbitration isn't chosen in Asia due to time difference and inconvenience of parties; also, perfectly good system in Hong Kong.

*e. New York Commercial Division Judges and Attorneys*

i. Considerations When Choosing Situs and Choice of Law

- When deciding between New York and U.K. law, E.U. enforcement of judgments is consideration for some parties.
- Parties choose New York and/or U.K. as the governing law over some countries (particularly Middle Eastern and Eastern Europe countries' governing laws) because New York and the U.K. have more transparency and predictability.

*f. Latin American Attorneys*

i. Considerations When Choosing Situs and Choice of Law

- While New York is attractive as seat of arbitration for large multi-national corporations, some smaller international companies (*e.g.* construction companies) may choose Brazil as the situs due to their comfort level there. A possible remedy is for New York to make an effort to educate these sectors as to about the positive aspects of New York for arbitration, litigation and mediation.
- Brazilian parties often choose ICC rules and thus request arbitrations in Paris.
- Brazilian firms and lawyers are willing to travel internationally to conduct arbitration provided their clients are willing to do so. Brazilian lawyers increasingly seek LLMs from U.S. and United Kingdom institutions. That increases their comfort with arbitration outside of Brazil.
- Brazil has developed a strong arbitration culture. However, explosive growth means that good arbitrators may be in short supply as compared with other jurisdictions.
- Language (Portuguese) is an important and sensitive cultural issue. Many Brazilian companies are led by people who speak only Portuguese. Lawyers/businessmen who travel to Brazil and speak only English are often not as well-received as those who speak Portuguese.
- The relative strength of the party and their preferences as to choice of situs and choice of law are a large determinant of where the arbitration will be allowed to take place.
- The ICC has been successful in creating local representatives that command respect among users of the local arbitration system, making companies more likely to site the arbitration in Brazil versus New York.
- Three factors are considered when advising Brazilian clients on arbitration in New York:
  - whether nature of the dispute is large enough to warrant going to New York;
  - whether the transaction will cause the company to be negatively perceived; and
  - economics — New York arbitration may in fact not be more expensive, but some Brazilian companies are adverse to hourly billing, unpredictability of discovery and where it can lead. Clients prefer contingency billing since it is perceived as less risky and is closer to the billing model in Brazil.

## **2011 N.Y.S.B.A. Task Force Questionnaire Selected Responses**

### **What factors do you think make New York law desirable as the governing law for cross-border business and international commercial transactions?**

“Both because of New York’s long history as a commercial center for both domestic and international transactions, and since the U.S. is a common law system, New York case law provides rich and comprehensive guidance for a broad range of commercial disputes, which enables a large degree of certainty to the parties and contract negotiators (who can with confidence interpret how a particular provision will be interpreted and enforced) and to litigators (who can with confidence help determine likely outcomes and guide settlement). Importantly, New York law provides wide latitude to parties in a transaction to craft and agree upon provisions that meet their needs — there is relatively little public policy that would trump and supersede the parties’ clear intentions. In general, the parties are free to agree upon terms as they see fit, and those terms will be enforceable. Also, there is a minimum level of formality needed for most contracts. Also, New York generally supports contracts that are formed through electronic communications, which is essential in today’s business environment.”

“Stable, relatively predictable, and has already addressed a huge assortment of financial and commercial issues.”

“Well-developed law; no NY nexus required for contracts over \$1 million.”

“Large size of the skilled NY lawyer talent pool promotes achievement of lawful business clients’ objectives. American and New York Constitutional (and other relevant) jurisprudence promotes a high degree of freedom of contract and protection of intellectual and other property rights.”

“Strong choice of law statute for commercial transactions, strong support for giving effect to parties’ expressed contractual intentions, extensive jurisprudence regarding many issues arising in commercial transactions which are not adequately addressed in other jurisdictions (e.g. English law).”

“Well-developed case law on commercial matters. Well-respected judiciary. Trusted and reputable place to do business. International lawyers are more likely to be familiar with NY law, or have relationships with law firms in NY that they can consult, than they are to be with law of any other U.S. or international jurisdiction.”

### **What factors, if any, do you think make New York law less desirable as the governing law for cross-border commercial transactions?**

“U.S. litigation time, cost and anomalous aspects such as punitive damages; submission to US jurisdiction for foreign entities and U.S. style discovery.”

“While the strength of New York law is in its respect for private ordering and the development of detailed provisions regarding representations, warranties, general standards of performance as well as the specific details of the contractual undertakings, the lack of a more detailed set of default provisions for general standards of performance and contractual assumptions is a weakness for parties who want a more simple and less expensive form of contract. I would suggest New York consider a series of statutory forms of contracts for such transactions as sale

of goods, loans and simple joint ventures — on the model of the NY statutory form of power of attorney (perhaps more in the spirit of the pre-Sept. 2009 version than the more cumbersome power of attorney we now have — indeed it would be good to also have a statutory commercial power of attorney that avoids the extra complications of the current power of attorney designed to protect against abuses that are not relevant to the commercial context). (Think of the widely used Bloomberg forms of sale of real property and cooperative apartments that practitioners modify by rider rather than using contracts of their own making.)”

**What factors do you think make New York courts (including the Southern District of New York and the New York State Court Commercial Divisions) desirable as forums for resolution of international legal disputes?**

“Good federal court system and commercial division in Manhattan; developed case law on business matters.”

“Great benches with full and fair understanding of international disputes.”

“Since New York has been the most important center of international commerce for almost two centuries, the courts of New York have a long experience in dealing with international legal disputes.”

“Obviously large body of case law and commercial statutes and experience of lawyers and courts with complex financial matters.”

“New York courts and other dispute resolution resources are generally viewed as unbiased and highly competent.”

“The Federal courts — and increasingly the commercial division — have very good reputations for "American-style" litigation, with its preference for pre-trial discovery. American style litigation can be very appropriate for very complex matters where pre-trial discovery can make sure all the facts are in the open and where the discovery process can play a very important role in encouraging settlement.”

“For [New York federal courts], the location, the excellent reputation of the judges, and the proximity of good lawyers.”

“Transparency and considerable precedent.”

“Great benches with full and fair understanding of international disputes.”

“I think European jurisdictions have sold foreign clients on the cost and unpredictability of American law and jury awards generally. It may once have been significantly more expensive to litigate in the United States, but I don't believe that is true any longer. Discovery, however, still comes as a shock, and electronic discovery costs are skyrocketing. There must be some middle ground between the fishing expeditions some litigants delight in and the civil law system in which litigants produce only what they want to produce and an opposing litigant needs to know not only that a document exists, its title and signatories, but almost which drawer the opposition keeps it in to compel production.”

“New York judges have experience as something other than judges before they begin service as judges, unlike many civil law judges who become judges straight out of school. Also New York judges are used to seeing people from all parts of the world and hearing a variety of accents.”

**What, if any, factors do you think make New York courts less desirable as forums for resolution of international legal disputes?**

“American discovery; stricter standards for getting foreign judgments enforced.”

“The American-style of litigation is less suited for disputes of a somewhat more simple nature and where the parties want to rely more on the expertise and “wisdom” of judges rather than on extensive fact-finding and investigation. To this end, we need to come up with a section or chamber of the New York courts that can address this desire for more streamlined procedures. We also need to ensure our commercial law judges have a good background in the civil and other non-common law traditions — I have heard complaints on their lack of understanding of these legal approaches — and this makes New York less attractive as a choice of forum for dispute resolution.”

“State courts are crowded; federal courts have excessive discovery requirements, especially e-discovery.”

“Generally, three things put off foreign contracting parties: punitive damages, jury trials and absence of loser pays.”

**What factors do you think make New York desirable as a forum for international arbitration?**

“There are many excellent arbitrators and New York is easy to reach and works well as a center for business.”

“Capital of the world. All services available.”

“Number of arbitrators available in the jurisdiction, exposure of New York attorneys to international transactions, nondiscriminatory laws and rules.”

“It is a major financial center, has facilities and a strong international arbitration bar, and is a multicultural city, and a city which people like to visit. Geography is a plus for North, Central and South American cases. Air connections are good.”

“The resources available in New York City and the perception that New York State is a neutral jurisdiction comparatively free of external influences and not subject to corruption.”

**What factors, if any, do you think make New York less desirable as a forum for international arbitration?**

“Poor non-English language skills, and limited exposure to non-U.S. legal systems, of both practicing lawyers (as advocates before arbitral tribunals) and experts/arbitrators.”

“Perception that New York or American-style litigation, with extensive pre-trial discovery, “leaks” into the arbitration process if arbitrators are appointed here in New York or if New York is the site of arbitration. We need to make clearer — and publicize — the extent to which New York courts can and cannot interfere in arbitral proceedings either governed by New York law or held in New York. We also, I think, very strongly need to create a model of more competent and streamlined judicial proceedings for international commercial and other disputes — that will give the international legal community a real proof that New York is serious about offering choices for dispute resolution and this will then make more credible and effective the efforts of the New

York international arbitration bar to convince the international legal community that New York can and does follow the “international standard” for fact gathering and evidentiary standards in New York-based arbitration.”

“Lack of clear standard arbitration provision template.”

“Fears — justified and unjustified — of high costs.”

“Availability of discovery although sometimes this can be used by foreign parties to their advantage against an American party.”

“The cost of arbitration can be very high — but this is not unique to New York.”

“New York has not adopted the UNCITRAL model law on international commercial arbitration, making the governing rules a little quirky.”

“New York State is not viewed as a neutral jurisdiction by non-U.S. parties. Parties to international agreements may reach agreement on jurisdictions not associated with either party, leading to choice of forum in London, Paris, Singapore, etc.”

“Some foreign companies avoid it because of a sense of a ‘hometown’ advantage to the New York/U.S. counterparty.”

**Please suggest one or more changes in New York law you believe would make it more attractive as the governing law for cross-border transactions in your area of practice and as forum for resolution of international disputes.**

“Increase the awareness of NY law and the court system or arbitration to lawyers and business people.”

“Encouragement to courts to limit discovery. . .make it more like an arbitration.”

“Dedicated judges with respect to arbitration issues.”

“Limit arbitrator's ability to order discovery.”

“Accelerate and limit discovery and award legal fees to prevailing party in commercial dispute and cause losing party to pay arbitration fees.”

“A New York Arbitration Center and for New York adoption of the UNCITRAL Model Arbitration Act.”

“Modernization of Federal Arbitration Act to, among other things, clarify role of state law.”

“The earliest possible ratification of Hague Convention on Choice of Court Agreement (if necessary, the U.S. should ratify it with limited territorial scope for New York only for the sake of promoting New York if other states are not ready).”

“Controlling discovery.”

## Appendix H

### Research Bibliography

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- 3) John Fellas, *Strategy in International Litigation*, 14 ILSA J. INT’L & COMP. L. 317, 320 (2008) (suggesting that plaintiffs may choose to bring suit in U.S. courts for the availability of broad discovery procedures).
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- 12) Sandeep Gopalan, *New Trends in the Making of International Commercial Law*, 23 J.L. & COM. 117, 130 (2004).
- 13) Miller & Eisenberg, *The Market for Contracts*, 30 CARDOZO L. REV. 2073, 2073-74 (2009).

## **Appendix I**

### **Treaties Relevant to International Business in New York**

#### **Part 1. Major Treaties in Force to Which the U.S. is a Party**

- (1) 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)
- (2) 1980 Convention on Contracts for the International Sale of Goods (CISG)
- (3) 1974 Convention on the Limitation Period in the International Sale of Goods (Limitation Period Convention); and Protocol (1980)
- (4) UNIDROIT Cape Town Convention on International Interests in Mobile Equipment (2001) and Aircraft Protocol (2001)
- (5) Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (Hague Service Convention) (1965)
- (6) Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, (Hague Evidence Convention) (1970)
- (7) Hague Convention on Abolishing the Requirement of Legalisation for Foreign Public Documents (Apostille Convention) (1961)

#### **Part 2. International Commercial Treaties that the U.S. Has Either Not Signed or Ratified**

##### a. Signed but not ratified:

- (1) UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules Convention) (2008)
- (2) UN Convention on the Assignment of Receivables in International Trade (Receivables Convention) (2001)
- (3) UN Convention on Independent Guarantees and Stand-By Letters of Credit (Letters of Credit Convention) (1995)
- (4) UN Convention on the Liability of Operators of Transport Terminals in International Trade (1991)
- (5) Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (Hague Securities Convention) (2006)
- (6) Hague Convention on Choice of Court Agreement (2005)
- (7) Hague Convention on the Law Applicable to Trusts and on their Recognition (Hague Trust Convention) (1985)

- (8) UNIDROIT Convention on International Factoring (1988, Ottawa)
- (9) UNIDROIT Convention on International Financial Leasing (1988, Ottawa)

b. Not signed:

- (10) UN Convention on the Use of Electronic Communications in International Contracts (Electronic Communication Convention) (2005)
- (11) UNIDROIT Convention on Substantive Rules for Intermediated Securities (Geneva Securities Convention) (2009)
- (12) Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock (Luxembourg, 2007)
- (13) Convention on Agency in the International Sale of Goods (Geneva, 1983)

**Part 3. Treaties Mentioned in Part 2 that N.Y.S.B.A. Should Study More Closely with a View to Recommending U.S. Ratification or Accession**

*(1) Rotterdam Rules Convention (2008) (Part 2(1))*

This Convention modernizes the preexisting international treaty regime and provides comprehensive, uniform legal rules for the international shipment of goods by sea, including the land-leg portion of such transport.

U.S. ratification of the Treaty, which in large part follows the U.S. negotiating position, could modernize and clarify U.S. laws including the 1936 Carriage of Goods by Sea Act governing the shipping industry and encourage other countries to follow suit.

New York State should at the same time consider developing better rules to cope with changes of jurisdiction on the land-leg portion of international shipping, and whether it would be a good policy for the Commercial Division of New York State Supreme Court to have admiralty jurisdiction over maritime cases governed by the Rotterdam rules under 28 USC 1331(1) (“saving to suitors clause”).

*(2) Electronic Communication Convention (2005) (Part 2(10))*

This Convention, which is popular in Asia, creates uniform rules concerning contract formation through electronic communications. U.S. accession would be important to preserve a leadership position for the United States in global standard-setting for the ever changing e-commerce area.

*(3) Receivables Convention (2001) (Part 2(2))*

This Convention provide rules regarding the cross-border assignment of receivables in order to promote harmonization of assignment laws, remove obstacles to international financing practices, facilitate access to lower-cost credit and generally promote the movement of goods and

services across national borders. Among other provisions, it contains special conflict-of-law rules to determine the priority of competing claims.

U.S. ratification, which would encourage other countries to follow suit, reflects the U.S. negotiating position and would help promote the New York and broader U.S. financial industry. Unless the U.S. takes a lead in promoting the Convention, the EU may adopt another approach. The Convention has a so-called “Canada clause,” under which the U.S. could ratify the Convention for application only to those states that elect to incorporate the Convention’s rules into state law.

*(4) Hague Securities Convention (2006) (Part 2(5))*

This Convention provides rules for determining the law applicable to securities held by intermediaries, i.e., “dematerialized” registered securities held by intermediaries and credited to the account of the actual owners, in the international context. U.S. ratification would help to win support for the Convention and use of the Convention’s “Canada” clause could facilitate approval of U.S. ratification by the Senate. This Treaty should be considered together with Geneva Securities Convention (2009), which deals with substantive law issues.

*(5) Hague Choice of Court Agreement Convention (2005) (Part 2(6))*

This Convention would allow third-country private parties to choose New York courts as the forum for resolving their disputes with a guarantee that a New York judgment would be enforced in any country that is a party to the Convention.

U.S. ratification would help promote other countries to follow (especially the EU). Use of the Convention’s “Canada” or federal-state ratification clause would allow the U.S. to ratify on behalf of those states that wish to apply the Convention’s rules in their own law and to take advantage of the Convention’s promise of foreign enforcement of their judgments while avoiding a Federal “cram down” on states that for whatever reason may be reluctant to join.

*(6) Hague Convention on Trusts (1985) (Part 2(7))*

This Convention specifies the law applicable to trusts and governs the recognition of foreign trusts by Member States. U.S. ratification would give momentum to the acceptance of trusts among civil law countries. The Convention has a “Canada” or federal-state clause which could encourage early U.S. ratification.

*(7) Geneva Securities Convention (2009) (Part 2(8))*

This Geneva Securities Convention complements the Hague Securities Convention by providing substantive rules regarding the registration of securities. Use of the Convention’s “Canada” federal-state clause is a possible solution for early ratification. See Hague Securities Convention (2006) above.

*(8) Letters of Credit Convention (1995) (Part 2 (3))*

This Convention provides common rules for independent guarantees or stand-by letters of credit to facilitate the use of such instruments in international commerce. Use of the “Canada” or federal-state clause is a possible solution for early ratification.

*(9) UNIDROIT Financial Leasing Ottawa Convention (1988) (Part 2(9))*

This Convention provide rules for cross-border financial lease transactions. U.S. ratification may serve as a useful export promotion measure for the U.S. economy.

**Part 4. List of Changes to Be Considered with Respect to Treaties in Force (among Treaties under Part 1)**

*(1) Convention on the International Sale of Goods (Part 1 (2))*

Withdrawal of Article 95 declaration should be strongly considered. This declaration limits the application of the CISG to the provisions of article 1(1)(a), excluding article 1(1)(b), thus preventing parties from using New York as a neutral choice of forum for dispute resolution unless all contractual parties are businesses located in state parties to the CISG (at this time, the United Kingdom and Brazil, among other countries, are not parties). It is somewhat unclear under case law that private parties can simply “opt into” the CISG rules under their private agreement without legal uncertainties and costs.

*(2) Limitation Period Convention (1974) Protocol (1980). (Part 1(3))*

For the same reasons as noted with regard to the CISG, the current reservation under the Protocol should be withdrawn because this Convention complements the CISG, and a withdrawal of the reservation for one but not the other will further complicate the ability of parties to elect New York as a forum for dispute resolution.

*(3) New York Convention (Part I(1))*

Implement 2006 UNCITRAL Recommendations on Article II (types of communications that satisfies the “writing” requirement of the arbitration agreement) and Article VII (party’s right to enforce the awards using the forum’s most favorable laws), which clarify the ways that Articles VII and V(1)(e) are interpreted.

## Appendix J

### **Estimated Revenues Related to International Dispute Resolution in New York (Millions of Dollars)**

		<b>Low</b>	<b>Mid</b>	<b>High</b>
(1)	Estimated Firm-wide Revenues for Largest Law Firms in New York in Aggregate	\$62,000	\$62,000	\$62,000
(2)	New York Lawyers as a Percent of Total Firm-wide Lawyers	25%	30%	35%
(3)	Estimated Revenues for New York Offices	\$15,500	\$18,600	\$21,700
(4)	New York Litigation Lawyers as a Percent of New York Total Lawyers	30%	33%	36%
(5)	Estimated Litigation Revenues for New York Offices	\$4,650	\$6,138	\$7,812
(6)	New York International Lawyers as a Percent of New York Litigation Lawyers	25%	30%	35%
(7)	Estimated International Dispute Resolution Revenues for New York Offices	\$1,163	\$1,841	\$2,734

Note:

Lines (1) and (2) are based on data reported in The National Law Journal's NYLJ 100 list of largest law firms in New York State, excluding offices outside of Manhattan; AmLaw 100 List; AmLaw200 list; AmLaw Daily; American Lawyer; Inc.com; Insideview.com; Law.com; and websites for the law firms. Lines (2) and (4) are based on data obtained from law firm websites and the extensive experience of the Task Force Co-Chairs in managing global law firms.

A review of law firm websites reveals that this source undercounts the number of lawyers who work in international dispute resolution in New York. For example, a number of websites merely identify lawyers as being members of the litigation practice, even though the firms have well-established reputations in providing international dispute resolution services. As such, "New York International Lawyers as a Percent of New York Litigation Lawyers," line (6) above, is based both on the Co-Chairs' understanding of the New York legal market, as well as a review of law firm websites.

The remaining lines are the mathematical results of multiplying reported data by estimated percentages. The low-mid-high presentation reflects the possibility of up to a 10% variation in the estimated percentages to take into account the differences in law firm economics.

## **Appendix K**

### **Why Choose New York Brochure**



NEW YORK STATE BAR ASSOCIATION  
**DISPUTE RESOLUTION SECTION**  
**INTERNATIONAL SECTION**

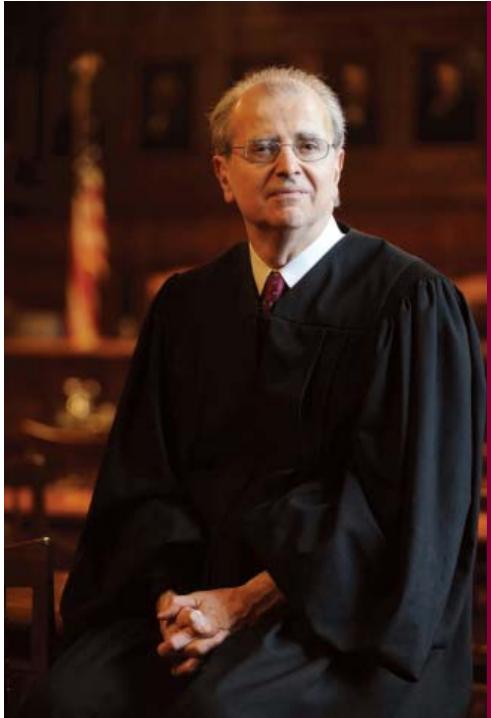


## Choose New York for International Arbitration

### WHY CHOOSE NEW YORK:

- Clear Legal Framework For International Arbitration
- Neutral Courts, Experienced In International Commercial Disputes
- Leading Arbitrators, Lawyers, And Arbitral Institutions
- The Infrastructure For Any Type Of Case

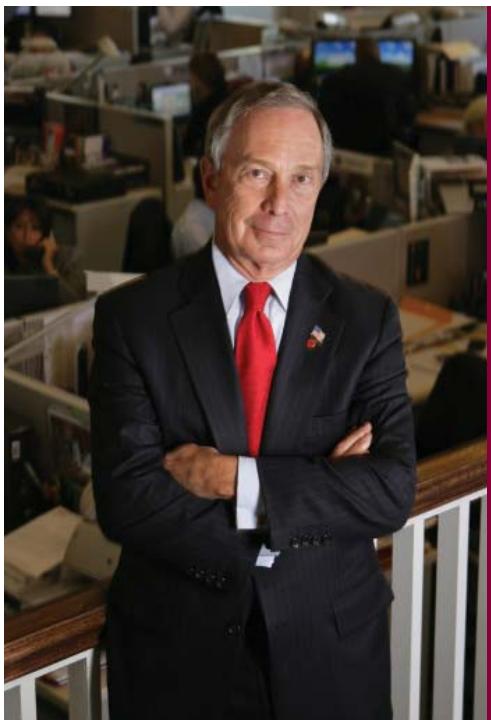




As Chief Judge of the State of New York, I am delighted to preface this brochure on International Arbitration, which definitively answers the central question posed: WHY CHOOSE NEW YORK? To my mind, the myriad reasons for choosing New York are superbly articulated in the pages that follow.

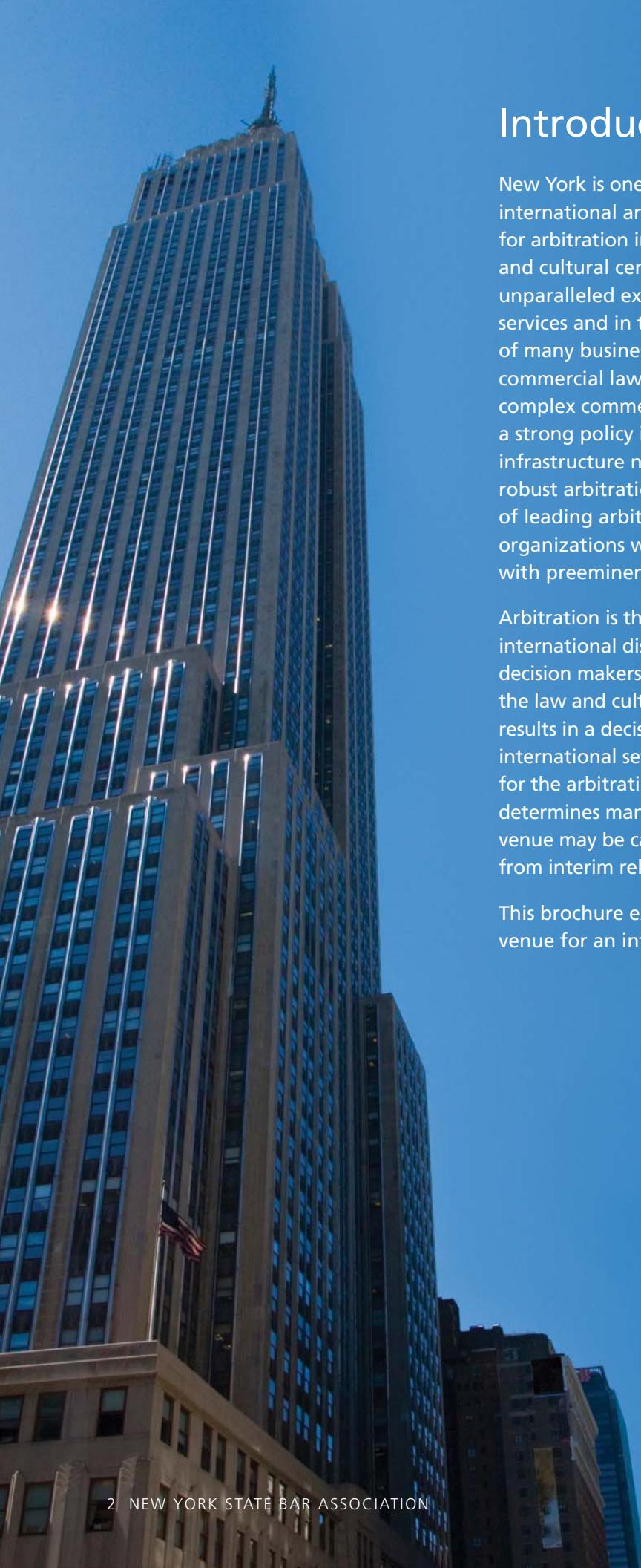
As the State's chief judicial officer as well as chief executive officer of the court system, I would wish only to add a word of assurance regarding the receptivity of the courts of our state to International Arbitration and to note our willingness to facilitate your important work, as we labor together in the universal interest of dispute resolution and justice. An additional pleasure for me is that my predecessor Chief Judge for many years, Judith Kaye, now herself functions in the international arbitration field, permitting us to continue our collaboration in effecting appropriate systemic reform.

**Jonathan Lippman**, *Chief Judge of the State of New York*



We welcome you to New York, financial capital of the world, and a vibrant center for international arbitration. Our talented pool of attorneys, arbitrators and other providers of international arbitration services, coupled with our unparalleled facilities and opportunities for culture and entertainment, offer an arbitration venue that cannot be matched anywhere else in the world.

**Michael R. Bloomberg**, *Mayor New York City*



# Introduction

New York is one of the most frequently selected venues for international arbitration in the world and the most popular city for arbitration in the United States. It is a major global commercial and cultural center, home to a vast pool of professionals with unparalleled expertise in the provision of dispute resolution services and in the business practices and commercial aspects of many businesses, has a well-developed and predictable commercial law, neutral courts with extensive experience in complex commercial disputes, a legal framework that embodies a strong policy in favor of international arbitration, and the infrastructure necessary to host any type of case. New York's robust arbitration culture is strengthened by the presence of leading arbitral institutions, excellent professional (legal) organizations with a focus on the field, and major universities with preeminent experts in international arbitration.

Arbitration is the dispute resolution mechanism of choice for many international disputes because it enables the parties to select decision makers with both subject expertise and knowledge of the law and culture of many nations, assures a neutral forum and results in a decision that is generally much easier to enforce in an international setting than a court judgment. The choice of venue for the arbitration is important because the law of the venue determines many procedural matters, and courts located in the venue may be called upon to deal with a variety of issues ranging from interim relief to recognition and enforcement of the award.

This brochure explains the benefits of choosing New York as the venue for an international arbitration.

# New York Has a Long Established and Accessible Framework Supporting International Arbitration

## United States Policy in Favor of International Arbitration.

The long established policy in the United States in favor of arbitration underlies the manner in which courts approach arbitration agreements and disputes about arbitrability:

- > Under federal law, any doubts about whether an arbitration clause covers the issue in dispute are decided presumptively in favor of arbitration.
- > Once a New York court has determined either that the parties agreed to give the arbitrators the authority to determine their own jurisdiction or that the parties have agreed to arbitrate a dispute and that the subject matter of a dispute is arbitrable, the court must refer those parties to arbitration.
- > If a New York court decides to apply New York contract law to determine the formation and validity of an international agreement to arbitrate, New York courts are required to give deference to the strong federal policy in favor of arbitration when applying that law.
- > New York courts consistently enforce awards and, in so doing, they narrowly construe the grounds for non-recognition of arbitral awards under both domestic law and as set forth in the New York Convention.

"[F]ederal policy strongly favors arbitration as an alternative dispute resolution process. While it is still the rule that parties may not be compelled to submit a commercial dispute to arbitration unless they have contracted to do so, federal arbitration policy requires that 'any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.'

"The policy in favor of arbitration is even stronger in the context of international business transactions. Enforcement of international arbitration agreements promotes the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation. The parties may agree in advance as to how their disputes will be expeditiously and inexpensively resolved should their business relationship sour. Stability in international trading was the engine behind the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This treaty — to which the United States is a signatory — makes it clear that the liberal federal arbitration policy applies with special force in the field of international commerce."

*David L. Threlkeld & Co., Inc. v. Metallgesellschaft Ltd. (London), 923 F.2d 245, 248 (2d. Cir. 1991).*



## **The New York Convention.**

The United States is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a multilateral convention among 144 countries, which requires all member state courts to recognize arbitration agreements and to enforce the awards made in other member states.

## **The Panama Convention.**

The United States is also party to the 1975 Inter-American Convention on International Commercial Arbitration, a regional treaty that largely replicates the New York Convention and has effect in 19 countries within the Americas and the Caribbean.

## **The Federal Arbitration Act.**

The Federal Arbitration Act governs all arbitrations that involve interstate or cross border commerce and embodies a strong policy in favor of the resolution of disputes by arbitration.

## **English Language.**

English has become the international language of commerce, and the vast majority of international arbitrations are now conducted in English.



# New York Courts are Neutral, Experienced and Differential to Arbitration and the Parties' Agreed Process

New York courts are neutral and respect the parties' decision to use arbitration to resolve their commercial disputes. The courts protect the arbitration process when called upon by one of the parties to an arbitration agreement to ensure that the other party does not undermine it by, for example, commencing litigation notwithstanding its agreement to arbitrate. At the same time, courts do not impose their own views of appropriate arbitration procedures, but respect the freedom of the parties to choose the procedures for their case and the authority of arbitrators to control the process. The New York courts, both state and federal, employ a single judge assignment system for commercial cases which serves to expedite any court process invoked by the parties.

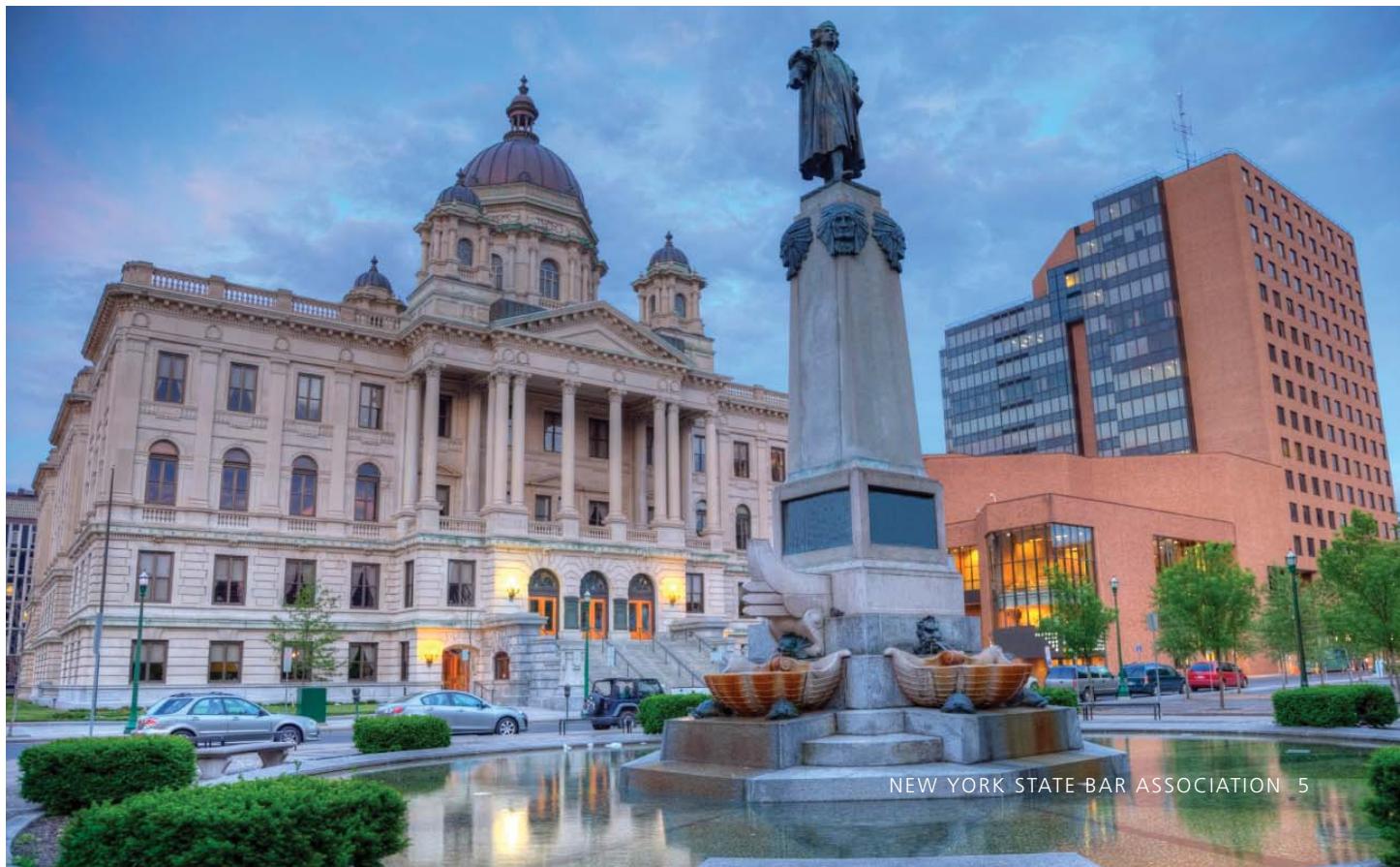
## **Parties' Freedom To Choose the Procedures for their Arbitration:**

The purpose of the Federal Arbitration Act is to ensure that "the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

*Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 404 (1967).

A party that agrees to arbitrate "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., et al.*, 473 US 614, 628 (1985)



# New York Courts Recognize the Authority of the Arbitrators

## **Arbital Jurisdiction and Kompetenz-Kompetenz.**

The law that applies to international arbitrations venued in New York affirms that arbitrators have authority to determine questions concerning their own jurisdiction whenever an arbitration clause manifests the parties' clear and unmistakable intention to confer such authority upon them. Importantly, New York courts have found such clear and unmistakable intention where the parties to an arbitration agreement have agreed to give the arbitrator the power to determine their own jurisdiction. The institutional rules of the ICC or the ICDR, JAMS and the CPR all provide that authority.

## **Deference to Arbitrators.**

Under the law applicable to arbitrations held in New York, most defenses to arbitrability, such as whether the underlying contract is not enforceable on grounds of fraud or unconscionability, have been deemed issues for the arbitrators, rather than courts, to decide.

## **The Separability Doctrine.**

New York courts recognize the doctrine of separability, providing that arbitration clauses are separate from the contracts in which they are embedded so that arbitrators retain their jurisdiction notwithstanding certain challenges to the validity of a contract containing an arbitration clause.

## **Emphasis on the Authority of the Arbitrators to Control the Process.**

New York courts have stressed that arbitrators have authority to control the arbitration process without court interference.



# New York Courts Enforce Agreements To Arbitrate

New York courts will enforce an agreement to arbitrate when called upon to do so by a party to an arbitration agreement:

## **Compelling Arbitration.**

New York courts have the authority to compel a party to arbitrate if it refuses to live up to its obligation to do so.

## **Staying Litigation Brought in Breach of an Arbitration Agreement.**

New York courts are obligated to stay or dismiss litigation brought in breach of an arbitration clause calling for arbitration in New York once it has determined that the parties have agreed to arbitrate that dispute and that its subject matter is arbitrable.

## **Issuing Anti-Suit Injunctions.**

New York courts have the authority to issue anti-suit injunctions enjoining parties from pursuing litigation commenced outside of the United States in breach of an arbitration clause calling for arbitration in New York.

# New York Courts Assist With the Arbitration Process When Called Upon

## **Appointment of Arbitrators.**

New York courts may be called upon to assist in the appointment of arbitrators if the arbitration agreement does not provide for a method of appointment of an arbitrator, if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his or her successor has not been appointed.

## **Preliminary Injunctions in Aid of Arbitration.**

New York courts have the authority to grant preliminary injunctions in aid of arbitration not only before the arbitration panel is constituted, but also after the arbitration is commenced.

## **Attachments in Aid of Arbitration.**

New York courts also have the authority to issue an attachment in aid of pending or prospective arbitrations if an "award to which the applicant may be entitled may be rendered ineffectual" without the attachment.

## **Enforcement of Subpoenas Issued By Arbitrators.**

In arbitrations venued in New York, the arbitral tribunal and counsel are authorized to issue subpoenas to persons or businesses in New York or its environs to provide documentary or testimonial evidence. In the event a person or entity within its jurisdiction refuses to comply with a subpoena, a New York court will carefully review the subpoena for relevance and burden and may exercise its power to compel such person to appear or to impose sanctions for contempt of court.

# The Finality and Enforceability of Arbitration Awards Rendered in New York

New York courts follow a pro-enforcement policy regarding the enforcement of arbitration awards and construe the limited grounds for vacatur narrowly.

Consistent with international practice, international arbitration awards rendered in New York are very rarely vacated. The statutory grounds for vacatur of an award rendered in New York are limited and narrowly construed. Those grounds are (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption by the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. While the law is unsettled as to the continued viability or effect of a judicially-created ground for vacatur, "manifest disregard of the law," its application is exceedingly rare, and few, if any, New York Convention awards have ever been vacated on this ground.

New York courts narrowly construe the grounds for non-recognition of arbitral awards set forth in the New York Convention, and generally enforce New York Convention awards.

## Frequently Asked Questions

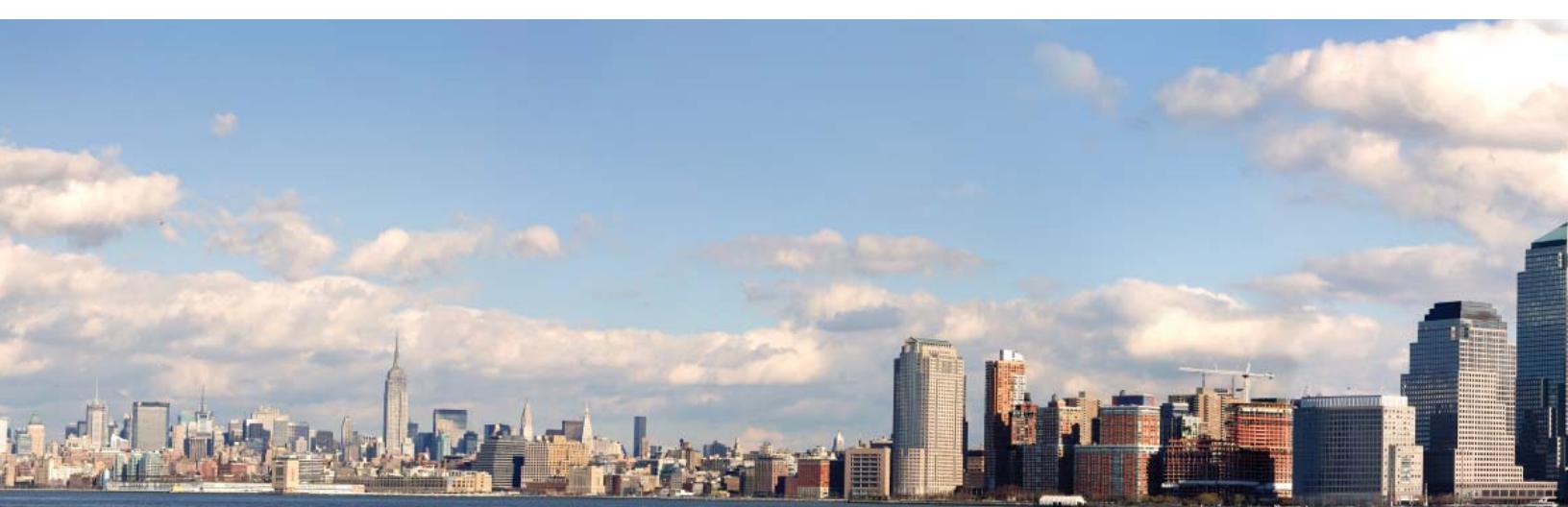
### Nationalities and Professional Qualifications of those Who Serve as Arbitrators or Counsel in New York

#### *Question*

Are there any restrictions as to the nationality or professional qualifications of those who can serve as an arbitrator in New York?

#### *Answer*

In New York, there are no restrictions on the nationality or qualifications of those who can serve as arbitrators or counsel in international arbitrations. In cases where parties seek an arbitrator or counsel who is (or is not) of a particular nationality, it is worth noting that New York is home to experienced international arbitrators and counsel of many different national backgrounds.



## Neutrality of New York Courts

### Question

Are New York courts neutral in resolving litigation arising out of international arbitration agreements or proceedings?

### Answer

Yes. New York, widely regarded as a neutral forum with an independent and experienced court, is one of the most popular venues for arbitration. New York courts are neutral, they do not favor a U.S. party over a non-U.S. party when resolving actions to set aside an arbitral award or other issues arising out of arbitrations venued in New York. New York courts have denied challenges made by U.S. parties to awards made in favor of foreign parties, and confirmed awards against U.S. parties. Examples of decisions by New York courts involving non-U.S. parties include:

- > *Gabriel Capital L.P. v. Caib Investmentbank Aktiengesellschaft*, 28 A.D. 3d 376 (1st Dep’t 2006) (finding that arbitration agreement was enforceable by Austrian entity against New York entity).
- > *R.J. Wilson & Assocs., Ltd. v. Underwriters at Lloyd’s London*, 2009 WL 3055292 (E.D.N.Y. Sep. 21, 2009) (granting U.K. defendant’s motion to compel arbitration against a U.S. corporation).
- > *J.K. Intern., Pty., Ltd., v. Agriko S.A.S.*, 2007 WL 485435 (S.D.N.Y. Feb. 13, 2007) (vacating an order of maritime attachment against foreign party and staying the action in favor of arbitration in London, England).
- > *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 891 N.Y.S.2d 622 (Sup. Ct. N.Y. Co. 2009) (granting order of attachment in favor of Japan-based company).
- > *China Nat’l Chartering Corp. v. Pactrans Air & Sea, Inc.*, 2009 WL 3805596 (S.D.N.Y. Nov. 13, 2009) (enforcing arbitral award in favor of Chinese entity).
- > *Gas Natural Aprovisionamientos, SDG, S.A. v. Atl. LNG Co. of Trinidad & Tobago*, 2008 WL 4344525, (S.D.N.Y. Sep. 16, 2008) (confirming arbitral award in favor of company organized under the laws of the Republic of Trinidad and Tobago).
- > *Telenor Mobile Commc’ns AS v. Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007) (enforcing arbitration award in favor of Norwegian company).
- > *Steelex S.A. v. Dasil Corp.*, 2007 WL 4373262 (E.D.N.Y. Dec. 10, 2007) (confirming arbitral award in favor of Swiss corporation against U.S. corporation).





## New York Law

### *Question*

Is New York commercial law predictable and sufficiently developed to regulate international business transactions in a fair manner?

### *Answer*

Yes. New York has a well-developed body of commercial law. This is one reason why parties to international business transactions often choose New York law to govern their deal, even if the transaction has no connection with New York. Because of New York City's position as a major international financial center, New York courts routinely decide disputes arising out of complex international commercial transactions and often review and apply foreign law. One of the policies underlying the promulgation and interpretation of New York commercial laws is to ensure predictability in business transactions. Courts in other jurisdictions in the United States look to New York precedent for assistance in deciding cases involving commercial transactions. As New York is a common law jurisdiction, courts make binding decisions in areas in which there is no governing statute, enabling the law to develop quickly in response to changing commercial imperatives. The decisions of the higher courts are binding on lower courts, enhancing the predictability of the legal system.

## Neutrality of Party-Appointed Arbitrators

### *Question*

In an arbitration sited in New York, will the party-appointed arbitrators in a three-member tribunal be neutral?

### *Answer*

Yes. The Code of Ethics for Arbitrators in Commercial Disputes promulgated jointly by the American Bar Association and the American Arbitration Association requires that all arbitrators, including party appointed arbitrators, must be neutral, unless all the parties agree otherwise in writing. New York offers a wealth of choices for the selection of arbitrators. New York is well known for its international arbitration practitioners and scholars and affords access to rosters of highly experienced international arbitrators of many nationalities drawn from the ranks of the legal profession as well as other disciplines.



## Qualified, Experienced Legal Professionals

### *Question*

If I choose to arbitrate in New York, will I be able to retain suitable counsel?

### *Answer*

Yes. Among the benefits of designating New York City as the location to conduct international arbitrations is access to the most highly qualified lawyers, experienced in international arbitration, as well as in the substantive law and business aspects relating to many areas of commerce. Many of them are bilingual or multilingual and have experience with multiple legal systems. Many leading international law firms are headquartered or have offices in New York City and have the capacity to perform services in multiple jurisdictions as the dispute may require. New York also has a wealth of expert mediators should the matter require such services.

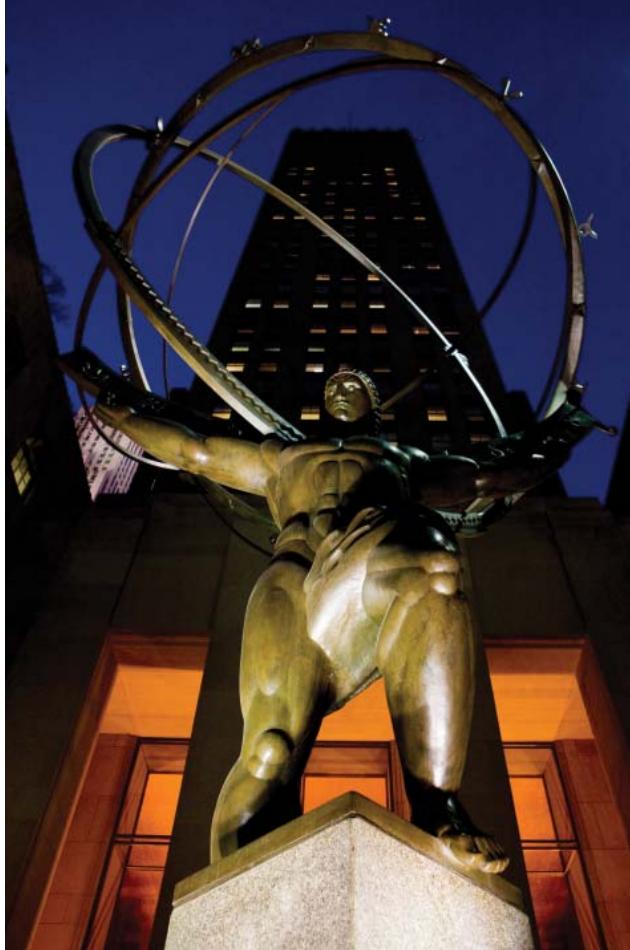
## Grounds for Challenging an Award

### *Question*

Is it possible to expand by contract the grounds upon which New York courts will review international arbitration awards?

### *Answer*

The standards for challenging international arbitration awards rendered in the United States, which are set forth in the Federal Arbitration Act, are narrow and generally track the grounds for non-recognition of arbitral awards set forth in the New York Convention. The United States Supreme Court has held that those statutory standards for the set aside of arbitral awards are exclusive.





## Limited Pre-Hearing Disclosure

### Question

If I choose New York as the place for an international arbitration, does the applicable law require that the procedure include U.S. discovery devices, such as depositions and burdensome e-discovery?

### Answer

No. New York is home to a great many practitioners and arbitrators who are experienced in international arbitration, and who would not seek or allow broad U.S.-style discovery in an international arbitration proceeding, but would be likely to follow the procedures more typically used in international arbitrations throughout the world, such as those set forth in the IBA Rules on the Taking of Evidence in International Arbitration.

On November 6, 2010, the New York State Bar Association (NYSBA) adopted *Guidelines for the Arbitrator's Conduct of the Pre-Hearing Phase of International Arbitrations*. In these Guidelines, the NYSBA makes clear as a matter of policy that "unless the parties agree otherwise, international arbitration in New York is conducted in accordance with internationally accepted practices," both with respect to pre-hearing exchange of evidence and otherwise.

## Absence of Punitive Damages

### Question

If a party chooses New York as the place of arbitration, will the arbitrators have the power to award punitive damages?

### Answer

While arbitrators in the United States do, in principle, have the authority to award punitive damages, such awards are extremely rare in domestic cases and even rarer in international cases. Parties may deprive arbitrators of such authority in their contract or by adopting rules, such as the ICDR Rules or the JAMS International Arbitration Rules, that prohibit arbitrators from awarding punitive damages.

## Unlikelihood of Class Actions

### Question

If I choose New York as the place of arbitration, do I have to be concerned that my arbitration proceeding which involves two parties to a contract will be transformed into a class arbitration.

### Answer

No. The United States Supreme Court's decision in *Stolt-Nielsen S.A. et al. v. Animal Feeds International Corp.*, 130 S.Ct. 1758 (2010) makes it clear that a party to a bilateral contract seeking to bring a case on behalf of a class has to demonstrate an agreement between the parties to allow class actions. This is because, as the Supreme Court held, "[a]n implicit agreement to authorize class arbitration . . . is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate."

## Costs and Attorneys' Fees

### Question

In New York, is each party responsible for its own attorneys' fees and costs for the arbitration notwithstanding the outcome?

### Answer

Arbitrators have the authority to award the prevailing party its attorneys' fees and costs if the arbitration clause or the applicable rules provide arbitrators with the authority to do so. Conversely, if the parties agree that attorneys' fees and costs shall not be awarded against the losing party, such agreements are generally respected.

## Drafting Arbitration Clauses for Arbitrations Venued in New York

The standard arbitration clauses recommended by the leading arbitral institutions are generally appropriate for cases venued in New York. Drafters of arbitration clauses designating New York as the place of arbitration may wish to take into account the following considerations:

- > **Authority to decide on arbitral jurisdiction.** As noted, an arbitral tribunal has authority to determine its own jurisdiction where there is "clear and unmistakable" evidence that the parties intended to grant such authority to the tribunal. Most international arbitration rules empower the arbitrators to decide these questions. The drafters may also include language along the following lines in their arbitration clause:

"The arbitral tribunal shall have the power to rule upon any challenge to its jurisdiction."

- > **Allocation of costs and fees.** New York respects the parties' freedom of contract with respect to the allocation of costs and fees in arbitration. Parties are free to include in their arbitration clause a provision that the prevailing party shall recover from the other side the prevailing party's reasonable costs and attorneys' fees incurred in connection with the arbitration. The so-called "American rule" is that each party bears its own costs and attorneys' fees regardless of the outcome of the arbitration. However, the American rule does not necessarily apply to international arbitration proceedings in New York, and some arbitration rules empower the arbitrators to allocate costs and fees. If drafters of arbitration clauses with New York as the seat of the arbitration want to make clear that the arbitrators have the authority to allocate fees and expenses, they may so provide in their arbitration clause, by including the following language:

"The arbitrators are authorized to include in their award an allocation to any party of such costs and expenses, including attorneys' fees, as the arbitrators shall deem reasonable."

- > **Punitive damages.** While the award of punitive damages in arbitrations is rare, any possibility of punitive damages may be eliminated by choosing arbitration rules that prohibit the award of punitive damages (such as the ICDR's or JAMS's International Arbitration Rules), or by adding the following language to the arbitration clause:

"The arbitrators are not empowered to award punitive or exemplary damages, and each party hereby waives any right to seek or recover punitive or exemplary damages with respect to any dispute resolved by arbitration."

- > **Exchange of Evidence.** International arbitrators sitting in New York, as in other international venues, need not, and generally do not, permit broad discovery. If the parties wish to explicitly limit disclosure, they can provide for this in their arbitration clause. Drafters seeking to limit the scope of disclosure to the exchange of documents between the parties, for example, could use the following language:

"The parties agree that pre-hearing disclosure shall be limited to documents that each side will present in support of its case, and non-privileged documents essential to a matter of import in the proceeding for which a party has demonstrated a substantial need."

- > **Confidentiality.** Arbitration proceedings are private, but if parties choosing New York as the seat of their arbitration wish to provide for confidentiality, they should include a clause providing for confidentiality, of which the following is an example:

"The parties and arbitrators shall keep confidential all awards in the arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party or arbitrator by legal duty, to protect or pursue a legal right or to enforce or challenge an award in legal proceedings before a court or other judicial authority."

- > **Provisional measures.** If drafters want to signal to a court that a court order in support of provisional measures would not be inconsistent with the arbitration agreement, the following language can be added to an arbitration clause:

"Nothing in this Agreement shall prevent either party from seeking provisional measures from any court of competent jurisdiction, and any such request shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate."

# Practical Issues

## Finding Mediators and Arbitrators

Highly qualified arbitrators and mediators can be found by contacting various provider organizations. Below is a representative list of provider organizations. All of these organizations have international panels of arbitrators and mediators, as well as panels dedicated to specific subject areas.

1. International Centre for Dispute Resolution ("ICDR"), the international arm of the American Arbitration Association ([www.icdr.org](http://www.icdr.org)). The ICDR's headquarters are in New York:  
1633 Broadway, 10th Floor  
New York, NY 10019  
USA  
Tel: +1 212-716-5800
2. JAMS ([www.jamsadr.com](http://www.jamsadr.com)).  
The contact information for its New York office is:  
620 Eighth Avenue, 34th Floor  
New York, NY 10018  
USA  
Tel: +1 212-751-2700
3. United States Counsel for International Business (USCIB), the United States arm of the ICC ([www.uscib.org](http://www.uscib.org)). It has an office in New York:  
1212 Avenue of the Americas  
New York, NY 10036  
USA  
Tel: +1 212-354-4480
4. International Institute for Conflict Prevention and Resolution ([www.cpradr.org](http://www.cpradr.org)).  
The CPR is headquartered in New York:  
575 Lexington Avenue, 21st Floor  
New York, NY 10022  
USA  
Tel: +1 212-949-6490

Furthermore, various local bar associations may be contacted. They have alternative dispute resolution sections/committees and may be a good source of recommendations for neutrals, facilities, law firms and other service providers. They have as members leading international arbitration practitioners in New York; they hold regular meetings, sometimes with guest speakers; and they seek to facilitate the exchange of information and views on various topics of international arbitration. These bar associations include:

1. New York State Bar Association (Dispute Resolution Section and International Section).  
Further information can be obtained at the website ([www.nysba.org](http://www.nysba.org)).  
For the Dispute Resolution Section, to contact the leadership and/or join the section: [www.nysba.org/drs](http://www.nysba.org/drs)  
For the International Section, to contact the leadership and/or join the section: [www.nysba.org/ilp](http://www.nysba.org/ilp)
2. New York City Bar Association (NYCBA) (Alternative Dispute Resolution Committee, Arbitration Committee and International Commercial Disputes Committee). Further information can be obtained at the website ([www.abcnyc.org](http://www.abcnyc.org)).
3. New York County Lawyers Association (NYCLA) (Arbitration Committee and ADR Committee).  
Further information can be obtained at the website ([www.nycba.org](http://www.nycba.org))
4. The International Arbitration Club of New York. Further information can be found on the website ([www.arbitrationclub.com](http://www.arbitrationclub.com)).

## Finding Law Firms Specializing in the Field

Many leading international law firms have offices or are headquartered in New York City. Among the benefits of designating New York City as the location to conduct international arbitrations is access to highly qualified lawyers, experienced in international arbitration, many of whom are bilingual or multilingual. Information can easily be located in legal directories or on the internet.

## Support Services

Other services to support international arbitration needs, such as translators, interpreters and court reporters are also readily available. A search of the membership directories of the New York Circle of Translators, Inc. at [www.NYCTranslators.org](http://www.NYCTranslators.org), under "Find Translator/Interpreter" or New York City Online Directory & Guide at [www.citidex.com](http://www.citidex.com) under "Category Indexes" letter "T" and then "Translation Services & Interpreters" will provide information on translators and interpreters by language skills and by numerous sub-categories relating to industry specialties and type of law. Court reporting services provide such services as video streaming over the internet, real time depositions, electronic transcripts, video conferencing, videography, meeting and conference rooms.

## Hearing Rooms

The provider organizations, AAA/ICDR, CPR and JAMS all have hearing rooms available for rental for the day. The local bar associations, NYCBA and NYCLA, also have conference facilities that are available for rental on a daily or even hourly basis. Other possibilities are the local offices of one of the arbitrators, hotels, or commercial providers of conference facilities.

## Travel to New York

### Major Airports

Three major international airports serve New York:

- > John F. Kennedy International Airport (about 15 miles from midtown Manhattan)
- > LaGuardia Airport (about 8 miles from midtown Manhattan)
- > Newark Liberty International (about 16 miles from midtown Manhattan)

Information about all three airports is available at [www.panynj.gov/airports](http://www.panynj.gov/airports). For information about U.S. visas, see <http://travel.state.gov>.

## Lodging and Activities

Most New York law firms have arrangements with one or more first class hotels where clients of the firms can enjoy excellent accommodations at significantly reduced rates.

New York is the cultural and culinary capital of the world. Excellent restaurants abound and offer diverse cuisine from around the world at a wide range of prices. New York theaters (on and off Broadway) are world famous, and New York's excellent museums and many other focal points provide an almost endless array of activities for those with time to enjoy them.

**This pamphlet, based on New York law, is intended to inform, not advise. No one should try to interpret or apply any law without an attorney's help. Produced by the New York State Bar Association in cooperation with the Dispute Resolution Section.**





NEW YORK STATE BAR ASSOCIATION

**DISPUTE RESOLUTION SECTION**

**INTERNATIONAL SECTION**

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