May 5, 2010

RESTATEMENT OF INTERNATIONAL COMMERCIAL ARBITRATION

MOTION FOR CLARIFICATION OF THE TREATMENT OF CONVENTION AWARDS RENDERED IN THE UNITED STATES

IT IS HEREBY MOVED that the Reporters be invited to give further thought to the enforcement of New York Convention awards rendered in the United States, and in any event be requested to clarify the treatment of that subject in Tentative Draft No. 1, in light of the applicable statutory provisions and the case law on the subject.

Proposed by Richard W. Hulbert of New York

STATEMENT IN SUPPORT OF THE MOTION

The United States in 1970 became a party to the 1958 New York Convention, which applies not only to foreign arbitral awards but also to geographically domestic awards that are "not considered as domestic awards in the State where their recognition and enforcement are sought." (Convention, Art. I, par. 1, set out in Appendix A, p. 239, of T.D. No. 1) Chapter 2 of the Federal Arbitration Act, which was enacted to implement American accession to the Convention, took advantage of this provision respecting "non-domestic" awards to include within the statutory definition of "awards falling under the Convention" all commercial arbitral awards except those entirely between citizens of the United States that have no "reasonable relation with one or more foreign states." (9 U.S.C. § 202, set out at p. 256 of Appendix C to T.D. No. 1). By virtue of this statutory command the Convention thus applies to these "international awards" whether the awards result from arbitrations conducted in the United States or elsewhere. Section 207 of Chapter 2 provides that the district court, on application by any party to the arbitration, "shall confirm" any such award, that is, shall convert the award into a judgment of the court, "unless [the court] finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." (9 U.S.C. § 207, referring to Convention Art. V; see pp. 257, 240-41 of T.D. No. 1).

The statute thus establishes a single regime for the enforcement of "Convention awards" regardless of the geography of the arbitration: the test for application of the Convention is the international character of the arbitration, not the place of it. The case law, consistent with the statute and the Convention, has held that the enforcement ("confirmation" is the

statutory term) of these Convention awards, including Convention awards rendered in the United States, is to be judged exclusively by reference to the standards set out in Article V of the Convention, as specified in Section 207, and has rejected the application of other standards applicable to enforcement of purely domestic arbitration awards governed by Chapter 1 of the FAA. Section 208 of Chapter 2 underscores that exclusivity by providing that the provisions of Chapter 1 apply in proceedings under Chapter 2 only "to the extent . . . not in conflict with this chapter or the Convention as ratified by the United States." (9 U.S.C. § 208, set out at p. 258 of T.D. No. 1)

T.D. No. 1 appears to be in conflict with the statutory scheme and invites further reflection and clarification, which is the objective of this motion.

1. Contrary to the provision of Section 201 of Chapter 2, that "The Convention . . . shall be enforced in United States courts in accordance with this chapter," § 5-3(b) of T.D. No. 1 provides that a party has the option of seeking enforcement of a Convention award rendered in the United States, although not a foreign Convention award, under Chapter 1 of the FAA as well as Chapter 2. The standards for enforcement of an award in Chapter 1, however, are not those of the Convention, and the treaty obligation of the United States is to apply Convention standards to the enforcement of Convention awards, including those rendered in the United States.

2. The Draft defines "enforcement" restrictively as a term applicable only to Convention awards rendered abroad (T.D. No. 1, pp. 2-3). Sections 5-6 and 5-8 through 5-14, which present the limited grounds on which "a Convention award" may be refused enforcement in the United States, thus appear to be wholly inapplicable to Convention awards rendered in the United States, even though the term "Convention award" is itself defined in Chapter 1 to include all Convention awards, including those rendered in the United States. In consequence, so far as concerns enforcement of Convention awards rendered in the United States, the Draft (by omission) treats them as if not subject to the Convention. This omission appears to be directly in conflict with Section 207, which provides for enforcement of Convention awards without distinction as to the place of arbitration.

3. In contrast to the special narrow sense given to "enforcement," the term "recognition" is not specially defined. Thus, it appears that the recognition of Convention awards rendered in the United States may be refused only on Convention grounds, that is, that §§ 5-6 and 5-8 through 5-14 <u>do</u> apply to recognition of these domestic Convention awards, but not to enforcement of them. This disparate treatment of recognition and enforcement appears to be directly in conflict with Article V of

the Convention, which treats recognition and enforcement of awards as subject to the same rules.

It was open to the United States, in acceding to the New York Convention, to treat all arbitral awards rendered in the United States as subject to whatever fate domestic legislation visited on them, without regard to the Convention. That is not, however, the choice that Congress made in enacting Chapter 2. It would be distinctly advantageous for the future of international commercial arbitration in the United States if American law were seen to embrace, rather than repudiate, the statutory scheme of a uniform regime for the treatment of international awards, regardless of the place of arbitration. That would be consistent with developments in international commercial arbitration elsewhere and with the expectations of the international arbitration fraternity. It would also eliminate much of the confusion, incoherence, inconsistency between circuits, opportunities for obfuscation and delay, and other problems arising out of Chapter 1 of the FAA, to which the extraordinary extent of the Reporters' valuable Notes is a vivid testimonial. The current project offers the Institute an opportunity to make an important contribution to American law on the subject. It would be a source of regret if the opportunity were missed.