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## An Empirical Survey of International Commercial Arbitration Cases in the US District Court for the Southern District of New York, 1970-2014

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## **Abstract**

This Article identifies and organizes the circumstances in which national courts play a role in international commercial arbitrations— border crossings. It then records and analyzes empirical data of these border crossings in cases filed in a key national court for international arbitration-related litigation: the US District Court for the Southern District of New York. Data were collected from the date of entry into force for the United States of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) on December 29, 1970 to September 15, 2014. Based on interpretation of these data, the Article suggests how to regulate the border crossings to best balance the policy goals of international commercial arbitration with reasonable allowances for national sovereignty and fidelity to the New York Convention.

**KEYWORDS:** Border Crossing; enforcement; arbitration; tribunal; SDNY; normative prescriptions; Data

## ARTICLE

# AN EMPIRICAL SURVEY OF INTERNATIONAL COMMERCIAL ARBITRATION CASES IN THE US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, 1970-2014

*Vera Korzun\* & Thomas H. Lee\*\**

### ABSTRACT

*This Article identifies and organizes the circumstances in which national courts play a role in international commercial arbitrations—border crossings. It then records and analyzes empirical data of these border crossings in cases filed in a key national court for international arbitration-related litigation: the US District Court for the Southern District of New York. Data were collected from the date of entry into force for the United States of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) on December 29, 1970 to September 15, 2014. Based on interpretation of these data, the Article suggests how to regulate the border crossings to best balance the policy goals of international commercial arbitration with reasonable allowances for national sovereignty and fidelity to the New York Convention.*

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### *INTRODUCTION*

The role of national courts in international commercial arbitration is more controversial than in domestic arbitration. When arbitration occurs in the fully domestic context, it displaces public court adjudication. For this reason, many national laws cabin off certain subject matter from arbitration altogether. And with respect to subject matter for which arbitration is permitted, national laws typically allow for oversight by courts to protect the rights of more disadvantaged parties. But in the international setting, any national government's interests are diminished because providing credible dispute resolution is believed to increase the net inflow of foreign business. Moreover, the domestic parties are usually local companies doing international business or State entities, not disenfranchised individuals (e.g., women, minorities, workers, the poor).

Indeed, there is a Platonic ideal of international arbitration as a fully autonomous transnational system of dispute resolution.<sup>1</sup> On this

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1. See, e.g., Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 *ARB. INT'L* 179, 181 (2006) ("Today, there is increasingly, I suggest, a new regime. International

view, two or more parties from different countries doing business together agree to resolve disputes privately without any assistance from national courts potentially hostile to the interests of foreign litigants. The parties' agreement to arbitrate reflects an explicit, mutual rejection of national courts or other national public fora for dispute resolution. The ideal is realized in the many cases in which the parties do not contest that they agreed to arbitrate, proceed to arbitrate the dispute, and then accept the award that results.

The reality, however, is that international arbitration always operates in the shadow of national courts, which often intervene directly. It is accordingly more accurate to say that international arbitrations and national courts are engaged in an ongoing partnership that has evolved over time. Indeed, most of the laws, rules, and commentary on international arbitration address the instances in which parties who contracted for international arbitration may choose or be forced to litigate in national courts. Thus, for instance, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"), the touchstone treaty on international commercial arbitration, speaks specifically to the obligations of the signatory States to honor agreements to arbitrate and to recognize and enforce arbitral awards.<sup>2</sup>

As the provisions of the Convention suggest, the state—principally through national courts—may have to intervene at two junctures: (1) before an arbitral proceeding, if a party asserts that it did not agree to arbitrate at all or (2) after the proceeding, if a party refuses to comply with an arbitral award. If one focuses on these explicit instances, the relationship between national courts and international arbitral tribunals seems to resemble a relay race where the baton is passed from judge to arbitrator and then back to judge. But, as the British international lawyer Lord Mustill, who coined the

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arbitration is a *sui juris* or autonomous dispute resolution process, governed primarily by non-national rules and accepted international commercial rules and practices. . . . As such, the relevance and influence of national arbitration laws and of national court supervision and revision is greatly reduced.”)

2. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. The New York Convention has achieved nearly worldwide acceptance with 156 states to date having become parties to the Convention. See United Nations Commission on International Trade Law (UNCITRAL), Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

relay-race analogy, observed, there are many more ways that national courts might be involved in international arbitrations:

In real life the position is not so clear-cut. Very few commentators would now assert that the legitimate functions of the court entirely cease when the arbitrators receive the file, and conversely very few would doubt that there is a point at which the court takes on a purely subordinate role. But when does this happen? And what is the position at the further end of the process? Does the court retake the baton only if and when invited to enforce the award, or does it have functions to be exercised at an earlier stage, if something has gone wrong with the arbitration, by setting-aside the award or intervening in some other way?<sup>3</sup>

Despite the attention paid to the role of national courts in international arbitrations,<sup>4</sup> there is no large-n empirical research and surprisingly little systemic analysis regarding what this Article will refer to as *border crossings*:<sup>5</sup> the various paths by which parties that

3. D. Alan Redfern, *Arbitration and the Courts: Interim Measures of Protection—Is the Tide About to Turn?*, 30 *TEX. INT'L L.J.* 71, 75 (1995) (quoting Lord Mustill, *Comments and Conclusions*, in *CONSERVATORY AND PROVISIONAL MEASURES IN INTERNATIONAL ARBITRATION* 118, 119 (ICC Int'l Court of Arbitration ed., 1993)). Lord Mustill famously compared the relationship between courts and arbitrators to a relay race in an address at an international arbitration conference:

Ideally, the handling of arbitrable disputes should resemble a relay-race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffectual. When the arbitrators take charge they take over the baton and retain it until they have made an award. At this point, having no longer a function to fulfill, the arbitrators hand back the baton so that the court can in case of need lend its coercive powers to the enforcement of the award.

*See id.* at 74-75.

4. *See, e.g.*, S.I. Strong, *Navigating the Borders Between International Commercial Arbitration and U.S. Federal Courts: A Jurisprudential GPS*, 2012 *J. DISP. RESOL.* 119, 121-22 (2012) (providing “a brief introduction to the relationship between international arbitral proceedings and U.S. federal courts”). *See generally* ICCA CONGRESS SERIES NO. 10, *INTERNATIONAL ARBITRATION AND NATIONAL COURTS: THE NEVER ENDING STORY* (Albert Jan van den Berg ed., 2001); Charles C. Correll, Jr. & Ryan J. Szczepanik, *No Arbitration is an Island: The Role of Courts in Aid of International Arbitration*, 6 *WORLD ARB. & MEDIATION REV.* 565 (2012).

5. This Article uses the phrase *border crossings* purely in a descriptive sense, without any intent to imply that any particular interaction between an international arbitration and a national court is good or bad, cooperative or confrontational. This usage contrasts, for instance, with Gary Born’s reference to *border crossings*, which he characterizes as sanctioned interventions by national courts, and “border incursions,” which he condemns as counterproductive. *See* S.I. Strong, *Border Skirmishes: The Intersection Between Litigation and International Commercial Arbitration*, 2012 *J. DISP. RESOL.* 1, 1, 9, 11 (2012) (citing

have plausibly opted for international arbitration may nonetheless end up in national courts. Specifically, there is very little scholarship tracking or analyzing data about the incidence of border crossings in actual national court systems;<sup>6</sup> indeed, this is the first US empirical survey. Furthermore, much of the sizable anecdotal scholarship on the subject of border crossings is fragmentary. Authors typically choose to focus on one or a few categories of border crossings, most prominently those related to the judicial enforcement of arbitration agreements and the judicial role in setting aside or enforcing arbitral awards.<sup>7</sup> There is also growing interest in the trend of national courts ordering pre-award interim, or post-award supplemental, relief in aid of arbitral tribunals, especially as against State parties in the investor-state context.<sup>8</sup> The few accounts that pull all of this together typically list the different categories of judicial intervention, describe them, and give a few illustrative examples. To date, no one has attempted an empirical study of the different types of border crossings together and systematically.

Another common theme in the existing commentary by both academics and practitioners is perceived competition between

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Gary Born, Partner, Wilmer, Cutler, Pickering, Hale and Dorr, LLP, Keynote Address, Center for the Study of Dispute Resolution Annual Symposium 2011, Boarder Skirmishes: The Intersection between International Commercial Arbitration and Litigation (Oct. 21, 2011) [hereinafter Gary Born Keynote] (introducing points made by Gary Born in his keynote address at a symposium event in October 2011). Another similar but distinguishable concept is José Alvarez's idea of *boundary crossings*, by which he means the potentially problematic migration of interpretive techniques across different subject matters in international law. See generally José E. Alvarez, *Beware: Boundary Crossings*, in BOUNDARIES OF RIGHTS, BOUNDARIES OF STATE (Tsvi Kahana & Anat Scolnicov, eds.) (forthcoming Apr. 2016) (N.Y.U. Law Sch. Pub. Law Research Paper Series, Working Paper No. 14-51, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2498182](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2498182).

6. There are some rare exceptions. See, e.g., Johan Munck & Helga Hullmann, *Mål om Klander av Skiljedom i Hovrätterna* [Challenge of Arbitral Awards before Courts of Appeal] 2 SvJT 141 (2015), <http://www.sccinstitute.com/media/69180/2015hftxxxxmunckhullmann-eng.pdf> (providing a review of challenges of arbitral awards opened in the period between January 1, 2004 and May 31, 2014 before Swedish Courts of Appeal).

7. See generally George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 YALE J. INT'L L. 1 (2012); Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16 (1999); Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT'L ARB. 297 (2007).

8. A prime example is discovery of assets for enforcement of awards, especially in the investor-state context against state parties. See, e.g., Brian King et al., *Enforcing Awards Involving Foreign Sovereigns*, in INTERNATIONAL COMMERCIAL ARBITRATION IN NEW YORK 413, 424-37 (James H. Carter & John Fellas eds., 2010) (discussing attachment and execution in cases involving foreign sovereigns).

national courts and international arbitral tribunals. The two are often portrayed as fighting for jurisdiction. National courts are depicted as defending their jurisdictions to decide disputes with a center of gravity within their sovereign borders against overreaching or encroachment by international arbitral tribunals.<sup>9</sup> And the rules and commentary of the international arbitration community emphasize strategies to avoid resort to national courts as much as possible, presumably to prevent a party from backsliding on its commitment to resolve a controversy by private means.

A concrete example of this tendency to minimize national court involvement is the consensus in the international arbitration literature that a State's courts cannot set aside arbitral awards solely because the parties contractually chose that State's law to govern the substance of any dispute.<sup>10</sup> There is a plain-language suggestion to the contrary in the New York Convention, which states that a signatory State may refuse recognition and enforcement of an award "set aside or suspended by a competent authority of the country in which, *or under the law of which*, that award was made."<sup>11</sup> As a matter of plain language, if an arbitral panel decides a contractual dispute under New York law pursuant to a choice of law provision that the parties agreed to, that arbitral award was made "*under the law*" of New York. It is accordingly at least plausible that a New York court would have set aside jurisdiction even if the arbitral seat was Paris, France and the parties were non-US. But international arbitration experts almost universally construe this textual ambiguity in the Convention as foreclosing such an interpretation, despite a lack of evidence in the legislative history dispositively rebutting the plain-language reading.<sup>12</sup>

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9. See, e.g., Alan Scott Rau, *Crossing the Threshold: Arbitral Jurisdiction after BG Group*, in *MÉLANGES EN L'HONNEUR DU PROFESSEUR PIERRE MAYER* (L.G.D.J. ed.) (forthcoming 2015) (Energy Center Research Paper No. 2014-04, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2492627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492627).

10. See, e.g., 3 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2996-3001 (2d ed. 2014) [hereinafter 3 BORN]; NIGEL BLACKABY ET AL., *REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION* 591-92 (5th ed. 2009) [hereinafter REDFERN & HUNTER].

11. New York Convention, *supra* note 2, art. V(1)(e) (emphasis added).

12. The New York Convention says "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." Born, for instance, argues that the reference to "under the law of which" pertained to the "largely theoretical case" where the parties provided in the arbitration agreement for a procedural law governing the arbitration different from the law of the place of arbitration. See 3 BORN, *supra* note 10, at 2990. He says that "The Convention's drafting history supports this conclusion" with a footnote to a different part of his treatise. *Id.* However, the cross-referenced part, §11.03[C][1][c], supplies no evidence from the drafting history on this point. In the absence of



This Article aims to provide the first comprehensive empirical mapping of the various kinds of border crossings and, in so doing, to generate a richer understanding of how to regulate and navigate the crossings. This mapping will be done by means of a survey of data on New York Convention-related litigation in the US federal trial court for the Southern District of New York, which includes Manhattan. The federal district court in the SDNY is the busiest venue for border crossings in the world—the John F. Kennedy (JFK) Airport of the international commercial arbitration community. A snapshot of border crossing statistics at the JFK of international arbitration cases can help scholars and practitioners to design and implement more efficient and productive partnerships between national courts and international commercial arbitration. And, at a deeper level, knowledge of the empirical facts on the ground helps us to comprehend what that project of international arbitration actually is—not a Platonic dream of an autarkic system of private dispute resolution across borders, but rather a hybrid private-public model that takes a middle path to avoid the perceived parochialism of full resort to national courts.

The Article proceeds in three parts. Part I identifies, describes, and organizes eleven different border crossings—scenarios in which parties that have plausibly chosen international arbitration may find themselves in national courts. Part II collects and describes survey data from the docket of the Federal District Court for the Southern District of New York from December 29, 1970 (the date when the New York Convention entered into force for the United States) to September 15, 2014, in order to track frequencies per border crossings and trends over time. Part III—the analytical and normative part—takes the description and observations generated by the prior parts to suggest how the role of national courts in international arbitrations can be reconceived. This is a first cut at the data—we envision future studies to examine in greater depth the qualitative information in the collected data on winners, losers, types of claims, and amounts of damages. A brief conclusion follows.

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any such legislative history, it seems more reasonable to construe the language of the Convention according to its plain meaning rather than as referring to an implausible “theoretical” possibility, which Born himself called “a highly unusual, ‘once-in-a-blue-moon’ occurrence.” *Id.* at 2995 (quoting *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 564 F.3d 274, 291 (5th Cir. 2004)).

I. *THE BORDER CROSSINGS*

The words *border crossings* as used in this Article refer to the various paths by which parties that have plausibly opted for international arbitration may nonetheless end up in national courts. Such crossings may be bidirectional: parties may move from an international arbitral proceeding to a national court proceeding and then back to international arbitration. For example, parties may find themselves in a court requesting discovery from non-parties in the United States and then go back to an arbitral tribunal to present the evidence collected with the court's assistance.

*International arbitration*, in turn, means consensual resolution of disputes between parties of differing nationalities by a private decisionmaker or decisionmakers whose adjudication the disputants have agreed to accept as binding. As the parties in international commercial arbitration generally come from different countries, they do not share a national court. Should a dispute arise in the absence of an arbitration agreement, both sides expect that national courts will favor their own nationals. And so, the parties typically agree to private international arbitration as a substitute to national courts. By contrast, in domestic arbitration, the parties share nationality, and so they are not as dubious about bias in the national court.

Consequently, in the international context the parties have a greater preference for arbitration autonomy to keep resort to national courts to the minimum required by the New York Convention. A key driver behind the growing popularity of international arbitrations is the Convention, itself a multilateral treaty ratified by 156 countries requiring members to enforce foreign or non-domestic arbitration agreements and awards subject to limited exceptions. There is no comparable multilateral treaty for the enforcement of foreign court judgments.

Private dispute resolution by international arbitration thus stands at the crossroads of international and national legal orders. The process occurs under the long shadow of an international law instrument—the New York Convention. But the rules of decision applied to any dispute that is arbitrated are usually drawn from national legal orders, whether of one of the parties or of a benchmark

jurisdiction, like New York for business contract law.<sup>13</sup> Furthermore, although in many instances parties will rely exclusively on the private dispute resolution process, often under the auspices of an institution like the International Chamber of Commerce (the “ICC”), there will be times when a party brings some aspect of the dispute to a national court.

As noted earlier, almost all international arbitration experts acknowledge the essential part that national courts play in the arbitral process.<sup>14</sup> As Lord Mustill observed:

[T]he arbitral process cannot remain effective without a partnership between that process and the courts. The old and sterile confrontation between the “minimalists” and the “maximalists” regarding the part to be played by the domestic courts has now given way to a recognition that the courts must recognise the essential role of arbitration in international commerce, and give it the maximum permissible support; and a converse recognition that arbitration cannot flourish without that support.<sup>15</sup>

Gary Born also underlined the important role of national courts in the international commercial arbitration process,<sup>16</sup> pointing to three specific junctures: (1) enforcement of international arbitration agreements, (2) enforcement of international arbitral awards, and (3) support of arbitral proceedings—for instance, by appointing arbitrators, assisting in the resolution of jurisdictional disputes, affording provisional measures, and facilitating evidence taking.<sup>17</sup>

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13. We hear of invocations of *lex mercatoria*, *lex petrolea*, and so forth, but they are a minority. By the same token, the parties can opt for *ex aequo et bono* arbitration by explicit choice, but this is rare outside of specialized industries and smaller-stakes cases.

14. See, e.g., WILLIAM W. PARK, *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE* 181 (2d ed. 2012) (“[S]ome measure of judicial scrutiny over arbitral jurisdiction remains a vital safeguard to the integrity of the process, and constitutes an essential corollary to enforcement of legitimate awards.”); REDFERN & HUNTER, *supra* note 10, at 441 (“[T]he involvement of national courts in the international arbitration process remains essential to its effectiveness.”); W. Michael Reisman & Heide Iravani, *The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT’L ARB. 5, 16 (2010) (“But arbitration is not an autonomous system . . . its functioning is inextricably linked to national courts.”).

15. Lord Mustill, *supra* note 3, at 118.

16. See Strong, *supra* note 5, at 9 (referring to Gary Born who, in his keynote address, outlined instances of necessary and desirable involvement of courts in international commercial arbitration).

17. See *id.* at 9-10.

The normative argument for court interventions in the international arbitral process seems especially strong in cases at two opposite ends of a spectrum. At one end are due process-level violations of procedural fairness. An international arbitration may be so poisoned by unfairness against one side that any resultant award should be set aside by a court at the seat of arbitration. On the other end of the spectrum is a lawsuit to recognize or enforce an arbitral award against an award debtor who was afforded notice and full and fair opportunity to make its case before a competent arbitral tribunal. In such a case, a court order reinforces the integrity of the international arbitral process by coercing the award debtor to pay.

International arbitration scholars and practitioners tend to criticize and warn against national court interference in the arbitral process in a range of other circumstances in between the two ends of the spectrum.<sup>18</sup> The most notable of these are undue interference of courts into the arbitrators' competence to decide their own jurisdiction or attempts by national courts to set aside awards generated by arbitral proceedings rendered in foreign countries and under the procedural law of foreign countries.<sup>19</sup>

No list of the border crossings can be fully comprehensive, but the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law" or "Model Law")<sup>20</sup> provide two useful starting points. The New York Convention explicitly mentions two state intervention points—actions to enforce arbitration agreements and actions to enforce or recognize arbitral awards. The Convention also makes indirect reference to a third type of border crossings—an action to set aside an award. The text of the UNCITRAL Model Law, which is commonly perceived as

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18. *See, e.g.*, 2 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2189 (2d ed. 2014) [hereinafter 2 BORN] ("[L]eading international arbitration conventions, arbitration legislation and institutional rules all adopt a basic principle of judicial non-interference in the ongoing conduct of the arbitral proceedings. This principle is fundamentally important to the efficacy of the international arbitral process. . . .").

19. *See, e.g.*, 3 BORN, *supra* note 10, at 2995-3001 (criticizing as "misconceived and violat[ing] both the language and purposes of the Convention" the decisions of Indian, Pakistani, and Indonesian courts, which have construed Article V(1)(e) of the New York Convention as referring to the substantive law applicable to the merits of the dispute rather than the procedural law of arbitration).

20. UNCITRAL Model Law on International Commercial Arbitration, G.A. Res. 40/72, U.N. GAOR, 40th Sess., Supp. No. 17, Annex I, U.N. Doc. A/40/17 (Dec. 11, 1985), *amended by* G.A. Res. 61/33, U.N. GAOR, 61st Sess., Supp. No. 17, U.N. Doc. A/61/17 (Dec. 4, 2006) [hereinafter UNCITRAL Model Law].

seeking to constrain court involvement in international arbitration,<sup>21</sup> explicitly contemplates a role for the “competent court” in the arbitral process in at least 13 out of the 47 articles of the Model Law.<sup>22</sup> These articles can be grouped into 10 discrete types of border crossings—the 3 referenced in the New York Convention, and 7 others:

- (1) enforcement of the arbitration agreement (Article 8);
- (2) court issuance of interim measures (Articles 9 and 17 J);
- (3) appointment of arbitrators and related measures (Articles 11(3) and 11(4)),<sup>23</sup>
- (4) adjudication of a challenge of an arbitrator following an unsuccessful challenge under the arbitration agreement or before the arbitral tribunal (Article 13(3));
- (5) adjudication of the termination of the arbitrator’s mandate in cases of failure or impossibility to act by an arbitrator (Article 14);
- (6) adjudication of a preliminary ruling by an arbitral tribunal upholding its own jurisdiction (Article 16(3));
- (7) recognition and enforcement of interim measures issued by an arbitral tribunal (Articles 17 H and 17 I);
- (8) court assistance to arbitral tribunals in taking evidence (Article 27);
- (9) setting aside of arbitral awards (Article 34); and
- (10) recognition and enforcement of arbitral awards (Articles 35 and 36).<sup>24</sup>

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21. *See, e.g.*, REDFERN & HUNTER, *supra* note 10, at 441 (“The Model Law seeks to exclude the involvement of the courts as far as possible.”); *see also* UNCITRAL Model Law, *supra* note 20, art. 5.

22. *See* UNCITRAL Model Law, *supra* note 20, arts. 8-9, 11, 13-14, 16, 17 H-17 J, 27, 34-36.

23. Note that under Article 15 of the UNCITRAL Model Law, the same appointment procedure, involving potential reliance on the court, is used when the appointment of substitute arbitrators is needed. *See id.* art. 15.

24. *See id.* arts. 8-9, 11, 13-14, 16, 17 H-17 J, 27, 34-36; *see also id.* art. 6, which allows each State adopting the law to specify the court or other authority for certain functions of arbitration assistance and supervision as provided for in articles 11(3) (dealing with failure to agree on procedure for appointment of arbitrators), 11(4) (failure to act under an agreed appointment procedure), 13(3) (court deciding on challenge of arbitrators following an unsuccessful challenge with the arbitral tribunal), 14 (deciding on the termination of the arbitrator’s mandate following his/her failure or impossibility to act), 16(3) (deciding whether arbitral tribunal has jurisdiction) and 34(2) (recourse to a court against an arbitral award by an application for setting aside).

Another type of border crossing that is not mentioned in the UNCITRAL Model Law but which has a high current profile is litigation in national courts to obtain evidence or otherwise to aid attachment of the assets of an award debtor within the relevant jurisdiction. In summary, then, there appears to be a total of 11 categories of border crossings (*See* Table 1).

Table 1. Circumstances in Which a National Court Might Be Asked to Intervene in an International Arbitration

	<b>Border Crossing (*: indicates a principal crossing, i.e., recognized by the New York Convention)</b>	<b>Timing with respect to arbitral proceeding</b>	<b>Relevant Provisions of the New York Convention or UNCITRAL Model Law</b>	<b>Likely National Courts (+: indicates a clear <i>primary</i> jurisdiction)</b>
1.	Enforcement of the arbitration agreement*	Before or during	New York Convention Art. II; UNCITRAL Model Law Art. 8	Seat of arbitration+; national court of a party
2.	Court issuance of interim measures	Before or during	UNCITRAL Model Law Arts. 9 and 17 J	Seat of arbitration, place of enforcement, or location of the property or evidence
3.	Appointment of arbitrators	Before	UNCITRAL Model Law Arts. 11(3) and 11(4)	Seat of arbitration+
4.	Challenges to arbitrators	Before or during	UNCITRAL Model Law Art. 13(3)	Seat of arbitration+ or a party's home state
5.	Termination of arbitrators' mandate in cases of failure or impossibility to act	During	UNCITRAL Model Law Art. 14	Seat of arbitration+
6.	Challenges to arbitral jurisdiction (in cases where arbitral tribunal rules as preliminary matter that it has jurisdiction)	During	UNCITRAL Model Law Art. 16(3)	Seat of arbitration+
7.	Court enforcement of tribunal-issued interim measures	During	UNCITRAL Model Law Arts. 17 H and 17 I	Seat of arbitration+

Table 1-continued from previous page

	<b>Border Crossing (*: indicates a <i>principal</i> crossing, i.e., recognized by the New York Convention)</b>	<b>Timing with respect to arbitral proceeding</b>	<b>Relevant Provisions of the New York Convention or UNCITRAL Model Law</b>	<b>Likely National Courts (+: indicates a clear <i>primary</i> jurisdiction)</b>
8.	Court assistance in taking evidence	During	UNCITRAL Model Law Art. 27	Anywhere that allows it, cf. 28 U.S.C. §1782 in the United States
9.	Setting aside of arbitral awards*	After	New York Convention Art. V(1)(e); UNCITRAL Model Law Art. 34	Seat of arbitration has primary jurisdiction, but secondary jurisdiction “under the law of which, that award was made”
10.	Recognition and enforcement of arbitral awards*	After	New York Convention Arts. III and V; UNCITRAL Model Law Arts. 35 and 36	Where the award-creditor seeks it, usually losing party’s jurisdiction or the United States as a default jurisdiction
11.	Execution of enforced arbitral award	After		Where the award-debtor has assets

Before describing the specific border crossings in greater detail, let us consider three different ways to categorize them. One way is to divide them temporally: a national court might be asked to intervene before an arbitral proceeding has started, during the proceeding, or after an award is rendered.<sup>25</sup> A second way would be to categorize them according to the perceived importance of the question posed to a national court. The three crossings mentioned in the New York Convention together might be characterized as *principal* border crossings, and all others as supplemental crossings. A third way to organize interventions by national courts would be geographically. A

25. See, e.g., John J. Barceló III, *Who Decides the Arbitrator’s Jurisdiction? Separability and Competence-Competence in Transnational Perspective*, 36 VAND. J. TRANSNAT’L L. 1115, 1118 (2003) (dividing the court-arbitration process into three stages).

court in the State in which an arbitral proceeding takes place might be seen as having *primary* jurisdiction over border crossings<sup>26</sup> and courts in other States as seized of secondary jurisdiction, most significantly for suits in which a winning party seeks to enforce or recognize an arbitral award. This Article will categorize the border crossings in a hybrid fashion relying mostly on the chronological and significance metrics.

#### *A. Enforcement of the arbitration agreement*

International arbitration starts with an agreement between the parties to send disputes between or among them to arbitration. The New York Convention requires such agreements to be in writing to avail of its protections. The treaty binds the courts of signatory States to enforce an agreement to arbitrate unless it is “null and void, inoperative or incapable of being performed.”<sup>27</sup>

Challenges to an arbitration agreement generally take one of two forms. First, after attempting unsuccessfully to get the other side to arbitrate a dispute, a party may sue in a national court in order to compel arbitration. Such suits are typically brought in the national courts of the country in which the arbitration was supposed to take place, or of a country that has a plausible basis of adjudicative jurisdiction (called personal or territorial jurisdiction in the United States) over the defendant who had refused to arbitrate. Second, a party may ignore the arbitration agreement and bring a lawsuit in a national court, acting as if the agreement never existed. The defendant then might plead the arbitration agreement as an affirmative defense or as the basis for a motion to dismiss the suit. In US courts, such a defendant would also typically file a counter-motion to compel arbitration. This second type of suit is usually brought in a jurisdiction that the plaintiff perceives to be friendly, paradigmatically its home jurisdiction if there is a basis for adjudicative jurisdiction over the defendant there.

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26. For the concepts of “primary” and “secondary” jurisdictions and the corresponding powers of courts in these jurisdictions with respect to arbitral awards, *see, e.g.*, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003). *See generally* Alan Scott Rau, *Understanding (and Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT’L ARB. 47 (2010).

27. New York Convention, *supra* note 2, art. II(3); UNCITRAL Model Law, *supra* note 20, art. 8(1).



The doctrine of *separability* in international arbitration famously prescribes that a challenge to the validity of an arbitration agreement is legally distinct from a challenge to the validity of the underlying business contract of which it is a part—the so-called *container* contract. A corollary of separability doctrine is that a challenge to the validity of the container contract does not necessarily entail a challenge to the agreement to arbitrate, and so may be sent to the arbitrators for their adjudication. The exception is when the attack on the container contract contests whether it ever came into existence at all, for example, because the individual who signed on behalf of the contracting counter-party was an imposter.

From a policy perspective, separability doctrine is justifiable as a safeguard against a moral hazard posed by dispute settlement by private arbitrators. Decisions about the validity of arbitration agreements necessarily implicate the power of arbitrators to decide the scope of their jurisdiction—the principle of *Kompetenz-Kompetenz*. But arbitrators have a powerful economic interest to uphold their jurisdiction, since, unlike judges who are public officials paid by a State, their compensation depends to a large extent on their upholding jurisdiction so they can hear the case. National court oversight thus seems critical as a check against the danger that arbitrators will uphold their jurisdiction even when the arbitration agreement is null or void.

But national laws have different approaches as to how they regulate judicial interventions to enforce arbitration agreements at the onset of proceedings. This is in part due to the fact that the invalidity of an arbitration agreement is one of the grounds available under the New York Convention for challenging an arbitral *award* after it has been rendered. And so there is a second opportunity to address the possibility of arbitrators overreaching, but it comes only after considerable time and resources have been spent by participating in arbitral proceedings.

Differences across national jurisdictions also reflect varying assessments of the severity of the moral hazard facing the arbitrators. French law, for example, instructs judges to dismiss onset challenges if an arbitral tribunal has already been set up (meaning that the challenging party at least participated in the arbitration to that point).<sup>28</sup> And, if an arbitral tribunal has not been set up, French law

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28. See NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 1448 (Fr.).

requires a national court to dismiss the case unless it determines that the arbitration agreement is *manifestly* void or *manifestly* not applicable, not simply so.<sup>29</sup> United States courts, by contrast, will retain jurisdiction to hear a challenge to an arbitration agreement even if a tribunal has been set up so long as it is the agreement being challenged, or the party resisting arbitration claims that the container contract never came into existence.

In the United States, both federal and state courts may get involved in the enforcement of international arbitration agreements. Under Section 203 of the Federal Arbitration Act (the “FAA”), US district courts have original jurisdiction over an action or proceeding falling under the New York Convention.<sup>30</sup> Section 206 of the FAA expressly authorizes such courts to compel arbitration in accordance with the arbitration agreement.<sup>31</sup> An action or proceeding to enforce an arbitration agreement may also be started in state courts. However, the defendant will often seek to remove such action or proceeding to US federal court under Section 205 of the FAA, availing itself of the benefits of litigation in the federal court system.<sup>32</sup> The court proceedings on the merits could be accompanied at this stage with a request for interim relief.<sup>33</sup>

### B. *Court issuance of interim measures*

Increasingly, parties to international arbitration agreements seek interim measures<sup>34</sup> before proceedings have begun in order to

29. *See id.*

30. Federal Arbitration Act, 9 U.S.C. § 203 (2015).

31. *Id.* § 206.

32. *Id.* § 205.

33. For analysis of the relevant U.S. case law with respect to interim relief provided by courts in this context, *see generally* Martin Davies, *Court-Ordered Interim Measures in Aid of International Commercial Arbitration*, 17 AM. REV. INT’L ARB. 299 (2006).

34. For the purposes of this Article, we use the term “interim measures” or “interim relief,” which encompasses other terms used in arbitration laws and rules with respect to interim measures, such as “provisional measures,” “preliminary measures,” “conservatory measures,” “precautionary measures,” and combination of these terms. *See, e.g.*, REDFERN & HUNTER, *supra* note 10, at 444-45 (referring to the terms used in the English and French versions of the ICC Rules of Arbitration and the Swiss law on international arbitration); *see also* FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 709 (Emmanuel Gaillard & John Savage eds., 1999) (commenting on the “not always helpful” terminology used in the context of provisional and conservatory measures). For a definition of interim measures as applicable to international commercial arbitration, *see* UNCITRAL Arbitration Rules, G.A. Res. 31/98, U.N. GAOR, 31st Sess., Supp. No. 17, ch. V, sec. 7, U.N. Doc. A/31/17 (Dec. 15, 1976), *as revised by* G.A. Res. 65/22, U.N. GAOR, 65th Sess., Supp.

preserve the status quo. The US litigation equivalents are preliminary injunctions, temporary restraining orders, and pre-trial attachments of assets. The need to go to court for interim measures had once been considered the Achilles' heel of international arbitration, since arbitral tribunals used to be incapable of ordering and enforcing interim measures.<sup>35</sup>

Today, however, many leading international arbitral institutions have rules affording tribunals jurisdiction to order interim measures.<sup>36</sup> Still, a national court remains the default, or even the only forum choice, where: (1) an urgent interim measure is needed prior to the constitution of an arbitral tribunal; (2) a party resists compliance with tribunal-ordered interim measures; or (3) the interim measure sought is directed towards a third party, which is not bound by the arbitration agreement and thus beyond the arbitral tribunal's jurisdiction.<sup>37</sup> Generally speaking, requests to courts for interim measures are not held to constitute an infringement or waiver of an agreement to arbitrate, or otherwise to affect the powers of arbitral tribunal.<sup>38</sup>

The New York Convention does not contain any provisions on interim measures. The 1975 Inter-American Convention on International Commercial Arbitration (the "Panama Convention") also has no provisions for interim measures.<sup>39</sup> Conversely, the 1961 European Convention on International Commercial Arbitration does provide for court involvement in the provision of interim relief for

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No. 17, Ch. III & Annex I, U.N. Doc. A/65/17 (Dec. 6, 2010), with new art. 1, ¶ 4, *as adopted* by G.A. Res. 68/109, U.N. GAOR, 68th Sess., Supp. No. 17, Ch. III & Annex II, U.N. Doc. A/68/17 (Dec. 16, 2013) art. 26(2) [hereinafter UNCITRAL Arbitration Rules].

35. *See* Davies, *supra* note 33, at 333.

36. *See, e.g.*, International Chamber of Commerce (ICC) Rules of Arbitration, art. 28 (Jan. 1, 2012), <http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Mediation/Rules/2012-Arbitration-Rules-and-2014-Mediation-Rules-ENGLISH-version/> [hereinafter ICC Rules of Arbitration].

37. *See, e.g.*, Redfern, *supra* note 3, at 86.

38. *See, e.g.*, European Convention on International Commercial Arbitration art. VI(4), Apr. 21, 1961, 484 U.N.T.S. 349; *see also* Arbitration Act 2010 (Act No. 1/2010) art. 9 (Ir.), <http://www.irishstatutebook.ie/eli/2010/act/1/enacted/en/pdf>; Chūsai-hō [Arbitration Act], Law No. 138 of 2003, *amended by* Law No. 147 of 2004, art. 15 (Japan); *International Arbitration Rules*, in INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (INCLUDING MEDIATION AND ARBITRATION RULES) (2014) art. 24(3) [hereinafter AAA/ICDR Arbitration Rules]; ICC Rules of Arbitration, *supra* note 36, art. 28(2); UNCITRAL Arbitration Rules, *supra* note 34, art. 26(9).

39. Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 104 Stat. 448, 14 I.L.M. 336 (as implemented by Chapter 3 of the Federal Arbitration Act, 9 U.S.C. §§ 301–307) [hereinafter Panama Convention].

international arbitrations.<sup>40</sup> The UNCITRAL Model Law, which in 2006 introduced a separate Chapter IV A (Interim Measures and Preliminary Orders<sup>41</sup>) dedicated primarily to tribunal-ordered interim relief, contains only one article on court-ordered interim measures.<sup>42</sup>

The issue of court-ordered interim measures is thus left largely to national lawmakers and is dealt with differently in various domestic laws. Arbitration laws of many jurisdictions, including Austria, England, France, India, South Korea, Russia, and Sweden, provide for court-ordered interim measures in support of arbitration.<sup>43</sup> Some other States, including Italy, Greece, Brazil, and Thailand, still do not allow interim measures to be ordered by arbitral tribunals, thus making the court the only forum choice for a party seeking interim relief.<sup>44</sup> The rules of arbitral institutions also anticipate court aid on

40. European Convention on International Commercial Arbitration, *supra* note 38, art. VI(4).

41. Preliminary orders are generally akin to temporary restraining orders used in litigation in the United States. Note, however, that the UNCITRAL Model Law uses the term “preliminary orders” for interim measures that can be issued on an *ex parte* basis by the arbitral tribunal. See UNCITRAL Model Law, *supra* note 20, art. 17 B.

42. See UNCITRAL Model Law, *supra* note 20, art. 17 J (establishing that the court has the same power of issuing interim measures in relation to arbitration proceedings as it has in relation to proceedings in court).

43. See ÖSTERREICHISCHES SCHIEDSRECHT [AUSTRIAN ARBITRATION ACT] BUNDESGESETZBLATT I [BGBl I] No. 7/2006, § 585 (Austria), translated by Riegler/Fremuth-Wolf/Platte in STEFAN RIEGLER ET AL., ARBITRATION LAW OF AUSTRIA: PRACTICE AND PROCEDURE 812-13 (2007) [hereinafter Austrian Arbitration Act]; Arbitration Act, 1996, c. 23, § 44 (Eng.) [hereinafter English Arbitration Act]; Закон РФ о Международном Коммерческом Арбитраже [Law of the Russian Federation on International Commercial Arbitration] ROSSIISKAIA GAZETA [ROS. GAZ.] Aug. 14, 1993, amended by Federal’nyi Zakon No. 250-Ф3, Dec. 3, 2008, art. 9 (Russ.); Arbitration Act, Act No. 1767, Mar. 16, 1966, amended by Act. No. 10207, Mar. 31, 2010, art. 10 (S. Kor.); 4 § LAG OM SKILJEFÖRFARANDE [ARBITRATION ACT] (Svensk författningssamling [SFS] 1999:116) (Swed.), <http://www.sccinstitute.com/media/37089/the-swedish-arbitration-act.pdf>; Davies, *supra* note 33, at 326 (citing S.N.T.M. Hyproc. v. Snach, Cass. 2e Civ. June 8, 1995 (Fr.), in 1996 REV. ARB. 125, 126) (holding by the Cour de Cassation that “the existence of an arbitration agreement is no obstacle to a judge granting ‘protective measures’ under the New Code of Civil Procedure”); see also Arbitration and Conciliation Act, 1996, No. 26 of 1996, § 9 (India). Note that the Supreme Court of India recently held that Indian courts can order interim relief under Section 9 or any other provision of the Arbitration Act only in support of arbitrations sitting in India. Bharat Aluminum Co. v. Kaiser Aluminum Technical Services Inc., Sept. 6, 2012.

44. See CÓDIGO DE PROCESSO CIVIL [C.P.C.] [CODE OF CIVIL PROCEDURE] arts. 86-87 (Braz.); KODIKAS POLITIKES DIKONOMIAS [KPOL.D.] [CODE OF CIVIL PROCEDURE] VII:889 (Greece), translated in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 7 (Jan Paulsson & Lise Bosman eds., Supp. 72 2007) (“The arbitrators may not order, amend, or revoke interim measures of protection.”); C.p.c. art. 818 (It.), translated in ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 6 (Jan Paulsson & Lise Bosman

interim relief, generally providing that such help can be requested from the court prior to the constitution of an arbitral tribunal, and, in limited circumstances, even thereafter.<sup>45</sup>

In the United States, the Federal Arbitration Act does not contain provisions expressly authorizing national courts to order interim relief in aid of arbitration.<sup>46</sup> But US courts are generally perceived as willing to grant interim measures with respect to international arbitration when such measures support, rather than impede, the arbitral process.<sup>47</sup> Prior to the constitution of an arbitral tribunal, the jurisdiction of a federal court to order interim measures may be based on its subject-matter jurisdiction over the underlying dispute.<sup>48</sup> Once the arbitration is commenced, the petition for interim relief could arguably be brought to the court independently of the underlying claim.<sup>49</sup> In granting provisional remedies, the US federal courts will generally apply the Federal Rules of Civil Procedure (the “FRCP”), such as Rule 65 for preliminary injunctions and temporary restraining orders.<sup>50</sup>

However, US state law (as opposed to federal law) may also play a role, even in an international commercial case in federal court under the FAA. This is because provisional remedies available under Rule 64 of the FRCP (e.g., arrest, attachment) are governed by the law of the state where the federal court is located.<sup>51</sup> And so, even in the US District Court for the Southern District of New York—a federal court—New York *state* law will govern the issuance of attachment in

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eds., Supp. 49 2012) (“The arbitrators may not grant attachments or other interim measures of protection. . . .”); Arbitration Act 2002 § 16 (Thai.), *translated in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 2 (Jan Paulsson & Lise Bosman eds., Supp. 37 2003).

45. See, e.g., AAA/ICDR Arbitration Rules, *supra* note 38, art. 24; Arbitration Rules of the China International Economic and Trade Arbitration Commission (CIETAC) art. 23 (Jan. 1, 2015), [http://cn.cietac.org/rules/rule\\_E.pdf](http://cn.cietac.org/rules/rule_E.pdf) [hereinafter CIETAC Arbitration Rules]; Arbitration Rules of the Singapore International Arbitration Centre (SIAC), art. 26 (Apr. 1, 2013), <http://www.siac.org.sg/our-rules/rules/siac-rules-2013> [hereinafter SIAC Arbitration Rules]; Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) art. 32 (Jan. 1, 2010), [http://www.sccinstitute.com/media/40120/arbitrationrules\\_eng\\_webbversion.pdf](http://www.sccinstitute.com/media/40120/arbitrationrules_eng_webbversion.pdf) [hereinafter SCC Arbitration Rules]; ICC Rules of Arbitration, *supra* note 36, art. 28.

46. Federal Arbitration Act, 9 U.S.C. §§ 1-307 (2015).

47. See, e.g., 2 BORN, *supra* note 18, at 2540-41. For further analysis of the decisions of the U.S. federal courts, see Davies, *supra* note 33, at 303-12.

48. See Davies, *supra* note 33, at 303.

49. See *id.* at 311-12.

50. Fed. R. Civ. P. 65.

51. Fed. R. Civ. P. 64.

aid of arbitration. Specifically, Section 7502(c) of the Civil Practice Law and Rules of New York provides courts with the power to order two types of provisional measures—a preliminary injunction and an order of attachment—with respect to a pending arbitration or an arbitration that is about to be commenced:

inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.<sup>52</sup>

A number of other states in the United States have adopted statutes, some of them based on the UNCITRAL Model Law,<sup>53</sup> granting their courts the power to order interim measures in support of arbitration.<sup>54</sup>

Among the various courts available to the parties in international arbitration, it is the courts at the seat of arbitration that often have primary jurisdiction with respect to interim measures requests. This jurisdiction is typically concurrent with the arbitral tribunal once constituted, although the exact boundaries between the interim-measures powers of court and tribunal remain unclear.<sup>55</sup> Other national courts, such as those where the property in dispute or key evidence is located, or where enforcement can be expected, regularly get involved in providing interim relief<sup>56</sup> or enforcing tribunal-ordered interim measures. The role of these other courts may, however, be limited due to domestic law restrictions on assisting arbitral tribunals sitting beyond the jurisdiction of the court.<sup>57</sup>

52. N.Y. C.P.L.R. 7502(c) (MCKINNEY 2005). The role of state law in interim relief applications has prompted us to conduct a supplemental search of border crossings in the Southern District of New York with reference to Section 7502(c), in addition to interim relief cases applying federal law.

53. Most recently, such statute was adopted in Georgia in 2012. *See* GA. CODE ANN. §§ 9-9-20 to 9-9-59 (2012).

54. *See* Davies, *supra* note 33, at 316-17; *see also* CAL. CIV. PROC. CODE § 1297.93 (West 1988); CONN. GEN. STAT. §§ 50a-109 (1989), 52-422 (1978); N.Y. C.P.L.R. § 7502(c) (MCKINNEY 2005); N.C. GEN. STAT. § 1-567.39(c)(1) (2014); OHIO REV. CODE ANN. §§ 2712.14-2712.16 (West 1991); OR. REV. STAT. § 36.470(3)(a) (1991); TEX. CIV. PRAC. & REM. CODE ANN. § 172.175(c) (West 1997).

55. *See, e.g.*, Charles Price, *Conflict with State Courts, in* INTERIM MEASURES IN INTERNATIONAL COMMERCIAL ARBITRATION 39, 40 (Ass'n for Int'l Arbitration eds., 2007).

56. *See* Davies, *supra* note 33, at 300-03.

57. One of the concerns that have been raised in this respect is whether the country's commitment to international arbitration should go as far as providing assistance to foreign

Moreover, under some national laws, courts' power to order interim measures and whether such power is exclusive to the courts or shared with an arbitral tribunal depends on the type of interim relief sought.<sup>58</sup>

### C. Court appointment of arbitrators and related measures

A separate category of border crossings relates to the appointment of arbitrators by the court. Domestic arbitration laws commonly permit the parties to agree on any procedure for the appointment of arbitrators. They also typically provide for a default procedure and an appointing authority—usually a court—to be relied upon if the parties cannot agree, or if the arbitrators fail to act in accordance with an agreed-upon selection procedure (such as where two party-appointed arbitrators cannot decide on a presiding arbitrator to constitute a three-person panel).<sup>59</sup> Where there is a statutory role for courts in appointments, the relevant domestic laws commonly provide that the courts have the final say on the appointment of arbitrators and their decisions are not subject to appeal.<sup>60</sup> In some countries, the national laws confer the functions of the default

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arbitrations that might have no or minimum connections with the jurisdiction at stake, especially when it is not the jurisdiction of the seat. *See id.* at 301.

58. For instance, under the laws of the People's Republic of China, once the arbitral proceedings have begun, the courts appear to have exclusive jurisdiction with respect to requests for preservation of property and evidence. The application for such conservatory measures is made with an arbitral institution if one is used, which then forwards the request to the municipal court with jurisdiction over granting such measures. Consistent with these laws, the latest edition of the CIETAC Arbitration Rules provides in Article 23(1) that "[w]here a party applies for *conservatory* measures pursuant to the laws of the People's Republic of China, CIETAC shall forward the party's application to the competent court designated by that party in accordance with the law." CIETAC Arbitration Rules, *supra* note 45, at art. 23(1) (emphasis added). However, Article 23(3) further provides that "[a]t the request of a party, the arbitral tribunal may decide to order or award any *interim* measure it deems necessary or proper in accordance with the applicable law or the agreement of the parties. . . ." *Id.* (emphasis added). Thus, the CIETAC Arbitration Rules permit tribunal-ordered interim measures. Yet, it is unclear how such measures are distinct from conservatory measures under Article 23(1), which can be ordered only by the courts. Arguably, beyond the exclusive jurisdiction of the courts with respect to measures on property and evidence preservation, the tribunals can order other interim measures, especially where such measures are not governed by the laws of the People's Republic of China and will be enforced outside of China.

59. *See, e.g.*, English Arbitration Act, *supra* note 43, §§ 16-18; NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art. 1452 (Fr.); Arbitration Law, Royal Decree No. M/34, art. 15 (Apr. 16, 2012) (Saudi Arabia); BUNDESGESETZ ÜBER DAS INTERNATIONALE PRIVATRECHT [IPRG] [FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW] Dec. 18, 1987, SR 291, art. 179 (1988) (Switz.); *see also* UNCITRAL Model Law, *supra* note 20, art. 11.

60. *See, e.g.*, UNCITRAL Model Law, *supra* note 20, art. 11(5).

appointing authority on an arbitral institution, not a national court.<sup>61</sup> This is the rarer scenario.

In practice, when a party resists arbitration, a request for the appointment of an arbitrator often accompanies a request to compel arbitration. In the United States, in addition to its powers to compel arbitration under 9 U.S.C. §206, a US district court having jurisdiction under Chapter 2 of the Federal Arbitration Act, has the power to appoint arbitrators in accordance with the provisions of an applicable arbitration agreement.<sup>62</sup>

#### *D. Court deciding on a challenge to an arbitrator*

National arbitration laws also generally provide for border crossings into national courts for challenges to arbitrators.<sup>63</sup> In jurisdictions adopting the UNCITRAL Model Law, the rules on challenges are outlined in Article 13, which allows the parties to agree on a procedure for challenging an arbitrator. It also provides that, failing such agreement, a challenge can be made, first, before the arbitral tribunal in accordance with Article 13(2). If, however, the challenge under the procedure as agreed by the parties or provided for in Article 13(2) is unsuccessful, Article 13(3) permits the challenging party to request a court to decide on the challenge within thirty days.<sup>64</sup> Article 13(3) determinations are not subject to appeal. While the court proceedings on the challenge are pending, Article 13 permits the arbitral tribunal, including the challenged arbitrator, to continue the arbitral proceedings, even to the point of rendering an award.<sup>65</sup>

The availability of, and grounds for, a request for court review of an arbitral tribunal's adjudication of a challenge to an arbitrator varies across jurisdictions. For instance, in England and Germany, judicial review of challenges is considered mandatory and cannot be limited by contract between the parties.<sup>66</sup> By contrast, court review is more limited in France, Switzerland, and Singapore. Courts in those

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61. *See, e.g.*, Arbitration Law of the People's Republic of China (promulgated by Order No. 31 of the President of the People's Republic of China, Aug. 31, 1994) art. 32; Law of the Russian Federation on International Commercial Arbitration, *supra* note 43, art. 11.

62. 9 U.S.C. § 206.

63. *See, e.g.*, English Arbitration Act, *supra* note 43, § 24; FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW, *supra* note 61, art. 180(3).

64. *See* UNCITRAL Model Law, *supra* note 20, art. 13(3).

65. *Id.*

66. *See, e.g.*, JEFFREY WAINCYMER, PROCEDURE AND EVIDENCE IN INTERNATIONAL ARBITRATION 324 n.418 (2012).



countries typically refuse to review arbitral panel denials of challenges or permit them only in limited circumstances, such as when a challenge is based on recently discovered information.<sup>67</sup>

The challenge of an arbitrator can also be made in setting aside proceedings before a court after an award is rendered. A party might move to vacate an award on the ground that the composition of the arbitral tribunal was not in accordance with the arbitral agreement.<sup>68</sup> This becomes the only option available for parties where a national arbitration law, like the US Federal Arbitration Act,<sup>69</sup> does not accord an explicit right for courts to address challenges until a final award is rendered.

A related issue is the request for disqualification of an attorney or a law firm from representing a party in international arbitration. Such requests would normally be addressed to the courts. In New York, in the context of ongoing arbitral proceedings, the courts (and not the arbitral tribunals) have exclusive jurisdiction to address attorney disqualification requests based on conflicts of interest and professional responsibility violations.<sup>70</sup> Although, for the purposes of this study, we will categorize them together with arbitrator challenges, in theory, this resort to national courts could constitute an independent border crossing in its own right.

#### E. Court deciding on the termination of the arbitrator's mandate

An additional border crossing is permitted pursuant to Article 14 of the UNCITRAL Model Law, which regulates failure or impossibility to act by an arbitrator. Specifically, if an arbitrator becomes *de jure* or *de facto* unable to perform or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws or if the parties agree on the termination.<sup>71</sup> If there is any controversy over whether arbitrators have failed to act, under Article 14(1) of the UNCITRAL Model Law, any party may

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67. *Id.* at 324 n.419.

68. *See, e.g.*, UNCITRAL Model Law, *supra* note 20, art. 34(2)(a)(iv).

69. *See, e.g.*, WAINCYMER, *supra* note 68, at 324. For the right of the U.S. court to remove arbitrators before the final award is made, *see generally* Yulia Andreeva, *How Challenging is the Challenge, or Can U.S. Courts Remove Arbitrators Before an Arbitration Has Come to an End?*, 19 AM. REV. INT'L ARB. 127 (2008).

70. *See, e.g.*, *Nw. Nat'l Ins. Co. v. Insko, Ltd.*, 2011 WL 4552997 (S.D.N.Y. 2011); *In Re Arbitration Between R3 Aerospace, Inc. & Marshall of Cambridge Aerospace Ltd.*, 927 F. Supp. 121 (S.D.N.Y. 1996).

71. *See* UNCITRAL Model Law, *supra* note 20, art. 14.

request a court to decide on the termination of the arbitrator's mandate. A resultant decision of the court is not subject to appeal.<sup>72</sup>

National arbitration laws may also provide for court involvement with respect to the arbitrator's right to resign. For instance, in cases of failure or impossibility to act, Article 14 of the UNCITRAL Model Law allows an arbitrator to resign without establishing further conditions for resignation. By contrast, the Belgian Judicial Code provides that an arbitrator cannot resign without prior judicial approval.<sup>73</sup> Similarly, the Netherlands Code of Civil Procedure requires approval of the parties, a designated appointed authority, or a court.<sup>74</sup> The US Federal Arbitration Act does not have an analogue to UNCITRAL Model Law Article 14(1), and so there are no separate data recorded for this border crossing in our study. However, the assistance of a US court might be invoked under 9 U.S.C. §206, by framing the issue as one in which arbitrators are not acting in accordance with the relevant arbitration agreement.

#### F. *Court deciding on the matter of the arbitral tribunal's jurisdiction*

As discussed above, arbitrators, as adjudicators, are understood to have jurisdiction to determine the scope of their own jurisdiction—a fundamental principle of judicial independence. In international arbitration circles, this is known as the principle of *Kompetenz-Kompetenz*. But in light of the possibility that arbitrators will be self-serving in upholding their jurisdiction (particularly since they have an economic incentive to do so), all national laws envision resorting to national courts for judicial review of arbitral panel jurisdictional decisions, especially those to affirm. For instance, Article 16(3) of the UNCITRAL Model Law allows any party, within thirty days of having received the notice of an arbitral tribunal's preliminary award upholding its own jurisdiction, to request a court to review the holding.<sup>75</sup> Judicial review thus serves as a sort of interlocutory appeal on the threshold question of arbitral jurisdiction. Article 16(3) further provides that any decision of the court is not subject to appeal; while the decision of the court is pending, the arbitral tribunal is authorized

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72. *Id.*

73. *See, e.g.,* WAINCYMER, *supra* note 68, at 328 n.447 (referring to CODE JUDICIAIRE [C.JUD] art. 1689 (Belg.)).

74. *See id.* (referring to RV art. 1029(3)-(4) (Neth.)).

75. UNCITRAL Model Law, *supra* note 20, art. 16(3).

to continue the arbitral proceedings.<sup>76</sup> A similar right to review an arbitral tribunal's threshold jurisdictional determination is part of the domestic laws of many countries, including such leading arbitral jurisdictions as France, Germany, and Switzerland.<sup>77</sup>

Obviously, the greater risk in an arbitral tribunal's jurisdictional holding is that it will find jurisdiction where it should not, i.e., that the panel will find a dispute arbitrable. Thus, German law only provides for judicial review of a tribunal's *affirmation* of jurisdiction.<sup>78</sup> In most jurisdictions, however, the relevant national laws provide for judicial review of all arbitral jurisdictional holdings, regardless of whether the tribunal affirms or denies jurisdiction.<sup>79</sup> In practice, there are very few instances where an arbitral panel refuses to find jurisdiction. Accordingly, these national laws are more about aesthetic symmetry rather than practical effect, as the more precisely calibrated German law implicitly acknowledges.

National laws also set out varying standards of review to be applied by courts in checking arbitral decisions on jurisdiction.<sup>80</sup> Some countries treat the arbitrators' decision as provisional and authorize *de novo* review by courts.<sup>81</sup> Other countries defer to the tribunal's determination with respect to its own jurisdiction and apply an unreasonableness or manifest-error standard of review.<sup>82</sup>

Finally, the laws of some countries permit the parties to enter into arbitration agreements that explicitly cut off judicial review of the arbitral tribunal's holding on its own jurisdiction.<sup>83</sup> Such

76. *Id.*

77. See NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C] art. 1502 (Fr.); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], promulgated Dec. 5, 2005, BGBl. I at 3202, last amended by Gesetz [G], Oct. 10, 2013, BGBl. I at 3786, § 1040(3) (Ger.); FEDERAL STATUTE ON PRIVATE INTERNATIONAL LAW, *supra* note 61, art. 190(2)(b).

78. See, e.g., 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1101 n.294 (2d ed. 2014) [hereinafter 1 BORN] (citing Bundesgerichtshof [BGH] [Federal Court of Justice] June 6, 2002, SCHIEDSVZ 39, 2003 (Ger.)).

79. See *id.* (referring to decisions providing for judicial review of negative jurisdictional awards in Belgium, England, France, Italy, Sweden, Switzerland, and the United States).

80. See Frédéric Bachand, *Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism*, 2012 J. DISP. RESOL. 83, 94 (2012).

81. See, e.g., 1 BORN, *supra* note 78, at 1107-10.

82. See, e.g., Bachand, *supra* note 82, at 94-95 (citing *Ace Bermuda Ins. Ltd. v. Allianz Ins. Co. of Canada*, 2005 ABQB 975 (Can.) (where the Court of the Queen's Bench of Alberta held that the standard of review relied upon was "one of reasonableness and deference")).

83. For instance, agreements to enhance competence-competence, that is to agree to finally resolve jurisdictional issues by arbitration, are permitted under the English law. See, e.g., 1 BORN, *supra* note 78, at 1097. By contrast, the law of Germany does not allow the parties to exclude the competence of the German courts with respect to tribunal's jurisdiction.

agreements however are rare, even in the countries that allow them. Absent such an agreement, judicial resolution of arbitral tribunal jurisdictional holdings is available in most countries. Generally, national laws allow the arbitral panel to continue its proceedings even to the point of issuing an award while judicial review of the panel's jurisdiction is pending.<sup>84</sup> In any event, if a party did not contest jurisdiction at the outset, it can still make the challenge in a proceeding to set aside or refuse enforcement of an arbitral award after it has been rendered.

### G. Court enforcement of tribunal-ordered interim measures

Part I.B above focused on court-ordered interim measures in aid of arbitration; here we discuss court enforcement of interim measures ordered directly by an arbitral tribunal. A strong recent movement in national arbitration laws<sup>85</sup> and institutional arbitration rules<sup>86</sup> is the tendency to give international arbitral tribunals the power to order interim relief.<sup>87</sup> These include measures: (1) seeking to preserve the subject-matter of the dispute; (2) assisting the arbitral proceeding (ordering discovery or preservation or production of evidence); and (3) securing the effective execution of the award. The arbitration laws and rules generally provide a party opposing interim measures the

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Thus, the German courts can always review jurisdictional determinations made by arbitral tribunals. *See id.* at 1121-25.

84. *See id.*

85. *See, e.g.*, Federal Arbitration Act, *supra* note 46; Austrian Arbitration Act § 593, *in* RIEGLER ET AL., *supra* note 43, at 812-13; Arbitration Law, Law No. 138 of 2003, art. 24 (Japan); Law of the Russian Federation on International Commercial Arbitration, *supra* note 43, art. 17.

86. *See, e.g.*, AAA/ICDR Arbitration Rules, *supra* note 38, art. 24(1); Deutsche Institution für Schiedsgerichtsbarkeit e.V. [DIS] [Arbitration Rules of the German Institution of Arbitration], § 20.1 (July 1, 1998), <http://www.dis-arb.de/en/16/rules/dis-arbitration-rules-98-id10>; ICC Rules of Arbitration, *supra* note 36, art. 28(1); London Court of International Arbitration (LCIA) Arbitration Rules art. 25.1 (Oct. 1, 2014), [http://www.lcia.org/Dispute\\_Resolution\\_Services/lcia-arbitration-rules-2014.aspx](http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx) [hereinafter LCIA Arbitration Rules]; Rules of Arbitration of the Vienna International Arbitral Centre (VIAC) art. 33(1) (July 1, 2013), <http://www.viac.eu/en/arbitration/arbitration-rules-vienna/93-schiedsverfahren/wiener-regeln/144-new-vienna-rules-2013>; UNCITRAL Arbitration Rules, *supra* note 34, art. 26(1).

87. For further review of arbitration rules providing arbitral tribunals with the power to order interim measures and the role of the court with regard to interim measures, see, for example, Christopher Boog, *Interim Measures—Relevance of the Courts at the Place of Arbitration and Other Places*, *in* FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 199 (Franco Ferrari ed., 2013); *see also* 2 BORN, *supra* note 18, at 2428-2511.

opportunity to object,<sup>88</sup> but may also allow for *ex parte* requests in emergencies.<sup>89</sup> The latter are particularly controversial, as they seem incompatible with the consensual nature of arbitration.<sup>90</sup> Nevertheless, the UNCITRAL Model Law now authorizes *ex parte* applications for “preliminary orders” that are binding on the parties and do not require going to a court for enforcement.<sup>91</sup> Such preliminary orders are limited to 20 days and will expire thereafter unless the tribunal extends the time period after the encumbered party has had an opportunity to interpose its objections.<sup>92</sup>

Some national laws have no special provisions on arbitral tribunals’ power to order interim measures;<sup>93</sup> others provide detailed rules on the tribunals’ power and courts’ role in enforcing any tribunal-ordered interim measures.<sup>94</sup> Such court enforcement of tribunal-ordered interim measures may lead to additional border crossings and may require modification of the measures by the court

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88. See, e.g., LCIA Arbitration Rules, *supra* note 88, art. 25.1 (“The Arbitral Tribunal shall have the power [to order interim and conservatory measures] upon the application of any party, after giving all other parties a reasonable opportunity to respond to such application.”); see also Austrian Arbitration Act § 593(1), in RIEGLER ET AL., *supra* note 43, at 812 (providing for on notice application for interim measures “[u]nless otherwise agreed by the parties, the arbitral tribunal may, upon request of a party and after hearing the other party, order such interim or protective measure it deems necessary . . .”).

89. See, e.g., UNCITRAL Model Law, *supra* note 20, arts. 17 B-17 C (discussing conditions of granting preliminary orders, which may be requested by the moving party without notice to any other party).

90. See, e.g., Hans van Houtte, *Ten Reasons Against a Proposal for Ex Parte Interim Measures of Protection in Arbitration*, 20 ARB. INT’L 85 (2004); see also United Nations Commission on International Trade Law, Report of the Working Group on Arbitration and Conciliation on the Work of its Forty-Seventh Session (Vienna, Sept. 10-14, 2007), ¶ 53-60, U.N. Doc. A/CN.9/641 (Sept. 25, 2007). Also note the results of the 2012 international arbitration survey conducted by the School of International Arbitration at Queen Mary University of London with the support of White & Case LLP, which are indicative of the divide on the desirability of *ex parte* applications, with 51% of respondents replying that they believe the arbitrators should have such power, while 43% of respondents stating that they should not (6% were unsure). See 2012 INTERNATIONAL ARBITRATION SURVEY: CURRENT AND PREFERRED PRACTICES IN THE ARBITRAL PROCESS (2012).

91. See UNCITRAL Model Law, *supra* note 20, art. 17 B.

92. See *id.*, art. 17 C.

93. See *id.*

94. See, e.g., Austrian Arbitration Act § 593(1), in RIEGLER ET AL., *supra* note 43, at 812, which authorizes the arbitral tribunal to order interim or protective measures it “deems necessary in respect of the subject-matter in dispute if the enforcement of the claim were otherwise frustrated or significantly impeded, or there were a risk of irreparable harm.” The Act also provides for the procedure and standards of enforcement of such measures by the district courts in Austria, including the grounds for refusing enforcement by the court. *Id.*

prior to enforcement.<sup>95</sup> Provisions on tribunal-ordered interim measures are also incorporated in the rules of international arbitral institutions, such as Article 28(1) of the ICC Rules of Arbitration, which gives the arbitral tribunal a broad power to “order any interim or conservatory measure it deems appropriate.”<sup>96</sup>

In an effort to harmonize domestic arbitration laws concerning tribunal-ordered interim measures, the UNCITRAL Model Law introduced a new Chapter IV.A in 2006. The chapter also addressed the role of national courts in the enforcement of tribunal-issued interim measures.<sup>97</sup> For instance, a party objecting to the enforcement of interim measures may assert any ground listed in Article 36(1)(a)(i), (ii), (iii), or (iv),<sup>98</sup> which mirror the grounds for refusing enforcement of arbitral awards under Article V(1)(a)–(d) of the New York Convention.

*Emergency arbitration* rules are a new frontier in international arbitration related interim measures.<sup>99</sup> Such rules aim to serve the

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95. One of the most specific rules in this respect is provided by Section 593(3) of the Austrian Arbitration Act: “Where the measure provides for a means of protection unknown to Austrian law, the court may, upon request and after hearing the other party, enforce such measure of protection under Austrian law which comes closest to the measure ordered by the arbitral tribunal. In this case the court may also, upon request, reformulate the measure ordered by the arbitral tribunal in order to safeguard the realization of its purpose.” *See id.* § 593(3). The Act further states that a court shall refuse enforcement of a measure if the “measure provides for a means of protection unknown to Austrian law and no appropriate means of protection as provided by Austrian law has been requested.” *Id.* § 593(4).

96. *See* ICC Rules of Arbitration, *supra* note 36, art. 28; *see also* LCIA Arbitration Rules, *supra* note 88, art. 25.1(ii), which provides the arbitral tribunal with more limited power “to order the preservation, storage, sale or other disposal of any documents, goods, samples, property, site or thing under the control of any party and relating to the subject-matter of the arbitration.”

97. *See* UNCITRAL Model Law, *supra* note 20, at ch. IV A (Interim Measures and Preliminary Orders). Note that an interim measure is defined by the Model Law as “any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.”

*Id.* art. 17.

98. *Id.* art. 17 I.

99. On emergency arbitration, *see, e.g.*, AAA/ICDR Arbitration Rules, *supra* note 38, art. 6; ICC Rules of Arbitration, *supra* note 36, art. 29(1); SCC Arbitration Rules, *supra*

parties' needs in cases where urgent relief is needed prior to the constitution of the arbitral tribunal. For instance, emergency arbitration rules have been introduced by the ICC (Article 29 of the ICC Rules of Arbitration, including the Emergency Arbitrator Rules found in Appendix V of the ICC Rules) and the AAA/ICDR (Article 6 of the ICDR International Dispute Resolution Procedures). These rules provide for the appointment of an emergency arbitrator at a very early phase of a dispute. Often, however, as with ordinary arbitral tribunals, the jurisdiction of an emergency arbitrator with respect to interim measures will be concurrent to the jurisdiction of national courts.<sup>100</sup> Where no emergency arbitration is available under the controlling rules, or a party against whom an emergency interim measure is invoked refuses to comply with the emergency arbitrator's order, court enforcement may be necessary.<sup>101</sup>

To summarize, tribunal-ordered interim measures are of intense present interest in the international arbitration community. Provisional relief is a big part of litigation on the ground in national courts, particularly in the United States. Accordingly, because international commercial arbitration aspires to provide a relatively autonomous alternative to national court litigation, there has been a campaign to empower analogues to the type of interim measures that can be had in national courts. Nevertheless, the courts are not entirely written out of the equation and remain an important backstop to the enforcement of any interim measures that arbitral tribunals may issue, especially when a burdened party seeks to object or have them lifted.

#### H. *Court assistance in taking evidence*

Article 27 of the UNCITRAL Model Law authorizes an arbitral tribunal, or a party with the approval of the tribunal, to request

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note 45, art. 32(4); SIAC Arbitration Rules, *supra* note 45, art. 26.2; *see also* Boog, *supra* note 89, at 203-04.

100. *See, e.g.*, ICC Rules of Arbitration, *supra* note 36, art. 29(7) (providing for a parallel jurisdiction of emergency arbitrator and national courts by stipulating that “[t]he Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules”).

101. *See, e.g.*, AAA/ICDR Arbitration Rules, *supra* note 38, art. 6; ICC Rules of Arbitration, *supra* note 36, art. 29 (“Emergency Arbitrator”); SCC Arbitration Rules, *supra* note 45, App. II (“Emergency Arbitrator”).

assistance in taking evidence from a competent court.<sup>102</sup> Specifically, courts can order the preservation or production of material evidence and documents or compel party witnesses to appear in arbitral proceedings. To be sure, the arbitral tribunal also has the power under domestic arbitration laws to summon party witnesses and request relevant documents.<sup>103</sup> Generally, however, the arbitral tribunal has no coercive power to threaten or punish non-compliance and therefore must turn to a court.<sup>104</sup>

Court assistance is also indispensable when a party wishes to rely on evidence or oral testimony from a *non-party* to the arbitration agreement. In the United States, discovery against non-parties might be obtained pursuant to 28 U.S.C. §1782. This statute authorizes district courts to provide assistance to foreign and international tribunals by ordering non-parties to hand over relevant material evidence for use before them. The US courts are divided on whether the statute authorizes such assistance to private foreign or international arbitral tribunals, and whether a party must go to a tribunal first before making a request to a US court.<sup>105</sup> Most countries do not have a statute like 28 U.S.C. §1782 that might arguably be construed to authorize a national court to order discovery from non-parties for use in a private international arbitral proceeding.

### *I. Setting aside of arbitral awards and related actions*

The making and delivery of an arbitral award to the parties does not mean that border crossing have come to an end. A common theme is that over ninety percent of arbitral awards are complied with voluntarily, and so courts need not get involved at all.<sup>106</sup> But when a losing party believes that an award was erroneously rendered, it may move to vacate it in a national court.

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102. See UNCITRAL Model Law, *supra* note 20, art. 27.

103. See, e.g., Federal Arbitration Act, 9 U.S.C. § 7.

104. See *id.*

105. See, e.g., THE COMM. ON INT'L COM. DISPUTES, THE NEW YORK CITY BAR ASS'N; 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/report/1782\\_Report.pdf](http://www.nycbar.org/pdf/report/1782_Report.pdf).

106. This data have been supported by survey results. See, e.g., Loukas Mistelis & Crina Baltag, *Special Section on the 2008 Survey on Corporate Attitudes towards Recognition and Enforcement of International Arbitral Awards: Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT'L ARB. 319, 343 (2008).



An action to set aside or vacate an arbitral award usually takes place in a national court of the seat of arbitration, which would have primary jurisdiction. Parties sometimes seek to vacate an award in their home courts, especially if the relevant jurisdiction is the center of gravity of the dispute in question. The New York Convention mentions setting aside in Article V(1)(e), but does not specify the grounds on which an award might be set aside, thus leaving it up to domestic arbitration laws. Many such laws adhere to Article 34 of the UNCITRAL Model Law, which adopts the grounds for refusing recognition and enforcement of arbitral awards under the New York Convention as the grounds for setting aside.

In addition to provisions for setting aside or vacating an arbitral award in a national court (common to almost all states), some jurisdictions also provide for limited appeal to a court. For instance, Section 69 of the English Arbitration Act allows limited appeal on issues of law, and some national laws allow appeal of arbitral awards on both issue of law and fact (the Argentine Civil Code, Article 758; the Iraqi Civil Code, Article 273-74).<sup>107</sup> The US courts, on top of the statutory grounds in the Federal Arbitration Act,<sup>108</sup> permit setting aside of arbitral awards that were rendered in “manifest disregard of law,”<sup>109</sup> although the standard is exceedingly difficult to meet. Some countries adopt a “middle position”: their laws permit setting aside of arbitral awards when the arbitrators failed to apply the law the parties chose,<sup>110</sup> thus allowing, in a sense, a meta-review of the merits.

### *J. Recognition and enforcement of arbitral awards*

When a losing party refuses to satisfy an arbitral award, the winning party may ask a national court for an order to enforce the award. Recognition and enforcement of arbitral awards is perhaps the

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107. See CHRISTOPHER F. DUGAN ET AL., *INVESTOR-STATE ARBITRATION* 646 (2012); see also Sapna Jhangiani & Nicola Vinovrški, *Appeals of Issues of Foreign Law under the English Arbitration Act 1996—a Matter of Fact*, 7 *DISP. RESOL. INT’L* 15 (2013).

108. 9 U.S.C. § 10.

109. See DUGAN, *supra* note 107, at 644 (referring to Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 24-25 (2d Cir. 1997)).

110. See DUGAN, *supra* note 107, at 646 (citing Law of Arbitration in Civil and Commercial Disputes, Sultanati Decree No. 47/97, art. 53(d) (July 1, 1997) (Oman) (permitting annulment of arbitral award “where the arbitrators have failed to apply the law chosen by the parties to govern their dispute”). For a text of the Law, see *Sultanati Decree No. 47/97 Promulgating the Law of Arbitration in Civil and Commercial Disputes*, in *ICAA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION* (Jan Paulsson & Lise Bosman eds., 1984 & Supp. 59 2010).

most commonly known and discussed category of border crossings—it is the centerpiece of the New York Convention.<sup>111</sup> The Convention requires signatory states to enforce foreign arbitral awards unless one of the grounds listed in Article V applies. For instance, under Article V(1)(e), recognition and enforcement of an arbitral award may be refused if it has been set aside “by a competent authority of the country in which, or under the law of which, that award was made.” However, the contracting States to the New York Convention are not obliged to refuse recognition of an award in this case; instead, recognition and enforcement *may* be refused. Consequently, the courts of some countries, such as France, will recognize an award that has been set aside in another country.

One controversial issue specific to US federal courts is the dismissal of suits to enforce foreign arbitral awards on the ground of *forum non conveniens*—a common law doctrine under which cases which are more properly brought in other forums are dismissed. The US Court of Appeals for the Second Circuit has consistently approved such dismissals, based not on Article V, but on its reading of Article III of the New York Convention. This Article states that signatory states “shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure of the territory where the award is relied upon.*”<sup>112</sup> *Forum non conveniens*, according to the US courts, is such a “rule of procedure.”<sup>113</sup> Opponents of this view have argued that Article V provides the exclusive grounds for refusal to entertain a foreign award enforcement action, but to no avail. In our study, these cases are coded as award enforcement actions.

Another way in which national courts get involved in the enforcement of international arbitration awards is when a winning party takes an arbitral award and obtains a judgment confirming it or refusing to set it aside.<sup>114</sup> Judicial confirmation of international

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111. Foreign arbitral awards may also be enforced under the provisions of regional treaties, such as the Panama Convention. *See* Panama Convention, *supra* note 39.

112. New York Convention, *supra* note 2, art. III (emphasis added).

113. *See, e.g.,* Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 496 (2d Cir. 2002) (“The doctrine of *forum non conveniens*, a procedural rule, may be applied in domestic arbitration cases brought under the provisions of the Federal Arbitration Act, . . . and it therefore may be applied under the provisions of the Convention.” (citation omitted)).

114. *See, e.g.,* Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc., 157 F. Supp. 245 (S.D.N.Y. 2001).

arbitral awards is not required under the New York Convention; in fact, the abolition of the requirement for judicial confirmation was a major innovation over the Convention's predecessor, the Geneva Convention of 1927<sup>115</sup>. However, there might be a shorter statute of limitations (the New York Convention does not specify a limitations statute) for foreign arbitral awards as compared to foreign judgments.<sup>116</sup> Also, specific to New York, New York state courts will enforce a foreign judgment against a defendant without independently establishing personal jurisdiction over the defendant, while US national courts in New York, such as the SDNY, require personal jurisdiction over the defendant prior to enforcing an arbitral award against it. In both scenarios, an award creditor would be better served by a foreign judgment (i.e., because the creditor has more time to confirm a judgment than an award, or does not have to establish personal jurisdiction over the award debtor), and so seeks judicial confirmation, typically in a national court at the seat of arbitration.

#### *K. Execution of Enforced Arbitral Awards and Other Instances*

Even after an arbitral award is recognized by a national court, an award creditor might still require court assistance to execute on the assets of a recalcitrant award debtor, especially in arbitrations involving States and state entities which may assert sovereign immunity defenses. The most straightforward such case is when the award creditor seeks to attach the assets of the debtor in the jurisdiction to satisfy the award. Increasingly, however, a special issue has arisen in the post-judgment context because of the US federal courts' liberal discovery rules. Award creditors come to the SDNY not only to enforce against assets in the jurisdiction, but also to obtain discovery regarding an award debtor's assets outside of the United States. This sort of discovery is not available in any other country's courts. As a result, the US national courts serve as a sort of clearinghouse for forensic accounting of the assets of the award

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115. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301.

116. *See, e.g.,* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572 (2d. Cir. 1993) (refusing enforcement of an ICC arbitral award as time barred). *Cf.* Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 29 F.3d 79 (2d. Cir. 1994) (enforcing a French court judgment confirming the above ICC arbitral award at the seat of arbitration).

debtor. This trend is controversial from a policy perspective, since it involves the US courts in global discovery sometimes with little or no connection to the United States.

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In summary, national court involvement in the international arbitration process is indispensable and diverse. Apart from the most common border crossings anchored in the New York Convention or national arbitration laws based on the UNCITRAL Model Law, additional instances of border crossings may derive from international treaties (such as the European Convention on International Commercial Arbitration<sup>117</sup>), national laws, and rules of major arbitral institutions (ICC, LCIA, AAA/ICDR, SCC).

## II. *BORDER CROSSINGS IN THE US DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK*

New York is probably the most important city in the world for international commercial arbitration. The multilateral treaty that provides the basic architecture for the transnational enforcement of arbitration agreements and awards bears its name. Many parties, both foreign and domestic, choose to conduct arbitrations in New York, which is the headquarters of the American Arbitration Association's International Centre for Dispute Resolution, and the location of a regional office of the International Chamber of Commerce ("ICC"). As a center of global finance and commerce, many businesses have bank accounts or assets in New York that make it a key enforcement jurisdiction. New York law is often chosen as the benchmark law in business contracts, even as between parties that are not US nationals and as to transactions that have no connection to the United States.<sup>118</sup> New York's federal and state courts have a reputation for neutrality that make them attractive fora for litigation in support of arbitration. And, because many international arbitration cases that start in New York state courts are removed to US federal courts located in New York, those courts are a particularly valuable vantage point from which to collect data and test theories about border crossings.

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117. For instance, while the New York Convention is silent on the provision of interim relief by courts in aid of international arbitration, such assistance by the courts are anticipated by the European Convention. See European Convention on International Commercial Arbitration, *supra* note 38, art. VI(4).

118 See, e.g., *Intern. Standard Elec. v. Bidas Sociedad Anonima*, 745 F. Supp. 172 (S.D.N.Y. 1990).

Surprisingly, no one has done so—a lacuna that this Article seeks to fill.

The Article aimed to survey all litigation related to international arbitration that originated in the US District Court for the Southern District of New York (SDNY) after December 29, 1970, when the New York Convention entered into force in the United States. It is the first article in a planned series that will examine and analyze these data about international arbitration litigation in the SDNY. Future articles in the series will apply statistical treatments to the data and analyze the data to glean qualitative information on winners, losers, types of claims, and amounts of damages.

In collecting and coding the data, we relied on both published and unpublished cases reported in the Westlaw database by employing the following methodology. First, we searched for all cases containing a reference to any provision of Chapter 2 of the Federal Arbitration Act (FAA)—the statute by which the New York Convention has been implemented in the United States. An advanced search for “9 usc 20\*” & CO(SDNY) returned a list of 308 cases for a period from December 29, 1970 to September 15, 2014.

Second, we performed a similar search for cases in the Southern District of New York that contain any reference to the provisions of Chapter 3 of the FAA, the provisions implementing the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”), which entered into force for the United States on October 27, 1990. The advanced search for “9 usc 30\*” & CO(SDNY) returned an additional list of 19 cases. To avoid duplications for cases found on both lists, we cross-referenced and deleted from the smaller Panama Convention list all cases already present on the New York Convention list. As a result, we crossed out 10 duplicate cases and added the remaining 9 Panama Convention cases to the New York Convention list, yielding a total of 317 observations from 1970 to the present day.

Third, we performed an additional search to locate cases in the SDNY involving requests for court assistance in taking evidence in aid of international arbitration from third parties within the court’s jurisdiction—Category 8 in Table 1. Here, we searched for all cases in the Southern District of New York that contained the terms “28 usc 1782”—the statute authorizing US federal courts to assist in the collection of evidence for foreign and international tribunals—and the terms “arbitration” or “arbitral” to limit the search results to cases in

which the relevant “foreign or international tribunal” was an arbitral panel. The advanced search for arbitral & “28 usc 1782” & CO(SDNY) produced a list of 37 results, which were then analyzed for border crossings with respect to court assistance in taking evidence, with the earliest of such cases dating back to 1994.

Fourth, we searched for cases where interim measures were ordered by the court in the SDNY under section 7502(c) of the Civil Practice Law and Rules of New York.<sup>119</sup> Here, the advanced search for arbitral & “7502(c)” & CO(SDNY) returned a list of 23 cases, which were then cross-referenced against cases already listed in the New York Convention list and then analyzed in search of additional instances of border crossings of Category 2—Court issuance of interim measures.

Finally, we analyzed all cases on the lists by classifying identified border crossings into one of the 11 categories generated in Part I based on the New York Convention, the UNCITRAL Model Law, and recent high-profile litigation. As we proceeded with the analysis, occasional non-arbitration cases were crossed off the list. This would happen, for instance, when the New York Convention was mentioned in a case only in a footnote as an analogy without directly invoking its provisions.

Cases were classified based on the original moving party’s motion or filing. For instance, if a moving party filed to vacate an arbitral award and the opposing party then cross-moved to confirm the same award, the case was counted as a single instance of a border crossing—in this example, Category 9 (Setting aside of arbitral awards). Similarly, if a party initially filed to confirm and enforce an arbitral award, and the opposing party moved to dismiss, the case was counted as a single instance of a Category 10 border crossing—Recognition and enforcement of arbitral awards. However, in a case where a party sued on a dispute despite the presence of an arbitration agreement, and the opposing party counter-moved to compel arbitration and stay court proceedings pending arbitration, we coded it as an action to enforce an arbitration agreement, a Category 1 border crossing.

Generally speaking, a single case would normally be counted as a single border crossing. Occasionally, multiple border crossings for a

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119. For reasons of such search for state law references in the U.S. district court practice, please *see supra* note 51 and the accompanying text, explaining the role of state law in provisional remedies granted by federal courts.

single case were recorded where a litigious party brought multiple actions or sought divergent forms of relief in the US federal district court within the context of a single case. For instance, if a motion to compel arbitration also contained a request to the court to appoint an arbitrator or to order an interim measure in aid of arbitration, such cases were counted as two instances of border crossings—categories 1 and 3 (Enforcement of the arbitration agreement and Appointment of arbitrators) and categories 1 and 2 (Enforcement of the arbitration agreement and Court issuance of interim measures), accordingly. The results of our analysis are presented below (Table 2 and Table 3).

Table 2. Border Crossings in SDNY, 12/29/1970-9/15/2014

Year/Border crossing	Enforcement of the arbitration agreement	Court issuance of interim measures	Appointment of arbitrators	Challenges to arbitrators	Termination of the arbitrator's mandate	Challenges to arbitral jurisdiction	Enforcement of tribunal's interim measures	Court assistance in taking evidence	Setting aside of arbitral awards	Recognition and enforcement of awards	Execution of enforced arbitral awards	Annual total
1970	-	-	-	-	-	-	-	-	-	-	-	-
1971	-	-	-	-	-	-	-	-	-	-	-	-
1972	-	-	-	-	-	-	-	-	-	-	-	-
1973	-	-	-	-	-	-	-	-	-	2	-	2
1974	-	-	-	-	-	-	-	-	-	1	-	1
1975	-	-	-	-	-	-	-	-	-	-	-	-
1976	1	-	-	-	-	-	-	-	-	-	-	1
1977	3	2	-	-	-	-	-	-	-	-	-	5
1978	1	1	-	-	-	-	-	-	-	2	-	4
1979	2	-	1	-	-	-	-	-	1	1	-	5
1980	-	-	-	-	-	-	-	-	-	-	-	-
1981	-	-	-	-	-	-	-	-	-	-	-	-
1982	-	-	-	-	-	-	-	-	-	1	-	1
1983	1	1	-	-	-	-	-	-	-	1	-	3
1984	2	1	1	-	-	-	-	-	-	-	-	4
1985	4	-	1	-	-	-	-	1	-	1	-	7
1986	1	1	-	-	-	-	-	-	-	3	1	6

Table 2-continued from previous page

Year/Border crossing	Enforcement of the arbitration agreement	Court issuance of interim measures	Appointment of arbitrators	Challenges to arbitrators	Termination of the arbitrator's mandate	Challenges to arbitral jurisdiction	Enforcement of tribunal's interim measures	Court assistance in taking evidence	Setting aside of arbitral awards	Recognition and enforcement of awards	Execution of enforced arbitral awards	Annual total
1987	1	3	-	-	-	-	-	1	-	3	1	9
1988	2	-	1	-	-	-	-	-	-	-	-	3
1989	1	1	-	-	-	-	-	1	1	2	-	6
1990	-	1	-	-	-	-	-	-	-	1	-	2
1991	3	-	-	-	-	-	-	-	1	1	-	5
1992	6	-	-	-	-	-	-	-	3	1	-	10
1993	3	-	-	1	-	-	-	-	1	2	-	7
1994	5	1	1	-	-	-	-	1	1	2	-	11
1995	4	-	1	-	-	-	1	-	-	2	-	8
1996	5	-	1	1	-	-	-	-	1	2	-	10
1997	4	1	-	-	-	-	-	2	-	5	-	12
1998	3	1	1	-	-	-	-	1	-	2	1	9
1999	3	2	-	-	-	-	-	-	-	3	-	8
2000	4	-	-	-	-	-	-	-	1	1	1	7
2001	2	2	-	-	-	-	-	-	-	5	1	10
2002	2	2	-	-	-	-	1	-	1	7	-	13
2003	6	3	-	-	-	-	-	-	1	8	1	19
2004	2	-	-	-	-	-	-	-	-	4	2	8
2005	5	2	-	-	-	-	1	1	-	3	-	12
2006	-	1	-	-	-	-	-	1	1	2	2	7
2007	2	-	-	-	-	-	-	-	4	4	-	10
2008	3	2	-	-	-	-	-	-	1	5	-	11
2009	6	5	-	-	-	-	-	-	1	9	-	21
2010	6	8	-	-	-	-	-	2	2	9	2	29
2011	5	-	-	-	-	-	-	2	1	6	1	15
2012	4	2	-	-	-	-	1	1	1	8	1	18
2013	7	3	1	-	-	-	-	-	1	7	1	20
2014	2	-	-	-	-	-	1	-	1	6	-	10
Total	111	46	9	2	-	-	5	14	25	122	15	349



Table 3. Litigious Parties in SDNY, 12/29/1970-9/15/2014

	Case name	Border Crossings
1.	Thai-Lao Lignite (Thai) Co., Ltd. v. Gov't of Lao People's Democratic Republic <sup>120</sup>	10, 11
2.	Amaprop Ltd. v. Indiabulls Fin. Servs. Ltd. <sup>121</sup>	1, 2, 10, 11
3.	Sanluis Dev., L.L.C. v. CCP Sanluis, L.L.C. <sup>122</sup>	9, 10
4.	Gerling Glob. Reinsurance Corp. v. Sompo Japan Ins. Co. <sup>123</sup>	7, 11
5.	U.S. Titan, Inc. v. Guangzhou Zhen HUA Shipping Co., Ltd. <sup>124</sup>	1, 1, 1
6.	Ermenegildo Zegna Corp. v. Lanificio Mario Zegna, S.p.A. <sup>125</sup>	10, 11
7.	Banco de Seguros del Estado v. Mutual Marine Offices, Inc. <sup>126</sup>	2, 7, 9
8.	Pan Atl. Grp., Inc. v. Republic Ins. Co. <sup>127</sup>	7, 10
9.	Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala <sup>128</sup>	10, 11
10.	Andros Compania Maritima, S.A. v. Intertanker Ltd. (consolidated, incl. Holborn Oil Trading Ltd. v. Interpetrol Bermuda Ltd.) <sup>129</sup>	2, 8, 10, 11
11.	Jamaica Commodity Trading Co. Ltd. v. Connell <sup>130</sup>	1, 10
12.	Ideal Mut. Ins. Co. v. Phoenix Greek Gen. Ins. Co. <sup>131</sup>	1, 2, 3

*Notes:* 1 – Enforcement of the arbitration agreement; 2 – Court issuance of interim measures, 3 – Appointment of arbitrators; 4 – Challenges to

120. See 997 F.Supp.2d 214 (S.D.N.Y. 2014); 924 F.Supp.2d 508 (S.D.N.Y. 2014); 2011 WL 3516154 (S.D.N.Y. 2011).

121. See 2012 WL 4801452 (S.D.N.Y. 2012); 2010 WL 1050988 (S.D.N.Y. 2010).

122. See 556 F.Supp.2d 329 (S.D.N.Y. 2008); 498 F.Supp.2d 699 (S.D.N.Y. 2007).

123. See 348 F.Supp.2d 102 (S.D.N.Y. 2011); 2005 WL 3601904 (S.D.N.Y. 2005).

124. See 2003 WL 23309445 (S.D.N.Y. 2003); 182 F.R.D. 97 (S.D.N.Y. 1998); 16 F.Supp.2d 326 (S.D.N.Y. 1998).

125. See 2003 WL 21709424 (S.D.N.Y. 2003); 2002 WL 31427341 (S.D.N.Y. 2002).

126. See 230 F.Supp.2d 427 (S.D.N.Y. 2002); 230 F.Supp.2d 362 (S.D.N.Y. 2002).

127. See 878 F.Supp. 630 (S.D.N.Y. 1995); 1995 WL 38179 (S.D.N.Y. 1995).

128. See 793 F.Supp. 444 (S.D.N.Y. 1992); 123 F.Supp.2d 174 (S.D.N.Y. 2000).

129. See 718 F.Supp. 1215 (S.D.N.Y. 1989); 658 F.Supp. 1205 (S.D.N.Y. 1987); 430 F.Supp. 88 (S.D.N.Y. 1977).

130. See 1991 WL 123962 (S.D.N.Y. 1991); 766 F.Supp. 138 (S.D.N.Y. 1991); 1985 WL 1423 (S.D.N.Y. 1985).

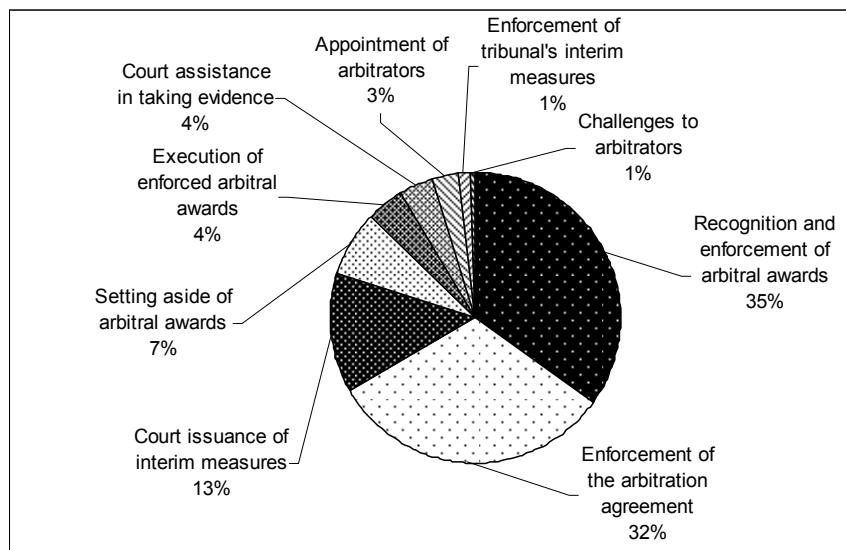
131. See 1987 WL 28636 (S.D.N.Y. 1987); 1984 WL 602 (S.D.N.Y. 1984).

arbitrators; 5 – Termination of the arbitrator’s mandate; 6 – Challenges to arbitral jurisdiction; 7 – Enforcement of tribunal’s interim measures; 8 – Court assistance in taking evidence; 9 – Setting aside of arbitral awards; 10 – Recognition and enforcement of arbitral awards; 11 – Execution of enforced arbitral awards.

### III. ANALYZING THE DATA AND NORMATIVE PRESCRIPTIONS FOR BORDER CROSSINGS

There are several conclusions to be drawn from the data. First, the two most highly trafficked border crossings are, as expected, the two that are the central focus of the New York Convention: actions to enforce arbitration agreements and actions to enforce or recognize arbitral awards. Between 1970 and 2014, there were 122 actions (35% of all border crossings observed) in the Southern District of New York involving suits to enforce arbitral awards, and 111 actions (32% of all border crossings) to enforce arbitration agreements (Table 2; Chart 1).

Chart 1. Border Crossings in SDNY, 12/29/1970-9/15/2014



Falling far behind, but ranking at numbers three and four in the top five border crossings are two that are not a surprise: 46 actions to seek interim measures (13%) and 25 suits to set aside or vacate

arbitral awards (7%). These data confirm natural expectations for the most trafficked border crossings and provide useful insight into frequency of crossings relative to each other (for trends over the years, see Chart 2 below).

Still, the frequency of resort to interim measures and set-aside actions seemed to us unexpectedly low. With respect to interim measures, despite the considerable commentary in the international arbitration literature, and initiatives by major international arbitration associations to build in-house capacities, there did not appear to be as many suits relating to such measures as we had expected. Nor was there an appreciable increase in recent years: other than the eight observations in 2010 and five observations in 2009, the typical annual frequency count was one to three instances, and observations in that range were recorded as early as 1977 and 1978. Moreover, there does

Chart 2. Four Most Trafficked Border Crossings in SDNY, 12/29/1970-9/15/2014

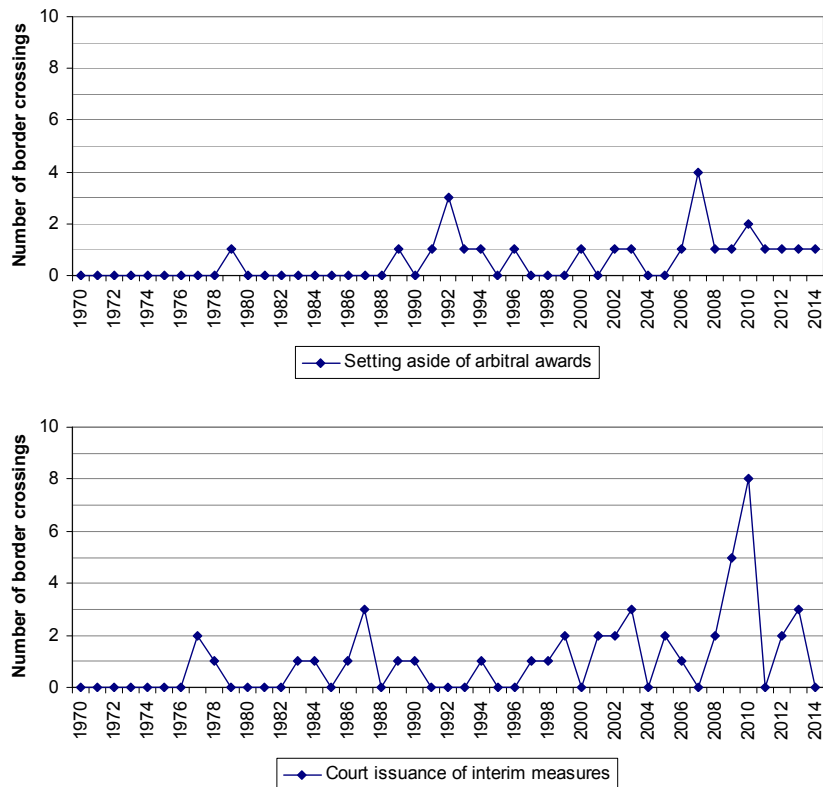
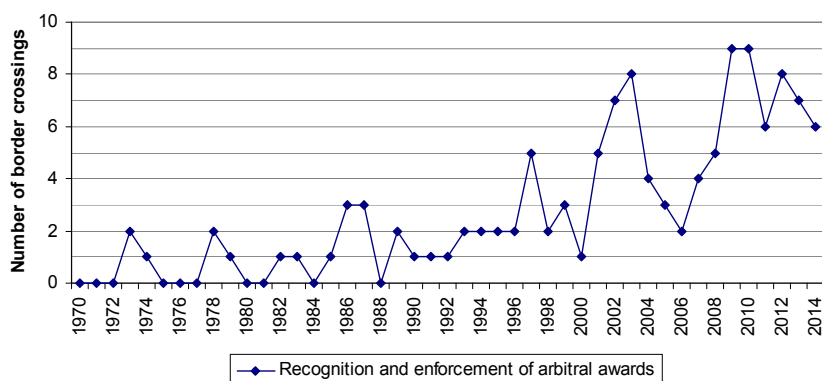
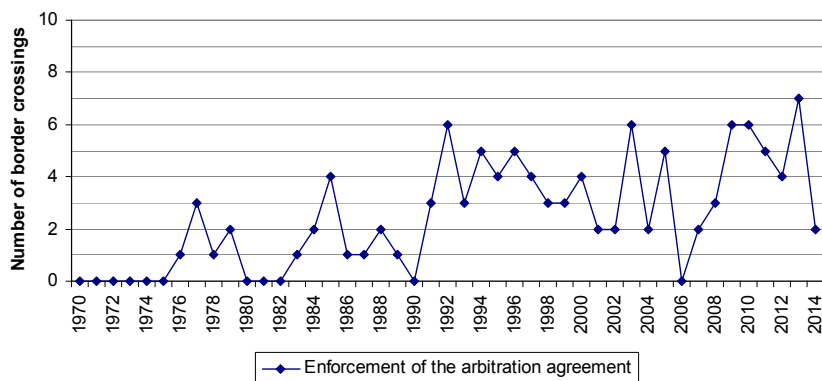


Chart 2-continued from previous page



appear to have been a drop-off after 2010 as leading private arbitral institutions started implementing internal interim, provisional, or emergency measure granting capacity. With respect to the number of set-aside actions we expected more instances where a party initiated a lawsuit to vacate an arbitral award.<sup>132</sup> The low frequency may be due to party expectations based on the law of the Second Circuit that the trial court will be highly unlikely to vacate an international arbitral award that falls under the New York or Panama Conventions.

Those four border crossings dwarfed all others. The fifth-ranked border crossing comprised actions to aid in the execution of an arbitral award, of which we counted fifteen, all but two coming since

132. We coded cases where there was a cross-motion to vacate after an initial suit to confirm or enforce an arbitral award as recognition or enforcement actions, since that was how they started.

1998. And we only observed 14 instances where a party sought to get court assistance in taking evidence, including discovery from a third party under 28 U.S.C. §1782. The result is low but not surprising, given that the US Court of Appeals for the Second Circuit—the appellate court that includes SDNY—has interpreted the statute not to apply to international arbitral tribunals—a result that has been cast into some doubt by a subsequent US Supreme Court decision.<sup>133</sup> Moreover, as the protracted multi-country litigation between Chevron and Ecuador demonstrates, there can be multiple discovery requests by a party, not all of them filed in the same district.<sup>134</sup> Thus, for any given parties, the actual number of border crossings for discovery under 28 U.S.C. §1782 could be higher than those observed in SDNY. We had also expected to see more suits involving requests to appoint arbitrators or challenging them that we actually observed—nine of the former and two of the latter.

In terms of annual totals, it seems that there has been an upward trend in border crossings, at least since the 1970s and 1980s. However, the levels of international arbitration-related litigation have seemed fairly stable since 1992 or so, with a peak of 29 observations in 2010 (with the second highest of 21 observed in 2009). It may be too early to tell, but it seems that there has been a downward trend since 2010. One explanation for this peak might be the global economic crisis that possibly led to more disputes in arbitration and litigation.

The statistics of arbitral institutions appears to reflect a similar tendency. The ICC, for instance, reported a greater than normal increase in requests for arbitration already in 2008 (663, as compared to 599 in 2007 and 593 in 2006), and an even higher increase for 2009 – 817 requests for arbitration (the highest ever in the history of the ICC arbitration).<sup>135</sup> On the back end of the arbitration process, the ICC then reported the highest number of awards rendered for the years 2011, 2012 and 2010 (508, 491, and 479, respectively).<sup>136</sup> If one

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133. *See Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

134. Over the years, Chevron and Ecuador filed multiple requests for discovery. The United States Court of Appeals for the Third Circuit calculated in 2011 that Chevron Corporation alone had submitted at least 25 motions for discovery under 28 U.S.C. §1782 in various courts in the U.S. *See In re Chevron Corp.*, 650 F.3d 276 (3d Cir. 2011).

135. For the ICC arbitration statistics, see the ICC International Court of Arbitration Bulletin and information presented on the ICC website at <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Introduction-to-ICC-Arbitration/Statistics/>.

136. *Id.*

assumes that similar trends were present in other arbitral institutions and ad hoc arbitration,<sup>137</sup> one would also expect higher number of border crossings for 2009 and 2010, as observed in the Southern District of New York. Also, we understood that we would not see any border crossings in Categories 5 and 6—courts deciding on the termination of the arbitrator's mandate and reviewing a preliminary ruling by an arbitral tribunal upholding its own jurisdiction. Both are border crossings under the UNCITRAL Model Law which are not contained in the Federal Arbitration Act.

Finally, we observed several persistent litigious border-crossers, although not so many as expected (see Table 3 above). One explanation for the low number of repeat border crossings may be that some additional crossings occur at the state court level or in other federal judicial districts and therefore are not observable in SDNY. More likely, the number of repeat crossers is small because an award debtor unhappy with the generative arbitration will probably not do anything and refuse to pay rather than hire lawyers to continue to challenge an arbitral award in costly court litigation.

These conclusions, in turn, generate some policy recommendations and normative themes. First and at the most abstract level, the New York Convention seems to be working fairly well, notwithstanding occasional calls to amend it (e.g., to add provisions for enforcement of interim measures) or even to junk it altogether.<sup>138</sup> Actions to enforce arbitration agreements and awards are still the main international arbitration events in national courts, and they far outnumber any other proceedings. In future work, we plan to engage in more detailed analysis of the facts of these cases to generate ideas about how national statutes might be revised or amended to make these high-traffic crossings more efficient.

Second, there appear to be a few underutilized border crossings (e.g., those related to the appointment of arbitrators or challenges of arbitrators) that might be closed in national laws to make arbitration

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137. The AAA/ICDR experienced a more steady increase in its caseload for international cases, reporting 703 cases for the year 2008, 836—for 2009, 888—for 2010, and 994—for 2011. See 3 *ICDR INT'L ARBITRATION REPORTER* (July 2012), [https://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_019805](https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_019805). In 2012, the ICDR administered 996 international arbitration cases. See 4 *ICDR INT'L ARBITRATION REPORTER* (Sept. 2013), [https://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTAGE2015007&RevisionSelectionMethod=LatestReleased](https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2015007&RevisionSelectionMethod=LatestReleased).

138. See Jack Graves, *Court Litigation Over Arbitration Agreements: Is It Time for a New Default Rule?*, 23 *AM. REV. INT'L ARB.* 113, 136 (2012).

more autonomous. In particular, the FAA, the UNCITRAL Model Law, and most major non-UNCITRAL statutes, provide for national court jurisdiction over arbitrator appointments and challenges. However, the data reveal that this is not a highly trafficked border crossing. With respect to appointments (there were only 9 observations in the 45 years surveyed), perhaps more might be done to incorporate alternative appointment procedures into institutional rules. With respect to challenges, it seems to us prudent and better policy to keep this at the institution or tribunal level rather than leave room for resort to courts. And, to serve parties who choose *ad hoc* arbitrations, institutions should fine-tune “*a la carte*” rules that allow parties to invoke them solely for issues involving the appointment or challenge of arbitrators.

Third, by contrast to the relative disuse and lack of need for resort to courts for appointment, challenge, and termination of arbitrators, courts do seem to be important in taking evidence or providing interim relief for arbitral proceedings. This state of affairs harkens back to the ancient partnership between the common law courts and courts of equity in early modern England and the United States. Common law courts handled substantive claims for money damages, but if a litigant there wanted supplemental provisional relief or discovery, he or she had to go to the equity court or chancery.<sup>139</sup> It seems to us apt to envision a similar partnership between national courts and international arbitral tribunals, with the former in the role of chancery and the latter in the role of a common law court.

Fourth, as Table 3 indicates, there appears to be a handful of persistent-objector litigious parties that attempt to get into national court as often as they can. Although abusive border crossings do not happen very often, there could—and should be—more attention paid to how national laws and institutional rules could be amended or designed to deter this sort of behavior. Of course, that is not to say that we would necessarily want to deter a party that is seeking to go into national courts because it believes in good faith that it never agreed to arbitration and is being railroad. But we do want to deter a party that is just being stubborn when it did plausibly agree to arbitration. How can we solve this puzzle? One start to a solution would be to find a way to lock them into the national courts of one

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139. See JOHN LANGBEIN ET AL., *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 271-98 (2009). See generally J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* (2d ed. 1979).

jurisdiction—the primary jurisdiction, which would be designated by the parties or the place of arbitration. This could be done by inculcating a norm of designating a court of primary jurisdiction in arbitration agreement drafting. To reduce parallel proceedings in courts and arbitration, greater stays of proceedings under 9 U.S.C. §3 could also be used.

Fifth, disappointed parties in international arbitrations have not initiated suits to set aside or vacate arbitral awards in the Southern District's trial courts as much as one would have expected—only 25 times in 45 years. International arbitration scholars and practitioners as a group are reluctant to acknowledge a broad scope of national courts' set-aside powers, especially in non-primary jurisdiction courts. As noted above, the reluctance flies in the face of the fact that a plain-language reading of words of the New York Convention suggests that set-aside jurisdiction is appropriate in any State “under the laws of which” an arbitral award was made. The data reveal that at least in the United States, even though in theory an award debtor could move first to set aside an award rendered in New York, it does not often do so. This in turn, suggests that concerns about recognizing multiple set-aside jurisdictions may be overblown. This is particularly true since the New York Convention does not require courts of signatory nations to deny recognition of an arbitral award on the ground that it was set aside by a foreign court—a discretion that the US courts of the Southern District have sometimes inadvertently forgotten.

Finally, we predict that there will be a rise in resort to court for aid in execution of arbitral awards. For this category of border crossings, we observed a total of 15 instances, including three observations made between 1971 and 1999 and 12 – from 2000 to 2014. Further growth of these border crossings will be assisted by the recent high-profile Argentina case decided by the US Supreme Court in June 2014.<sup>140</sup> This trend leads us to the hypothesis that an award debtor does not react as much as expected when it loses an arbitral award. Consequently, it does not pay lawyers to try to set it aside. But the loser really minds when the award creditor begins the process of coercing it to pay.

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140. *See Republic of Argentina v. NML Capital Ltd.*, 134 S. Ct. 2250 (2014).



*CONCLUSION*

As the pace of global commerce quickens, the use of international arbitration to resolve commercial and investor-state disputes will accelerate correspondingly. But international arbitrations occur in the shadow of State-based international legal obligations (like the New York Convention) policed by national courts. Everyone knows this, but no one has explored what this partnership looks like on the ground by sifting the data. This Article is a first cut at filling this gap, using data from the Southern District of New York—the JFK airport of the international commercial arbitration world. The findings confirm some expectations and reflect doubt upon others. What is clear, however, is that national courts are heavily vested in aiding the international arbitral process, and there are ways to make them more effective in doing so.

