Keeping Dispute Resolution Costs Smaller Than Your Small Business: The Case for International Commercial Arbitration under the New York Convention

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KEEPING DISPUTE RESOLUTION COSTS SMALLER THAN YOUR SMALL BUSINESS: THE CASE FOR INTERNATIONAL COMMERCIAL ARBITRATION UNDER THE NEW YORK CONVENTION

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"Business is grateful to the United Nations for having provided it with this instrument in a world where arbitration is resorted to for the resolution of international commercial disputes."1

- Pieter Sanders, Principal Drafter of The Convention on the Recognition of Foreign Arbitral Awards of 1958 (The New York Convention)

I. Introduction

The popular press did not treat arbitration well in 2015.2 In particular, The New York Times published a three-part series about arbitration with titles including “Arbitration Everywhere: Stacking the Deck of Justice,” and “In Arbitration,

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a ‘Privatization of the Justice System.”’ The series even included a piece called “In Religious Arbitration, Scripture is the Rule of Law.” These headlines imply unfairness. The prose, discussed intermittently in this article, depicts arbitration as the evil twin of the American justice system, depriving consumers of their due process rights.

Reading articles like these would leave the reader with the impression that arbitration inherently favors one side and limits the other party’s access to justice. While the articles sweepingly discuss arbitration, their real focus appears to lie in business to consumer arbitration, overlooking settings in which arbitration is useful, helpful and fair. This comment focuses on one of those settings: international commercial arbitration and the benefits it holds for small businesses engaging in international transactions and signing cross-border contracts. International commercial arbitration is particularly effective when conducted to take advantage of The Convention on the Recognition of Foreign Arbitral Awards of 1958 (The New York Convention).

International commercial arbitration offers several generally applicable benefits that are particularly helpful to small businesses. As one scholar writes:

There are different principles by which to gauge the legal tradition of international commercial arbitration. The first principle is consensual, namely, that the parties choose arbitration. The parties are free to select the nature, form and operation of arbitration, whether its nature is ad hoc or institutional, whether its form is modelled on European, English, American or “other” legal traditions, whether it is conducted primarily

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5 See generally Arbitration Everywhere, supra note 3. (The first article in the series explores arbitration clauses in consumer contracts that prohibit class action suits. Nonetheless, the authors enhance the apparent severity of their narrow focus by pointing out such facts how Chief Justice John Roberts worked on a case seeking to uphold these clauses. The Times attempts to depict a conspiracy where none exists.); see also David B. Lipsky, The New York Times’ Attack on Arbitration, Series Highlighted Abuses – But Also Ignored Arbitration’s Many Advantages, 22 DISP. RESOL. MAG., no. 4, 2016 at 6 (“There is more than a hint of a conspiracy in the Times account of this development . . . .”).

6 Silver-Greenberg & Gebeloff, supra note 3; Privatization of the Justice System, supra note 3; Scripture is the Rule of Law, supra note 4.

through oral testimony or written submissions, and whether it is impacted by a multi-or bilateral treaty or by discrete customary law influences.\(^8\)

While *The New York Times* finds “circumventing the courts” objectionable, the ability to avoid courts actually favors small businesses that use arbitration in international disputes.\(^9\) Parties are free to set the rules of their proceedings, the laws to be applied, and how the arbitration will be conducted.\(^10\)

Like the popular press, scholars have increasingly spoken out against international commercial arbitration. Academics tend to endorse large scale-judgment reciprocity treaties.\(^11\) This article will show that such schemes are impractical and provide minimal benefits to small businesses and their lawyers.\(^12\)

Fortunately, the New York Convention ensures that arbitration awards won in any signatory country are enforceable in any other signatory country.\(^13\) Since arbitration proceedings and their location are inherently consensual anyway, parties can proceed confidently that as long as they receive an award, it will be upheld and entered as a judgment in any of the convention’s 156 ratifying countries.\(^14\)

This fundamental aspect of the New York Convention forms the foundation of this comment. The following pages provide a guide to international commercial arbitration within the New York Convention’s framework. The comment begins with an examination of the relevant provisions of the New York Convention, as well as its companion treaty, the Inter-American Convention on International Commercial Arbitration, more commonly known as the Panama Convention.\(^15\)

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\(^9\) *Privatization of the Justice System*, supra note 3 (discussing arbitration as amounting to a whole-scale privatization of our justice system); see also Lipsky, supra note 5, at 6-7 (contrasting the N.Y. Times article’s sentiment that arbitration for small businesses is always bad).

\(^10\) Trakman, *supra* note 8, at 23-26 (discussing the nature of arbitration through the rules and procedures and illustrating how the “wide range of services provided by different arbitration associations is the plethora or arbitration clauses, procedures and evidentiary rules adopted by each [region].”).

\(^11\) See generally John F. Coyle, *Rethinking Judgments Reciprocity*, 92 N.C.L. Rev. 1109, 1113 (2014); see also Katherine R. Miller, *Playground Politics: Assessing the Wisdom of a Reciprocity Requirement into U.S. International Recognition and Enforcement Law*, 35 Geo. J. Int’l L. 239, 241-42, 280-81 (2004) (citing that the Hague Conference is an ideal forum for the adoption of a major international treaty where “more than forty-five countries are involved in the Hague Convention project, including every significant U.S. trading partner.” The need for simplification of “international recognition and enforcement practice is enormous.” Thus introducing the “reciprocity requirement” will provide an incentive for other countries to join the Hague Convention and increase the “bargaining power of the United States vis a vis those other countries.”).

\(^12\) GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 1081-91 (Kluwer Law International, et al. eds., vol. 1, 2009) (“It is fundamental that the scope of an agreement to arbitrate is a matter of contract, subject to the parties’ will”).

\(^13\) New York Convention, supra note 7, art. I.


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Subsequently, it explores the enforcement mechanisms for arbitration awards both generally and under the New York Convention, both in the United States and abroad. The enforcement climate is particularly favorable in the United States because federal preemption allows the Federal Arbitration Act, with its incorporation of the New York Convention, to supersede any state arbitration laws. American courts have even upheld arbitration awards to the government of Iran. European and other foreign courts, while bound by the New York Convention to enforce arbitration awards, are less inclined to allow arbitrations to proceed in the first place.

The analysis also illuminates the potential pitfalls of international commercial arbitration that arise from relying on the New York Convention. The choice of law clause causes significant consternation as countries have varying standards for what constitutes a fair arbitration clause. If an arbitration is subject to a certain country’s law, the New York Convention does not stop that law from applying to the validity of the arbitration clause.

In sum, effective and efficient arbitrations arise from careful planning. Small business owners and their counsel should take considerations discussed in this comment into account when planning for dispute resolutions in international transactions to ensure a successful result and an expedient and cost efficient process. Accordingly, this article concludes with a proposal to promote arbitration and to more widely disseminate materials that educate lawyers serving small businesses on the mechanics of international commercial arbitration and small business owners on the process’ benefits.

II. Background

International commercial arbitration emerged after World War II as trade increased between the victorious and economically expanding Western nations. This post-war international economic expansion created the need for the New York Convention.


18 Donna M. Bates, A Consumer’s Dream or Pandora’s Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?, 27 FORDHAM INT’L L.J. 823, 839-40 (2004) (finding that in the European Union, unlike in the United States, no pre-dispute arbitration agreements with consumers is binding. Thus, the burden does not rest on the consumer in the European Union to demonstrate a “recognized ground for non-enforcement of the agreement” because the Union generally refuses to enforce such clauses).


20 Id. at 183-84.


The International Commerce Commission ("ICC") first proposed an international arbitral award enforcement treaty in 1953. After extensive discussion and proposals, the United Nations ratified the "Dutch Proposal," in 1958, a version of the convention far narrower than others. This version's limited scope ensured foreign awards would be recognized in the courts of other ratifying states.

The Panama Convention, ratified in 1984, is effectively a regional, Latin-American version of the New York Convention. Today, the Panama Convention covers eighteen Latin American countries and is written to be fully compatible with the New York Convention. While there are some small differences between these two agreements, the Panama Convention supplements the New York Convention by resolving long-standing problems in enforcement of arbitral awards in Latin America. Many of the countries that ratified the Panama Convention were not original signatories to the New York Convention, but subsequently ratified the New York Convention. In instances where both treaties apply, American law resolves the existing conflict by applying the Panama Convention, though the differences between the two are nominal.

The New York Convention sought to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in signatory nations." Justice Potter Stewart of the United States Supreme Court wrote those words in Scherk v. Alberto-Culver Co., a landmark case that solidified the United States' adherence to the provisions of the New York Convention. While only the notes in Stewart's opinion reference the New York Convention specifically, Stewart nonetheless captured the essence of the convention and its aims in his opinion when he wrote:

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23 Carbonneau, supra note 22, at 778.
24 Sanders, supra note 1.
25 See Sanders, supra note 1. Sanders drafted the proposal that became the New York Convention in a distinctly non-legal setting: perched in a relative's suburban New York garden with a typewriter.
27 Id. at 19-20.
28 Id. at 8-9 (explaining that barriers to enforcement of arbitral awards in Latin America include, "(1) court refusal to enforce agreements to arbitrate future disputes; (2) the existence of extremely broad grounds for attacking arbitral awards, making enforcement difficult at best; (3) restrictions or prohibitions against non-nationals acting as arbitrators; and (4) the requirement that an arbitration agreement be made in a public writing—an escritura publica, a writing executed before a notary, a judicial officer in civil law countries.").
29 N.Y. ARB. CONVENTION, supra note 14.
32 Id. at 507.
A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.  

Stewart and the Supreme Court protected the New York Convention in the United States to ensure that ignorance of a foreign forum on a particular topic or national bias would not hinder aggrieved parties in receiving the relief to which they are entitled.

The convention’s drafters sought uniformity and strived “to establish a single, stable set of international legal rules for the enforcement of arbitral agreements and awards.” Assurance that arbitration awards in one country will be enforced in another makes certain that arbitration can achieve its principal advantages of “privacy of the proceedings, likely maintenance of the business relationships if the parties so desire and savings in cost and time.”

Considering that business’ litigation costs are spiraling out of control, such certainty makes sense. Procedural and discovery costs of the American litigation system make any lawsuit a potentially damaging proposition to a small business. In 2008, small businesses in the United States spent $105 billion dollars on tort judgment awards. The escalating costs of litigating in the United States judicial system only further adds to the expense of defending lawsuits. The effect of losing a suit, or even just having to defend one, can be catastrophic for a small business that may already be on precarious financial footing, particularly during its foundational stages. For companies doing business overseas, enforcing a foreign judgment domestically or vice versa would discourage investment in any jurisdiction where enforcement of an award is less than certain.

Finally, this article adheres to the guidelines of the United States’ Small Business Administration (“SBA”) defining small businesses. These definitions vary by industry and are measured by either employees or gross annual receipts. For

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34 Id.
35 BORN, supra note 12, at 23.
37 U.S. Chamber of Commerce, supra note 21.
38 Id.
39 U.S. Chamber of Commerce, supra note 21.
40 Id.
43 Id.
instance, the SBA defines a “truck transportation company” as a small business when it has $27.5 million in annual receipts, but deems a water transportation company a small business when it has 500 employees. For general purposes of this article, small businesses have fewer financial and human resources than larger corporations, such that protracted and expensive litigation would pose a threat to their viability.

III. Discussion

In the United States, the Federal Arbitration Act (“FAA”) gives the New York Convention its authority. The FAA subjects any arbitration award for which a party seeks enforcement in the United States to federal oversight and a single standard of review. Regardless of the size of the dispute and whether it is between domestic or international parties, the FAA applies. Further, the recent Supreme Court cases of AT&T Mobility v. Concepcion and American Express Co. v. Italian Colors, both reaffirmed that the FAA will preempt any state court decision to circumvent the act. While these cases focused on the application of the FAA to class action lawsuits, the court nonetheless made the emphatic point that courts must “rigorously enforce arbitration agreements” and that the only a “congressional command” can override the FAA. Thus, since the FAA backs the New York Convention, United States courts have set a precedent that the United States will continue enforcing the convention’s provisions.

In contrast, other countries are still institutionally hostile towards arbitration. For instance, the European Union Consumer Directive of 1993 throws out any contract’s arbitration clause if a court deems the provision “unfair” or if the court detects a “significant imbalance in the parties’ rights and obligations.” This directive stands in stark contrast to the situation in the United States discussed above. United States courts have even gone so far as to force a complex antitrust claim under U.S. law to be arbitrated in Japan because the arbitration agreement prescribed doing so. Nonetheless, the Japanese courts are far less willing to do

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44 Summary of Size Standards by Industry Sector, supra note 42.
47 Moses, 460 U.S. at 24; Park, supra note 46.
49 Am. Express Co., 133 S. Ct. at 2308-09.
50 Am. Express Co., 133 S. Ct. at 2308-09.
51 Bates, supra note 18, at 839.
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the same. Japanese courts by law invalidate any arbitration clause “contrary to public policy and good morals.”

This hostility notwithstanding, arbitration is nonetheless fundamentally fair because the parties may decide the terms of the proceedings far in advance of their disputes. It is “competitive and consensual, allowing parties to both singularly and mutually consider and agree upon the dispute resolution terms most suitable to their particular situations.” In drafting an arbitration agreement, parties may negotiate the terms of their arbitration proceedings, starting with the procedural rules that will govern a potential arbitration. They may choose the governing law of the situs of the arbitration, set their own rules, or use a set of pre-prescribed rules from one of the myriad of international arbitration organizations across the world. The parties also select their own arbitrator or set of arbitrators and can prescribe how they are chosen. Many arbitration organizations are readily discoverable over the internet and their rules are generally posted on their websites.

IV. Analysis

In this anti-arbitration academic and journalistic climate, what is a small business owner reading about arbitration to believe and how should he proceed? The following considerations about the New York Convention will equip lawyers to direct a conversation with a small business client about the benefits of international commercial arbitration. This section explores the safeguards built into the New York Convention to ensure only fair and lawful arbitration awards are enforced, the potential pitfalls of international arbitration under the New York Convention and, finally, why alternatives to international commercial arbitration are still inferior for both small businesses and the population at large.

A. Safeguards Built into the New York Convention

Even in the face of popular criticism of arbitration, the New York Convention provides numerous safeguards for parties arbitrating under its framework. For example, a losing party under the convention can invalidate an award in the court

53 Sangsvan, supra note 19, at 183 (citing Chris Noonan, The Emerging Principles of International Competition Law 294 (2008)).

54 Id.


57 Id.

58 Id. at 178.


where enforcement is sought by showing either an invalid arbitration agreement, that a party was denied procedural fairness or due process, that the arbitrators exceeded their authority, or that the arbitration procedures differed materially from the parties' arbitration agreement or the applicable procedural law. The party may also show that the award is not yet fully binding or was set aside by a "competent authority." The New York Convention also sanctifies the freedom to choose the rules of the arbitration by stating in Article V (1)(d) that awards under the convention are unenforceable when they are not in accordance with the parties' agreement and, therefore, should the procedural rules not be provided for in the agreement, then the law of the arbitration situs shall govern the proceedings. The convention is thus drafted to ensure that procedural omissions from an initial arbitration agreement do not undermine award enforcement. Theoretically, this clause should alleviate the need for the protectionist laws in the European Union and Japan, but in practice, these countries' legal systems simply invalidate arbitration agreements so that they are not enforced.

Beyond the provisions of arbitration agreements themselves, the New York Convention also protects any bilateral agreements already in place between nations. Article VII states explicitly that the convention "shall not affect the validity of the multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States." In addition, Article VII allows for parties to still avail themselves of local laws in place for enforcement of arbitration awards.

B. Pitfalls to Consider in Preparing for Arbitration Under the New York Convention

Even with all of these benefits and safeguards, the New York Convention's choice of law clause in Article V (1) (a) undermines the Convention's mission of universal arbitral award enforceability. This clause states that parties may either choose the law that applies or, if they fail to do so, then the arbitration agreement is subject to the law of the country where the award was made, which is logically the situs of the arbitration. However, under the second option, some countries will not enforce awards if they find the arbitration agreement

61 Stromberg, supra note 60, at 1372-73.
62 Id. at 1373.
63 Id. at 1374.
64 Stromberg, supra note 60, at 1372-73.
65 Sangsuvan, supra note 19.
66 New York Convention, supra note 7, art. VII.
67 Id.
68 Id.
69 New York Convention, supra note 7, art. V.
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"offensive to the generally accepted values of the forum." Some countries have codified the meaning of "values" in an similarly vague way. For example and as previously mentioned, in Japan, the standard is simply what is "contrary to public policy and good morals." Kitsuron Sangsuan, an adjunct professor at Indiana University Robert H. McKinney School of Law, points out the perils of this aspect of the New York Convention for small business owners and urges them to heed this problem in drafting their arbitration agreements. Parties must therefore choose wisely where they will arbitrate in case they need to seek local judicial enforcement of the award later.

Awards enforceable under the New York Convention are far from assured because foreign courts with jurisdiction over one party to the original contract can still interfere with pre-arbitration disputes that may affect the proceedings' outcome. Federal courts in the United States have simply ignored the arbitration agreement's choice of law clause and instead employed Federal law. Becker-Autoradio U.S.A, Inc. v. Becker Autoradiowerk GmbH provides a notable example of this phenomenon dating back to 1978. In that case, the choice of law clause specified that German law would govern the arbitration, including which issues the arbitrator could resolve. Nonetheless, the Third Circuit Court of Appeals refused to apply German law and instead applied United States law in determining the scope of the German arbitrator's authority, citing a long string of authority stating that once an agreement is covered by the Federal Arbitration Act, then all questions of interpretation are determined by United States law rather than foreign law.

Pre-arbitration issues notwithstanding, a review of the cases surrounding U.S. enforcement of foreign arbitration awards reveals that once an award is made, U.S. courts do not overturn it. Among many interesting examples, the Ninth Circuit Court of Appeals would not overturn an arbitration award rendered against a United States military defense manufacturer and the Ministry of Defense of Iran. In Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc., the defendant argued that upholding an arbitration award in favor of the government of Iran amounted to payment to Iran that was repugnant to the United States' policy against 

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71 Sangsuan, supra note 19.
72 Id.
73 Id. at 181.
74 Id.
75 Gertz, supra note 16.
76 Id.
78 Gertz, supra note 16.
79 Becker Autoradio U.S.A., Inc., 585 F.2d at 43; see also Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d Cir. 1972) ("once a dispute is covered by the [Federal Arbitration] Act, federal law applies to all questions of [the arbitration agreement's] interpretation, construction, validity, revocability, and enforceability.").
80 Ministry of Def. & Support of Iran, 665 F.3d 1091.
investment, and economic support” of an enemy state.\textsuperscript{81} Both this case and another 1992 breach of contract case, in which Iran sued an American company, stress the sanctity of the New York Convention and the strong public policy interest in ensuring the enforcement of foreign arbitration awards.\textsuperscript{82} While certainly federal preemption issues surround pre-arbitration disputes, awards remain safe under the New York Convention.

Gary Born, a preeminent authority on international commercial arbitration, notes that the same pre-arbitration and procedural issues outlined here in U.S. courts can occur in any jurisdiction. The arbitration situs’ own domestic laws can govern certain aspects of the arbitration, regardless of what the parties’ arbitration agreement or arbitration clause says.\textsuperscript{83} Indeed, “in virtually all countries local law contains mandatory public policy or statutory restrictions that apply to any arbitration conducted within national territory, even if a foreign procedural law applies generally to the arbitration.”\textsuperscript{84} In other words, the scenario that played out in Becker could happen in any jurisdiction.

C. Alternatives to International Commercial Arbitration

The New York Convention does not supplant the laws of its signatory countries, but rather supplements them, making the convention preferable to other award assurance schemes such as global judgment reciprocity enforcement.\textsuperscript{85} This concept sharply contrasts with John Coyle and his 2015 article on judgment reciprocity enforcement.\textsuperscript{86} Coyle advocates a system of what he calls “reciprocal legislation” for enforcing judgments in which each signatory country enforces judgments made in another signatory’s country.\textsuperscript{87} While Coyle’s article at first glance appears to focus only on litigation, he dismisses arbitration and the New York Convention, stating that arbitration is seldom used in tort suits and foreign parties would be hindered by language barriers and unfamiliarity with the United States’ legal system.\textsuperscript{88} Coyle, however, misses the converse argument, that the problems of language and unfamiliarity with a foreign legal system would plague a United States party abroad. He instead proposes a complicated and unwieldy system of judgment reciprocity agreements predicated on the elements of a few successful bilateral reciprocity agreements.\textsuperscript{89} One of his examples, a treaty between the State of New York and the Australian State of New South Wales is so limited in scope as to be completely unadaptable to a larger scale.\textsuperscript{90} In that

\textsuperscript{81} Ministry of Def. & Support of Iran, 665 F.3d at 1097.
\textsuperscript{82} Id. at 1098; Ministry of Def. of the Islamic Republic of Iran, 969 F.2d at 770.
\textsuperscript{83} Born, supra note 12, at 415, 429.
\textsuperscript{84} Id. at 415.
\textsuperscript{85} Coyle, supra note 11; see also Miller, supra note 11.
\textsuperscript{86} Coyle, supra note 11.
\textsuperscript{87} Id. at 1111-13.
\textsuperscript{88} Coyle, supra note 11, at 1146.
\textsuperscript{89} Id. at 1169.
\textsuperscript{90} Id. at 1123.
agreement, New York judges are able to certify questions of Australian law to judges in New South Wales and vice versa. Such an agreement, while laudable, solves very little. To have universal judgment enforcement under this scheme, every jurisdiction in the world would each need agreements with all other jurisdictions. Rather than focus on large-scale and impractical global initiatives to ensure judgment reciprocity, the international legal community should heed and use the New York Convention as a well-conceived and helpful aid to international dispute resolution.

However, Coyle’s proposal makes sense as a complement to international commercial arbitration. Given that the New York Convention still reinforces the sanctity of local laws and bilateral treaties, Coyle’s proposal can work on a limited basis when the parties have failed to agree on terms of arbitration and instead litigate (or simply proceed to litigation without considering arbitration). Nonetheless, litigation across international borders poses the significant challenges previously discussed as well as uncertainty about whether a judgment is enforceable. Judgment enforcement is not merely an international problem. For example, in the United States, thirty-two of the fifty states adopted the Uniform Foreign Money-Judgment Act, which provides specific procedures for enforcement of foreign judgments in the United States. Nonetheless, some states have their own laws on this issue. Of course, if foreign judgment enforcement is not even uniform within the United States, the situation is even worse abroad. As one author describes his own thought process when meeting with a client seeking enforcement of a foreign judgment, “You mutter to yourself no wonder the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly called the New York Convention) is so popular in international transactions!”

While nearly every ratifying country to the New York Convention needed to enact domestic legislation to implement the convention, such a hurdle is minor compared to a patchwork of bilateral agreements. On a regional level though, there certainly is quite a bit of room for bilateral agreements when they suit the close trade ties between two localities. In particular, several U.S. states bordering Canada have reciprocal arrangement with Canada for money judgments in

91 Coyle, supra note 11, at 1123.
92 Coyle, supra note 11, at 1113.
95 Coyle, supra note 11, at 1155.
96 Lowry, supra note 94, at 35.
97 BORN, supra note 12, at 20.
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Canada and vice versa. However, parties in these places still may do business with entities outside of these agreements. Since the New York Convention accommodates existing laws and bilateral treaties, treaties of these sorts only strengthen and supplement the New York Convention’s general applicability.

Some scholars have realized that the enforcement of foreign arbitration awards is far more assured under the New York Convention than under any potential judgment enforcement regime. Unlike Coyle, Yelena Zenalova advocates for such a scheme, but then concedes that the prospects for achieving such a framework are remote. Zenalova instead proposes internal United States reforms to make the U.S. more amenable to accepting other countries’ judgments. While her limited scheme certainly seems more practical than other proposals discussed in this article, neither Zenalova nor Coyle have discussed what benefits, if any, their plans would confer upon small business owners.

One student article from 2005 discussed how international commercial arbitration could help small business owners, but does so in a cursory way that leaves unanswered many questions that this article addresses. Its author, William S. Fiske, advocates that arbitration is only logical in countries without specialized knowledge of a particular industry. Fiske argues that arbitration succeeds because parties can select an arbitrator with knowledge of the industry in question or countries that lack a common law tradition, like China. While Fiske finds arbitration to be a “wonderful alternative for all American transnational businesses, large, medium and small,” he still misses the general applicability that makes international commercial arbitration under the New York Convention so appealing. The New York Convention makes such jurisdictional gymnastics unnecessary. Arbitration is simply available to any party that wishes to use it and the New York Convention provides the necessary framework for successful enforcement of a trans-border arbitration award.

Indeed, Fiske admits that his hypothetical is “simplistic.” This analysis, however, picks up where he left off and demonstrates how businesses can benefit from dictating the terms of their dispute resolutions and then subsequently ensuring the enforcement of hard-won arbitration awards. While there are certainly important considerations and even pitfalls in drafting an arbitration agreement, the New York Convention provides sturdy assurance that companies conducting

100 Id.
102 Id. at 484.
103 Fiske, supra note 101, at 484.
104 Id. at 483-84.
105 Trakman, supra note 8.
106 Fiske, supra note 101.

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business across international borders will realize the relief to which they are entitled.

**Proposal**

While international commercial arbitration is rarely, if ever, a flawless process, the New York Convention is an excellent starting point for parties to begin drafting useful and effective arbitration clauses in their contracts. Organizations with an interest in promoting international commercial arbitration must find ways to effectively communicate the process' benefits and utility, particularly because governments have been of little help to international commercial arbitration.\(^{107}\) For example, the North American Free Trade Agreement simply relies on the New York Convention, Panama Convention, and other treaties like it in its sole provision for international dispute resolution.\(^{108}\) In other words, international trade treaties tend to ignore arbitration altogether, leaving lawyers and the clients to fend for themselves in effectively utilizing international commercial arbitration.\(^{109}\)

Reaching non-lawyer business owners requires thinking of international commercial arbitration not as a legal proceeding, but rather as a marketable service.\(^{110}\) Parties consenting to arbitration hire an arbitrator to meet them in a specific place at a specific time to resolve a dispute in accordance with previously stipulated rules, a convenient alternative to litigating in government-run courts.\(^{111}\) The lawyer's task is thus to explain arbitration as such, thereby steering dollars that businesses earmark for legal services to international commercial arbitration since parties left to their own devices will often simply ignore resolution of potential disputes when drafting agreements.\(^{112}\) While introducing this issue into discussions with a potential business partner may cast a pall over the negotiations, preparation for dispute contingencies is essential.\(^{113}\) Companies engaged in trans-border business should develop standard policies for dispute resolution to be heeded in any contract negotiation.\(^{114}\) The considerations related to the New York Convention outlined here provide guidelines for framing such a policy.

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\(^{109}\) Miller, *supra* note 107.


\(^{111}\) Read, *supra* note 56.


\(^{113}\) *Id.*

\(^{114}\) Stipanowich & Kaskall, *supra* note 112.
While arbitration is often the default choice for large business, preferred over litigation, the same is not true for small and medium sized businesses. Even so, an increasing number of U.S. law firms are offering international arbitration to small and medium size businesses that have not previously considered it. However, offering services only represents half of the puzzle. Organizations with an interest in arbitration, whether profit or as the purpose of the organization should publicize the advantages of international commercial arbitration and of their group. For its part, in 1996, the American Arbitration Association (“AAA”) established the International Centre for Dispute Resolution (“ICDR”) as an extension of the AAA for international arbitrations. Certainly, ICDR serves an important purpose, but does little to advance the case for international commercial arbitration over its competitors, especially for business owners unfamiliar with the intricacies of the local system and options for alternative dispute resolution.

Like ICDR, The International Commerce Commission provides the support necessary to facilitating effective arbitrations when disputes arise. While this organization has handled approximately 7,500 international arbitrations since its inception in 1923, almost half of those were in the ten year period from 1983-93. That growth has only continued in recent years, though international commercial arbitration remains under siege from the popular press and academic community, as discussed previously. Nonetheless, the advantages of what one author calls “mercantile justice” are clear, but need to be properly communicated to the business community at large.

Many arbitration organizations already conduct their own forms of marketing to attract potential parties to their services, but these efforts are not specifically targeted to small businesses. Some countries and municipalities even compete with each other to be the situs of arbitrations. For example, New York City, in 2010 launched a Task Force on New York Law in International Matters to bring arbitration business to the city. Similar efforts in the last five years have developed in the United Kingdom and Germany as well as on the island of Mauritius, off Africa. Governments sponsor these efforts to bring arbitration

115 Fiske, supra note 101, at 480.
117 Stromberg, supra note 60, at 1353.
119 Id.
120 Stephanie Garber, Global Trend Drives Arbitration Growth, LAWYERS WEEKLY (Mar. 31 2015).
121 Trakman, supra note 8, at 6.
122 Fiske, supra note 101, at 479.
124 Ersing, supra note 110, at 7.
125 Ersing, supra note 110, at 6-8.
business within their borders for the economic benefit that arbitrations bring. Thus, the question then turns to not only bringing in existing arbitrations, but also to creating new consumers of arbitration proceedings.

To do so, the international arbitration community must both raise awareness about the advantages of international commercial arbitration and provide guidance to companies and their counsel about how best to ensure a smooth and cost-effective arbitration process. When Sangsuvan wrote his own proposal for how small businesses should draft their international contracts, he cited a website that actually provides very little useful guidance and only cursory information about arbitration. While arbitration may only be necessary in what businessmen perceive to be a remote contingency, arbitration clauses are nonetheless essential to any international business contract. The alternative of litigating in a foreign forum without the prospect of enforcement of an award elsewhere is a risk too great to bear for many small businesses.

Although an increasing number of American law firms are offering international commercial arbitration services, their fees may be out of the price range of small business owners. Many materials on how to draft an arbitration clause already exist to help lawyers less familiar with international commercial arbitration, but who may already be serving small businesses. However, attorneys must heed special considerations for drafting the arbitration clause for a potential international proceeding. In particular, choosing an appropriate arbitration site can be challenging. While the New York Convention ensures enforcement of judgments in any signatory jurisdiction, it makes no provision for the selection of arbitrators and contains no safeguards towards nationalistic inclinations. An agreement between a Chinese company and American company could easily disintegrate if one company insisted on the arbitration occurring within its native borders for fear of local bias in the other party’s jurisdiction.

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127 Sangsuvan, supra note 19, at 174 (citing at note 261 “[i]nclude an arbitration clause to facilitate amicable and quick settlement of disputes or differences that may arise between the parties.”).

128 Fischer & Haydock, supra note 118, at 942.


130 Helmer, supra note 116.

131 See RODOLPHE J.A. DESEFFE, *SOLVING DISPUTES THROUGH COMMERCIAL ARBITRATION* 30 (1987) for useful, but concise, considerations about how to draft a general arbitration clause. See *HANDBOOK ON COMMERCIAL ARBITRATION* 93-140 (American Arbitration Association, 2nd ed. 2010) for a much more comprehensive set of articles on this topic.


133 Id. at 78.

134 New York Convention, supra note 7, art. I.

135 Wagoner, supra note 132, at 78.
More countries are entering the arbitration hosting market to serve the need for compromise and neutrality, including Bulgaria, China, and Mexico. However, lawyers from both sides should remember that some forums impose their own laws on the arbitral proceedings, a phenomenon discussed at some length earlier in this article. Businesses and their counsel should also consider the emergence of the internet and e-commerce an important angle to contemplate in arbitrating potential disputes. In recent years, the internet has given rise to a rash of thorny personal jurisdiction questions avoidable through arbitration. Given the ambiguity surrounding jurisdiction over disputes stemming from business occurring over the internet, arbitration agreements in both the business to consumer and business-to-business settings help to avoid costly litigation just to resolve jurisdictional issues. Upon proper implementation of an arbitration clause, the Federal Arbitration Act, Panama Convention and most importantly, the New York Convention, will all operate over the agreement, such a contract’s genesis from internet-based business notwithstanding.

Additional issues abound but exceed the scope of this article. Nonetheless, a lawyer attempting to help any client draft an agreement should keep these mechanical considerations in mind. Only with sufficient concern for the technical aspect of an arbitration agreement can a lawyer confidently explain to his client a plan for pursuing and winning an arbitration. Under the New York Convention, the ensuing award will then be uniformly enforceable in any and all signatory countries.

VI. Conclusion

In an ever-expanding global business climate, effective dispute resolution ensures that litigation does not derail a small business. The New York Convention provides assurance that any award won in an international arbitration conducted in a ratifying country will be upheld in any other ratifying country.

The international commercial arbitration process allows parties to control the terms of their dispute resolution, with the added benefit of likely reducing costs to do so. This article has demonstrated the safeguards that the New York Convention has in place to protect the integrity of arbitration awards. Lawyers and business owners alike will benefit from considering pitfalls of the New York Convention system, especially the choice of law clause and the reluctance of

136 Wagoner, supra note 132, at 78.
139 Bennett, supra note 138, at 134-35.
140 Id. at 135.
141 New York Convention, supra note 7.
142 DESEIFE, supra note 131, at 4.
some countries to recognize otherwise legitimate arbitration clauses and agreements.\footnote{143 Bates, \textit{supra} note 18.}

Even with the New York Convention in place, breaking the inclination to litigate remains difficult, but possible. In 1987, Rodolphe J.A. DeSeife, a law professor at Northern Illinois University and leading scholar on international commercial arbitration, wrote:

The American System of justice, in claiming its total devotion to the ideals of the common law, is closer in spirit to the English law of 1776 than is any member of the British Commonwealth, including the United Kingdom itself. Thus, the American constitutional guarantee of jury trials really may not be compatible with the resolution of commercial cases which require prompt and knowledgeable attention.\footnote{144 \textit{DeSeife}, \textit{supra} note 131, at 3-4.}

In the twenty years since DeSeife penned these words, the United States Supreme Court has repeatedly upheld the New York Convention and its supporting domestic legislation, the Federal Arbitration Act.\footnote{145 See, \textit{e.g.}, \textit{Am. Express Co.}, 133 S. Ct. at 2304 (holding "no contrary congressional command overrode principle that arbitration was a matter of contract, as would require a court to reject merchants' contractual waiver of class arbitration."); \textit{see also AT&T Mobility}, 131 S. Ct. at 1740 (holding "the FAA preempts California's judicial rule regarding unconscionability of class arbitration waivers in consumer contracts."); \textit{see also Scherk}, 417 U.S. at 520 n.15 (holding "in the context of the international agreement which the purchase and sale of business represented the arbitration clause would be enforced.").}

While the foreign countries discussed here are unlikely to change their stances on enforcing arbitration clauses, parties can still avail themselves of the New York Convention as long as they do three things. First, they should thoughtfully select the situs of the arbitration to be a jurisdiction friendly to enforcing New York Convention awards. Second to mitigate enforcement issues, parties should also make the agreement prominent in the contract. Finally, to mitigate the chance of a foreign country's courts not enforcing the award, the arbitration agreement itself must be fundamentally fair on its face.\footnote{146 \textit{Compare generally Bennett, supra} note 138, at 137 (supports making the clause prominent and wording it fairly is essential to avoiding claims of a fraudulent clause in the American context), \textit{with} Bates, \textit{supra} note 18 (stating that the Japanese have set the bar far lower for invalidating an arbitration agreement as "contrary to public policy and good morals").} Attorneys' careful planning to utilize the New York Convention in their clients' favor and dodge certain countries' hostility towards arbitration ensures that small businesses that win arbitration awards can quickly and expediently recover their damages wherever their rapidly expanding businesses lead them.