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THE NEW YORK CONVENTION: A SELF-EXECUTING TREATY

*Gary B. Born**

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards—also known as the New York Convention—is the world’s most significant legislative instrument relating to international commercial arbitration. It currently has 159 Contracting States, including the United States, and provides a global constitutional charter for the international arbitral process. The Convention has enabled both national courts and arbitral tribunals to develop durable, effective means for enforcing international arbitration agreements and awards and has thereby facilitated the remarkable growth and success of international arbitration over the past 50 years.

Notwithstanding the Convention’s significance, there is surprising uncertainty whether the Convention, or any individual provision of the Convention, is “self-executing” under U.S. law and therefore directly applicable in American courts without the interposition of domestic implementing legislation. There is limited commentary in the United States addressing these issues in any detail, and, although a number of courts have treated the Convention as self-executing, other authorities have either concluded to the contrary or expressed confusion as to the Convention’s status.

The thesis of this Article is that uncertainty regarding the Convention’s status as a self-executing treaty of the United States is unwarranted and unfortunate. Instead, both the Convention’s provisions for recognition and enforcement of arbitration agreements (in Article II) and of arbitral awards (in Articles III, IV, V, and VI) should be regarded as self-executing and directly applicable in U.S. (and other national) courts. As discussed in detail below, this is because Article II establishes mandatory, complete, and comprehensive substantive rules, directed specifically to national courts, for the recognition and enforcement of international arbitration agreements.

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Likewise, the history and purposes of the Convention, the language and legislative history of Chapter 2 of the Federal Arbitration Act (the “FAA” or “Act”), and the practices of other Contracting States support the conclusion that Article II is directly applicable in American courts.

Similar analysis applies to Articles III, IV, V, and VI of the Convention. The text of these provisions, as well as their objects and purposes, also indicate that they were intended to apply directly in American courts. Likewise, a careful reading of Chapter 2 of the FAA and its legislative history indicates that the Convention’s provisions dealing with arbitral awards are self-executing and directly applicable in American courts.

It is important to the Convention’s success, particularly in the United States, that its self-executing status be recognized. If the Convention were not self-executing, there would be no basis for its application in U.S. state courts, which would likely place the United States in material breach of its international obligations under the Convention and produce highly unusual disparities in the treaty’s application in state and federal courts. Likewise, if the Convention were not self-executing, the application of some of its terms, including the critical provisions of Article II, might also be inapplicable in U.S. federal courts—again, placing the United States in violation of its international obligations. Moreover, treating the Convention as non-self-executing would result in national courts—and particularly U.S. courts—interpreting and applying disparate domestic arbitration statutes, rather than developing a uniform, harmonized interpretation of a single international instrument. This approach would materially undercut one of the Convention’s fundamental objectives: the establishment of uniform rules of international law governing the international arbitral process.

This Article examines the foregoing issues. Part I addresses the history, provisions, and purposes of the New York Convention. Part II considers whether the New York Convention is self-executing. This Part first analyzes whether Article II of the Convention is self-executing, addressing the text and purposes of Article II, the process leading to U.S. ratification of the Convention, the position of the U.S. government, and relevant national court decisions. It then addresses whether the Convention’s provisions concerning awards—in Articles III, IV, V, and VI—are self-executing and concludes that these provisions, like Article II, are directly applicable in American courts. Finally, Part III examines the implications of the Convention’s self-executing status for the treaty’s role as the constitutional charter for international commercial arbitration in the United States and elsewhere.

I. THE NEW YORK CONVENTION

The New York Convention is central to the legal regime applicable to international arbitration agreements and awards. The Convention prescribes mandatory, uniform international rules governing the recognition and enforcement of international arbitration agreements and awards in Contracting States. The Convention also provides the foundation for most

national legislation governing the international arbitral process, which in turn gives effect to and elaborates upon the Convention's basic principles.¹

A. *History and Objectives of the New York Convention*

The New York Convention was adopted to address the needs of the international business community and to facilitate international trade and commerce.² In particular, the Convention aimed to improve the legal regime provided by the Geneva Protocol on Arbitration Clauses of 1923 (the "Geneva Protocol") and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (the "Geneva Convention").³

The first draft of what became the Convention was prepared in 1953 by the International Chamber of Commerce (the "ICC").⁴ The ICC observed that "[t]he 1927 Geneva Convention . . . no longer entirely meets modern economic requirements" and introduced its draft of an improved treaty with the objective of establishing "a new international system of enforcement of arbitral awards."⁵ The ICC draft,⁶ and a subsequent draft prepared by the United Nations Economic and Social Council, provided the basis for a three-week conference in New York—the United Nations Conference on Commercial Arbitration (the "New York Conference")—attended by delegates from 45 states in the Spring of 1958.⁷ The United States sent a delegation to attend the negotiating and drafting sessions at the Conference, but deliberately played a limited role in the proceedings.⁸

1. See generally 2 GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION*, § 11.02, at 1535–36 (2d ed. 2014).

2. See Robert Briner, *Philosophy and Objective of the Convention*, in *ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS* 9, U.N. Sales No. E.99.V.2 (1999).

3. See ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*, at 7 (1981) [hereinafter VAN DEN BERG, *CONVENTION*].

4. *Id.* The International Chamber of Commerce's ("ICC's") draft focused exclusively on the recognition of international arbitral awards. See GIORGIO GAJA, *INTERNATIONAL COMMERCIAL ARBITRATION: THE NEW YORK CONVENTION* (1978); Int'l Chamber of Commerce, *Report and Preliminary Draft Convention Adopted by the Committee on International Commercial Arbitration at Its Meeting of 13 March 1953*, reprinted in 9 ICC INT'L CT. ARB. BULL. 32, 32 (1998) [hereinafter ICC, *Report*].

5. ICC, *Report*, *supra* note 4.

6. *Id.*

7. U.N. CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION, *Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 3, ¶¶ 3–4, U.N. Doc. E/CONF.26/8/Rev.1 (1958); *History 1923 - 1958*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/travaux+preparatoires/history+1923+-+1958> (last visited Nov. 28, 2018).

8. *Report of the United States Delegation to the United Nations Conference on International Commercial Arbitration* (Aug. 15, 1958), reprinted in 19 AM. REV. INT'L ARB. 91, 95 (2008) [hereinafter *Delegation Report*]. At the time, the U.S. Delegation was skeptical of the value of the proposed treaty and was largely uninvolved in negotiations. *Id.* at 95, 115–18.

The Conference ultimately produced a draft convention that came to be referred to as the New York Convention. The new draft was in many respects a radically innovative instrument: it created, for the first time, a comprehensive legal regime for the international arbitral process. Earlier drafts of the proposed treaty focused entirely on the enforcement of arbitral awards with no provisions addressing the enforcement of arbitration agreements. As one commentator summarizes the Convention's drafting history:

Originally, it was the intention to leave the provisions concerning the formal validity of the arbitration agreement and the obligatory referral to arbitration to a separate protocol. At the end of the New York Conference of 1958, it was realized that this was not desirable. Article II [which dealt with arbitration agreements,] was drafted in a race against time, with, as a consequence, the omission of an indication as to which arbitration agreements the Convention would apply.⁹

This revised approach was eventually adopted,¹⁰ and the resulting provisions addressing the recognition of arbitration agreements form one of the central elements of the Convention. The extension of the draft to encompass both arbitration agreements and awards made the Convention the first international instrument to comprehensively deal with all major elements of the arbitral process—from arbitration agreement to arbitral award.¹¹

The New York Conference's members approved and opened for signature the text of the Convention on June 10, 1958 by unanimous vote (with only the United States and three other states abstaining).¹² The final version of the Convention was set forth in English, French, Spanish, Russian, and Chinese texts.¹³ The text of the Convention is only a few pages long, with seven concisely drafted provisions (Articles I through VII) containing the Convention's essential terms.

Most of the remaining provisions of the Convention are of no relevance to the treaty's self-executing status. One exception, however, is Article XI

9. VAN DEN BERG, CONVENTION, *supra* note 3, at 56.

10. See GEORGE HAIGHT, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: SUMMARY ANALYSIS OF RECORD OF UNITED NATIONS CONFERENCE, MAY/JUNE 1958, at 21–28 (1958) [hereinafter HAIGHT, SUMMARY ANALYSIS].

11. I BORN, *supra* note 1, § 1.04[A][1], at 100–02.

12. U.N. Conference on International Commercial Arbitration, *Summary Record of the Twenty-Fourth Meeting*, at 10, U.N. Doc. E/CONF.26/SR.24 (Sept. 12, 1958). For a summary of these negotiations, see Pieter Sanders, *The History of the New York Convention, Address at the Fourteenth Congress of the International Council for Commercial Arbitration* (May 1998), in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 11 (Albert Jan van den Berg ed., 1999).

13. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. XVI, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

of the Convention, which addresses the Convention's application in federal or non-unitary states, such as the United States.¹⁴ Article XI provides that, where the Convention's provisions "come within the legislative jurisdiction of the federal authority," then the Contracting State's obligations will be no different from those of unitary or non-federal states.¹⁵ If, however, the Convention's provisions "come within the legislative jurisdiction of constituent states or provinces[.]" then "the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment[.]"¹⁶ As discussed below, the United States has not taken the position that Article XI applies to it and has taken no action under Article XI(b),¹⁷ which requires notice and a favorable recommendation to constituent states.

B. *Provisions of the New York Convention*

The New York Convention's provisions focus principally on establishing uniform international standards for the recognition of arbitration agreements and arbitral awards. As the U.S. Supreme Court subsequently observed, the Convention was designed 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 the signatory countries."¹⁸ Although these observations are accurate, it is clear that the Convention also indirectly governs the arbitral process by requiring courts of Contracting States to recognize arbitration agreements—including their procedural terms—and to refuse to recognize awards if the parties' agreed arbitral procedures have not been followed.¹⁹

Thus, the Convention's provisions, taken together, prescribe binding international legal rules governing the entire arbitral process, including the recognition of arbitration agreements, the conduct of the arbitration itself,

14. Christopher R. Drahozal, *The New York Convention and the American Federal System*, 2012 J. DISP. RESOL. 101, 107–08 (2012) [hereinafter Drahozal, *Convention*]; see also Robert B. Looper, 'Federal-State' Clauses in Multi-Lateral Instruments, 32 BRIT. Y.B. INT'L L. 162 (1957).

15. New York Convention, *supra* note 13, art. XI(a).

16. *Id.* art. XI(b).

17. Drahozal, *Convention*, *supra* note 14, at 108. The U.S. position regarding Article XI varies. See *id.* (noting that a later official description of Article XI was "very different"). At no time, however, has the United States taken the position that it may invoke Article XI(b). NICHOLAS DEB KATZENBACH, LETTER OF SUBMITTAL, S. EXEC. DOC. NO. 90-118, at 22 (2d Sess. 1968) [hereinafter KATZENBACH, LETTER].

18. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); see also *Smith/Enron Cogeneration L.P. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) (noting "the goal of simplifying and unifying international arbitration law.").

19. See 2 BORN, *supra* note 1, § 11.03[C][1][c][ii], at 1549–50.

and the recognition of awards.²⁰ These provisions, which are summarized below, have provided the basis for the development of a comprehensive, effective, and efficient legal regime for the international arbitration process.

1. Article II: Presumptive Validity of Arbitration Agreements

Central to the Convention is Article II(1), which establishes a basic, internationally-uniform rule of formal and substantive validity for arbitration agreements falling within the Convention's scope. Article II(1) provides:

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.²¹

Article II(3) elaborates on this basic rule and adds an enforcement mechanism, requiring the courts of Contracting States, when seized of a matter subject to arbitration, to refer the parties to arbitration unless their arbitration agreement is “null and void, inoperative or incapable of being performed.”²² Article II(3) ensures that international arbitration agreements will, consistent with their basic objectives, be promptly and efficiently enforced in accordance with their terms by requiring the parties to arbitrate, rather than litigate, their underlying dispute.²³

By virtue of Article II, international arbitration agreements are presumptively valid and enforceable, subject only to specifically defined international exceptions identified in Articles II(1) and II(3). The party opposing recognition of the agreement must prove the applicability of these exceptions.²⁴ Under the Convention, Contracting States may not fashion additional, domestic grounds for denying recognition of agreements to arbitrate: as one appellate court explained, “[d]omestic defenses to arbitration are transferable to [the challenge to an arbitration agreement

20. See 1 *id.* § 1.04[A][1][c], at 105–12.

21. New York Convention, *supra* note 13, art. II, ¶ 1.

22. *Id.* art. II, ¶ 3.

23. 1 BORN, *supra* note 1, § 1.04[A][1][c][i], at 108–10; see also Gerald Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U. L. REV. 1, 1 (1971) [hereinafter Aksen, *American Arbitration Accession*] (“[A] Treaty whereby international arbitration agreements and awards will be specifically, speedily, and uniformly enforceable in federal courts.”).

24. See 1 BORN, *supra* note 1, § 5.04[B][4], at 749–50. In addition, Article II(1) provides for a non-arbitrability exception, allowing Contracting States to deny enforcement of arbitration agreements in matters “not capable of settlement by arbitration.” See 1 BORN, *supra* note 1, § 6.02[A], at 946–47.

under the Convention] only if they fit within the limited scope of defenses” permitted by Article II.²⁵

Importantly, the Convention prescribes international choice-of-law rules that govern the selection of the law applicable to international arbitration agreements. These choice-of-law rules—set forth in Article V(1)(a) and impliedly in Article II—are one of the Convention’s crowning achievements.²⁶ The Convention’s choice-of-law rules require Contracting States to give effect to the parties’ choice of law governing their agreement to arbitrate, and, in the absence of any express or implied choice by the parties, to apply the law of the arbitral seat, providing essential clarity with regard to the law applicable to the parties’ arbitration agreement.²⁷

The Convention is also interpreted as imposing limits on the grounds of substantive invalidity that can be asserted against international arbitration agreements.²⁸ In particular, courts and commentators have concluded that Article II(3) requires—as a mandatory international rule—the recognition of international arbitration agreements except where such agreements are

25. *Bautista v. Star Cruises*, 396 F.3d 1289, 1302 (11th Cir. 2005); *see also* *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 547 (11th Cir. 2016); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 370–71 (4th Cir. 2012) (“‘[The Convention] expressly compels the federal courts to enforce arbitration agreements,’ notwithstanding jurisdiction conferred on such courts to adjudicate Seaman’s Wage Act claims.”) (quoting *Rogers v. Royal Caribbean Cruise Line*, 547 F.3d 1148, 1157 (9th Cir. 2008)); *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273–74 (5th Cir. 2002); *Simon v. Princess Cruise Lines, Ltd.*, No. G-13-0444, 2014 WL 12617820, at *3 (S.D. Tex. May 19, 2014); *Greenberg v. Park Indem. Ltd.*, No. LA CV12-10756 JAK (AJWx), 2013 WL 12123695, at *7–8 (C.D. Cal. Oct. 8, 2013).

26. *See* 3 BORN, *supra* note 1, § 26.05[C][1][e][i], at 3462 (citing authorities). Article II does not itself expressly address the choice-of-law governing international arbitration agreements. It does, however, require Contracting States to recognize all material terms of such agreements, including the parties’ express and implied choice-of-law. *Id.* The better view is also that Article II impliedly incorporates Article V(1)(a)’s similar choice-of-law rule. *Id.*

27. *See* New York Convention, *supra* note 13, art. V, ¶ 1(a); *id.*, art. II. Moreover, the better view is that the Convention also requires application of a validation principle reflecting the parties’ implied intentions to give effect to the parties’ arbitration agreement. *See* 1 BORN, *supra* note 1, § 4.04[A][3], at 542–49.

28. *See, e.g., Aggarao*, 675 F.3d at 372–73; *Bautista*, 396 F.3d at 1302; *Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazioni v. Lauro*, 712 F.2d 50, 53–54 (3d Cir. 1983); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982); *Alghanim v. Alghanim*, 828 F. Supp. 2d 636, 658 (S.D.N.Y. 2011); *Matthews v. Princess Cruise Lines, Ltd.*, 728 F. Supp. 2d 1326, 1329–31 (S.D. Fla. 2010); *Hodgson v. Royal Caribbean Cruises, Ltd.*, 706 F. Supp. 2d 1248, 1260 (S.D. Fla. 2009) (noting that Article II permits non-recognition only for fraud “that can be applied neutrally on an international scale.”) (quoting *Bautista*, 396 F.3d at 1302); *Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 499 F. Supp. 2d 245, 248–49 (E.D.N.Y. 2007), *vacated on other grounds*, 610 F. Supp. 2d 226 (E.D.N.Y. 2009); *Khan v. Parsons Glob. Servs., Ltd.*, 480 F. Supp. 2d 327, 339–40 (D.D.C. 2007), *rev’d on other grounds*, 521 F.3d 421 (D.C. Cir. 2008); *Prograph Int’l Inc. v. Barhydt*, 928 F. Supp. 983, 989 (N.D. Cal. 1996); *Technetronics, Inc. v. Leybold-Geaeus GmbH*, No. CIV. A. 93-1254, 1993 WL 197028, at *6 (E.D. Pa. June 9, 1993) (declining to declare agreement null and void absent evidence of the “traditionally recognized international defenses such as fraud, duress or mistake.”).

invalid under ordinary, generally-applicable principles of contract law (that is, when such agreements are “null and void, inoperative or incapable of being performed”). These limits effectuate the Convention’s objective by ensuring that Contracting States recognize the validity of international arbitration agreements in accordance with uniform international standards.²⁹

Under these standards, a Contracting State may not avoid its obligation to recognize international arbitration agreements by adopting rules of national law that single out such agreements for invalidity. Thus, national law provisions that impose unusual notice requirements (e.g., particular font), consent requirements (e.g., that arbitration agreements be specifically approved or established by heightened proof requirements), procedural requirements (e.g., only institutional arbitration agreements are valid), or invalidity rules (e.g., arbitration agreements applicable to future disputes, fraud claims, or tort claims are invalid) are all impermissible under Article II(3).³⁰ As one U.S. appellate court emphasized, “[t]he limited scope of the Convention’s null and void clause ‘must be interpreted to encompass only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale.’”³¹ Other authorities adopt the same analysis of the Convention, either expressly or impliedly.³²

Article II applies to, and requires recognition of, all material terms of international arbitration agreements. This includes the recognition of provisions regarding the choice of the arbitral seat, the selection of

29. See 1 BORN, *supra* note 1, § 5.06[B][1][a], at 838–41, § 5.02[D][1]–[3], [5], at 719–22; see also *Rhone Mediterranee*, 712 F.2d at 53; Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 21, 2006, Appeals No. 05-21.818, Bull. civ. I, No. 502 (Fr.); *Dyna-Jet Pte Ltd. v. Wilson Taylor Asia Pac. Pte Ltd.*, [2016] SGHC 238 (Sing.).

30. See 1 BORN, *supra* note 1, § 5.06[B][1][a], at 839.

31. *Bautista*, 396 F.3d at 1302 (quoting *DiMercurio v. Sphere Drake Ins.*, 202 F.3d 71, 80 (1st Cir. 2000)).

32. See *Aggarao*, 675 F.3d at 372–73; *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1278 (11th Cir. 2011) (refusing to recognize “a new public policy defense under Article II—based on the elimination of a U.S. statutory claim under the Seaman’s Wage Act—[which] by definition could not be applied neutrally on an international scale, as each nation operates under different statutory laws and pursues different policy concerns.” (internal quotation omitted)); *Authenment v. Ingram Barge Co.*, 878 F. Supp. 2d 672, 684–85 (E.D. La. 2012) (“[P]ublic policy defenses in Convention cases must be brought at the ‘award-enforcement stage’ rather than at the ‘arbitration-enforcement stage.’”); *Lazarus v. Princess Cruise Lines, Ltd.*, No. 1:11-cv-22665-KMM, 2011 WL 6070294, at *3 (S.D. Fla. Dec. 6, 2011); *Hodgson v. Royal Caribbean Cruises, Ltd.*, No. 11-21046-CIV., 2011 WL 5005307, at *2 (S.D. Fla. Oct. 19, 2011) (“[A]n arbitration clause is null and void only if the arbitration agreement has been obtained through fraud, mistake, duress, and waiver.” (citation omitted)); *W. Tankers Inc. v. Ras Riunione Adriatica di Sicurta SpA*, [2005] EWHC (Comm) 454 [56–57] (Eng.); *Sun Life Assurance Co. v. CX Reins.*, [2003] EWCA (Civ) 283 [2, 55] (Eng.); *Westacre Inv., Inc. v. Jugoinport-SDPR Holding Co.*, [1998] 3 WLR 770 [785–86], [2000] QB 288 (Eng.) (identifying examples where an arbitration agreement might be invalid, “such as fraud . . . , the effect of the statute rendering the underlying contract illegal, the absence of *consensus ad idem, non est factum*, mistake as to the person making the contract, and contracts adhesion in which the arbitrator is, in practice, the choice of the dominant party”).

institutional rules, the choice of arbitrators, and arbitral procedures.³³ Consequently, courts in Contracting States must enforce not just the parties' exchange of commitments to arbitrate, but also give effect to the material terms of that agreement to arbitrate, pursuant to Article II's internationally neutral standards.³⁴ The overwhelming weight of national court authority is consistent with this analysis.³⁵

2. Articles III, IV, and V: Presumptive Validity of Arbitral Awards

Equally central to the New York Convention are Articles III, IV, and V, which establish a basic international rule of validity and enforceability of foreign and non-domestic arbitral awards falling within the scope of the Convention.³⁶ These obligations apply only to "foreign" awards—those made outside the Contracting State where the party seeks recognition of the award—and "non-domestic" awards—a category of awards with limited relevance in contemporary practice.³⁷ For these two types of awards, Article III provides that "[e]ach Contracting State shall recognize arbitral awards as binding" and shall enforce such awards in accordance with the Convention and the recognition forum's national procedural rules.³⁸ In turn, Article IV prescribes streamlined procedures for the proof of foreign and non-domestic awards by the award-creditor, requiring only the presentation of translated copies of the award and underlying arbitration agreement.³⁹ As with Article

33. 1 BORN, *supra* note 1, § 5.01[B][2], at 641.

34. *See id.*, § 8.02[A][1], at 1255–56.

35. *See, e.g.*, Salt Lake Tribune Publ'g Co. v. Mgmt. Planning, Inc., 390 F.3d 684, 690 (10th Cir. 2004) ("Parties need not establish quasi-judicial proceedings resolving their disputes to gain the protections of the FAA, but may choose from a broad range of procedures and tailor arbitration to suit their peculiar circumstances."); Sec. Ins. v. TIG Ins., 360 F.3d 322, 325 (2d Cir. 2004) ("FAA requires 'arbitration proceed in the manner provided for in [the parties'] agreement.'" (emphasis and alteration in original) (quoting Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 475 (1989)); Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 709 (7th Cir. 1994); *Lufuno Mphaphuli & Assocs. (Pty) Ltd. v. Andrews* 2009 (4) SA 529 (CC) at 102 para. 217 (S. Afr.) ("[T]he identity of the arbitrator and the manner of the proceedings will ordinarily be determined by agreement between the parties."); Bundesgericht [BGer][Federal Supreme Court] Mar. 12, 2003, DECISIONI DEL TRIBUNALE FEDERALE SVIZZERO [DTF] 4P.2/2003 I 3 (Switz.); Austria No. 10 of 1992, 22 Y.B. COMM. ARB. 619, 625 (Austrian Sup. Ct.).

36. 1 BORN, *supra* note 1, § 1.04[A][1][c], at 108–12. *But cf.* 3 BORN, *supra* note 1, § 26.06[A], at 3719 (noting that Article VI of the Convention provides a limited exception to the obligation of courts of Contracting States to recognize foreign arbitral awards, allowing courts in the recognition forum to stay or suspend recognition proceedings if an application to annul the award has been filed in the arbitral seat).

37. 2 *id.* § 22.02[E][1][a], at 2942. Non-domestic awards are awards made in the state where recognition is sought, but which are not regarded as "domestic" awards by that state. In practice, very few Contracting States treat any awards made in their territory as non-domestic. *Id.*

38. New York Convention, *supra* note 13, art. III.

39. *Id.* art. IV.

II(3) and arbitration agreements, the purpose of Article IV is to ensure the speedy and efficient recognition of arbitral awards, giving effect to the parties' underlying objectives in agreeing to finally resolve their disputes by arbitration.⁴⁰

Finally, Article V provides that "[r]ecognition and enforcement of the award may be refused . . . only if" one of seven specified exceptions, set forth in Articles V(1) and V(2), applies.⁴¹ The Convention's exceptions are limited to issues of jurisdiction (Articles V(1)(a) and V(1)(c)); procedural regularity and fundamental fairness (Article V(1)(b)); compliance with the procedural terms of the parties' arbitration agreement or, absent such agreement, the procedural requirements of the arbitral seat (Article V(1)(d)); and public policy or non-arbitrability (Articles V(2)(a) and V(2)(b)). An award may also be denied recognition if a competent court in the arbitral seat annuls the award (Article V(1)(e)). Notably, these exceptions do not permit review by a recognition court of the merits of the arbitrators' substantive decisions resolving the parties' dispute.⁴²

As with Article II, the provisions of Articles III, IV, and V are mandatory, not permissive—a conclusion that national courts and other authorities have uniformly confirmed.⁴³ It is also clear that the exceptions set forth in Article V are exclusive: courts in Contracting States may not deny recognition of foreign or non-domestic awards except on one of the grounds listed in Article V.⁴⁴ Moreover, consistent with the Convention's

40. See *id.* art. IV; 1 BORN, *supra* note 1, § 1.04[A][1][c][ii], at 110 ("Article IV prescribes streamlined procedures . . ."); Aksen, *American Arbitration Accession*, *supra* note 23, at 1 (prefacing that, under the Convention, "international arbitration agreements and awards will be specifically, speedily, and uniformly enforceable in federal courts.").

41. New York Convention, *supra* note 13, art. V.

42. See generally 3 BORN, *supra* note 1, §26.05[C][12], at 3707–12.

43. See, e.g., *Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 307 (3d Cir. 2006) ("[A] district court . . . must confirm the award unless one of the grounds for refusal specified in the Convention applies to the underlying award.") (citation omitted); *Rosseeel N.V. v. Oriental Com. & Shipping Co.* [1991] 2 Lloyd's Rep. 625 (Comm) at 628 (Eng.) ("If none of the grounds for refusal are present, the award 'shall' be enforced."); *Cayman Islands No. 2 of 1989*, 15 Y.B. COMM. ARB. 436, 439 (Gambon Grand Ct.); see also Jan Paulsson, *The New York Convention in International Practice – Problems of Assimilation*, in THE NEW YORK CONVENTION OF 1958, at 100, 105 (Marc Blessing ed., ASA Special Series No. 9, 1996) (emphasis in original) ("The Convention imposes a clear obligation on member States to enforce awards, if various conditions [set forth in Article IV] are fulfilled. . . . If the conditions are fulfilled, the award must be enforced unless one of the grounds for refusal of enforcement [set forth in Article V] exists.").

44. See, e.g., *Encyc. Universalis S.A. v. Encyc. Britannica, Inc.*, 403 F.3d 85, 92 (2d Cir. 2005) ("[A] district court is strictly limited to the seven defenses under the New York Convention when considering whether to confirm a foreign award.") (citations omitted); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 288 (5th Cir. 2004) ("[C]ourts in countries of secondary jurisdiction may refuse enforcement only on the grounds specified in Article V."); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs of the Gov't* [2010] UKSC 46 [101], [2010] 3 WLR 1472 [1510] (Eng.) ("[Article V] grounds are exhaustive."); *Bundesgericht [BGer]* [Federal

pro-enforcement objective, the burden of proof for resisting recognition and enforcement of an award under Article V is on the award-debtor, not the award-creditor, and national courts have emphasized that Article V's exceptions must be strictly construed.⁴⁵

3. Articles II and V(1)(d): Recognition of Parties' Procedural Autonomy

The Convention also addresses, at least indirectly, the procedures used in international arbitrations. In particular, Articles II and V(1)(d) of the Convention both provide for recognition of the parties' agreed arbitral procedures.⁴⁶

As noted above, Articles II(1) and II(3) require Contracting States to recognize all of the material terms of agreements to arbitrate and to refer the parties to arbitration in accordance with those terms.⁴⁷ Those provisions obligate courts in Contracting States to give effect to the arbitral procedures that the parties provide for in their arbitration agreements.⁴⁸ The Convention impliedly permits Contracting States to deny effect to such agreements in limited, exceptional circumstances in order to protect the integrity of the arbitral process, but it does not otherwise limit the parties' procedural autonomy.⁴⁹

Article V(1)(d) similarly provides for non-recognition of awards where the "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place[.]"⁵⁰ Even more explicitly than Article II, Article V(1)(d) gives priority to the parties' agreement regarding arbitral procedures, providing for application of the law of the arbitral seat only as a default mechanism

Supreme Court] July 28, 2010, DECISIONI DEL TRIBUNALE FEDERALE SVIZZERO [DTF] 4A_233/2010 (Switz.); Belgium No. 10 of 1997, 22 Y.B. COMM. ARB. 643, 647 (Belg. App. Ct.).

45. See, e.g., *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 836 (9th Cir. 2010) ("Convention defenses are interpreted narrowly.") (citations omitted); *Ario v. Underwriting Members of Syndicate 53 at Lloyds for 1998 Year of Account*, 618 F.3d 277, 291 (3d Cir. 2010) ("[C]ourts have strictly applied the Article V defenses and generally view[ed] them narrowly.") (second alteration in original) (quoting *Admart AG*, 457 F.3d at 308); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 283 (3d Cir. 2003) (noting that courts have "construed those exceptions narrowly.") (citations omitted); *Int'l Trading & Indus. Inv. Co. v. DynCorp Aerospace Tech.*, 763 F. Supp. 2d 12, 28 (D.D.C. 2011) ("[A] narrow reading of the New York Convention comports with the context in which the Convention was enacted . . .") (citation omitted); *AO Techsnabexport v. Globe Nuclear Servs. & Supply, Ltd.*, 656 F. Supp. 2d 550, 554 (D. Md. 2009); *FG Hemisphere Assoc. LLC v. Dem. Rep. Congo*, [2008] H.K.C.F.I. 906 (C.F.I.) (H.K.).

46. See 2 BORN, *supra* note 1, § 15.02[A], at 2131–32.

47. See *supra* Part I.B.1.

48. See 1 BORN, *supra* note 1, § 1.04[A][1][c][iii], at 112.

49. *Id.*

50. New York Convention, *supra* note 13, art. V, ¶ 1(d).

when the parties have not made any agreement regarding procedural matters.⁵¹ Together, these provisions ensure that one of the central objectives of the arbitral process—facilitating the parties’ procedural autonomy—is realized.⁵²

* * * * *

In sum, the various provisions of the Convention made a number of significant improvements to the Geneva Protocol and Geneva Convention. Among other things, the Convention shifted the burden of proving the validity or invalidity of awards from the award-creditor to the award-debtor and mandated summary, expedited recognition procedures; recognized substantial party autonomy with respect to the arbitral procedures; prescribed choice-of-law rules for the law applicable to arbitration agreements and required their specific enforcement; and abolished the previous “double exequatur” requirement (which had required that awards be confirmed in the arbitral seat before being recognized abroad).⁵³ The President of the New York Conference summarized the Convention’s improvements as follows:

[I]t was already apparent that the [Convention] represented an improvement on the Geneva Convention of 1927. It gave a wider definition of the awards to which the Convention applied; it reduced and simplified the requirements with which the party seeking recognition or enforcement of an award would have to comply; it placed the burden of proof on the party against whom recognition or enforcement was invoked; it gave the parties greater freedom in the choice of the arbitral authority and of the arbitration procedure; it gave the authority before which the award was sought to be relied upon the right to order the party opposing the enforcement to give suitable security.⁵⁴

The Convention’s provisions establish a robust legal framework for the international arbitral process. Consistent with the Convention’s objectives, national courts have held that these provisions mandate a uniform, “pro-enforcement” regime that allows effective, efficient recognition and enforcement of both international arbitration agreements and awards. As one U.S. appellate court declared, “The purpose of the New York Convention . . . is to ‘encourage the recognition and enforcement of

51. At the same time, Article V(1)(b) of the Convention also permits non-recognition of awards where a party was denied an opportunity to present its case, imposing a requirement of procedural fairness on the arbitral process. BORN, *supra* note 1, § 1.04[A][1][c][iii], at 112.

52. *See id.*

53. *Id.* § 1.04[A][1], at 102.

54. U.N. Conference on International Commercial Arbitration, *Summary Record of the Twenty-Fifth Meeting*, at 2, U.N. Doc. E/CONF.26/SR.25 (Sept. 12, 1958).

commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”⁵⁵ Other courts and commentators have adopted similar interpretations of the Convention’s “pro-enforcement” objectives with respect to both arbitration agreements⁵⁶ and arbitral awards.⁵⁷ In particular, despite the United States’ initial reluctance to ratify the Convention, U.S. courts have played a leading role in interpreting the Convention and ensuring the efficacy and efficiency of the international arbitral process, with foreign courts frequently relying on U.S. decisions.⁵⁸

The Convention has been highly successful in achieving its objectives.⁵⁹ The use of arbitration to resolve international commercial disputes increased

55. *Int’l Ins. v. Caja Nacional De Ahorro y Seguro*, 293 F.3d 392, 399 (7th Cir. 2002) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)).

56. *See, e.g., Scherk*, 417 U.S. at 520 n.15; *Repub. of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393 (2d Cir. 2011) (federal policy favoring arbitration “is even stronger in the context of international business transactions”); *Polimaster Ltd. v. RAE Sys., Inc.*, 623 F.3d 832, 841 (9th Cir. 2010) (“New York Convention was enacted to promote the enforceability of international arbitration agreements”); *Soci t  Bomar Oil N.V. v. E.T.A.P.*, 1987 REV. ARB. 482, 485–86 (Ct. App. Paris 1987) (“facilitate dispute resolution by way of international commercial arbitration”); *Bundesgerichtshof [BGH] [Federal Court of Justice] September 30, 2010, 2011 NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT [NJW-RR] 569 (570) (Ger.)* (“With the New York Convention, the enforcement of arbitration agreements should be facilitated internationally.”); *Switzerland No. 8, 1986 Y.B. COMM. ARB. 532, 535* (“The purpose of the Convention is to facilitate the resolution of disputes through arbitration”); *IMC Aviation Sols Pty Ltd v Altain Khuder LLC* [2011] VSCA 248, ¶ 45, n.16 (Austl.) (“Convention is widely recognised in international arbitration circles as having a ‘pro-enforcement’ policy”).

57. *See, e.g., Admart AG v. Stephen & Mary Birch Found., Inc.*, 457 F.3d 302, 307 (3d Cir. 2006) (“policy of favoring enforcement of foreign arbitral awards”); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983) (purpose of Convention is “to encourage the recognition and enforcement of international arbitration awards.”) (citation omitted); *Parsons & Whittemore Overseas Co. v. Societe Generale de l’Industrie du Papier (RAKTA)*, 508 F.2d 969, 973 (2d Cir. 1974) (Convention’s “basic thrust was to liberalize procedures for enforcing foreign arbitral awards”); *Dowans Holdings SA v. Tanzania Elec. Supply Co.* [2011] EWHC (Comm) 1957 [10] (Eng.) (“intention of the New York Convention was to make enforcement of a Convention award more straightforward”); *Bharat Aluminium v. Kaiser Aluminium*, (2010) 9 SCC 552, ¶ 149 (India) (“The underlying motivation of the New York Convention was to reduce the hurdles and produce a uniform, simple and speedy system for enforcement of foreign arbitral award.”); *Italy No. 104, 1988 Y.B. COMM. ARB. 498, 499* (“New York Convention clearly aimed at making the enforcement of foreign arbitral awards easier”); *Singapore No. 1, 1995 Y.B. COMM. ARB. 771, 779* (“principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist”).

58. A number of U.S. decisions under the Convention have been influential in non-U.S. courts, including *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk*, 417 U.S. 506; *Parsons & Whittemore*, 508 F.2d 969; *see BORN, supra* note 1, § 2.03[B][1][b][i], at 299–300; *id.* § 5.01[C][2], at 644–46.

59. *Yugraneft Corp. v. Rexx Mgmt. Corp.*, [2010] S.C.R. 649, 657 (Can.) (“great success”); *see BORN, supra* note 1, § 1.04[A][1][b], at 103; Michael John Mustill, *Arbitration:*

dramatically over the past fifty years,⁶⁰ with observers describing arbitration as the predominant means of resolving international commercial disputes.⁶¹ The Convention has been central to these developments, providing the foundation for contemporary international commercial arbitration and one of the pillars of today's broader international legal system.

C. U.S. Ratification of the New York Convention⁶²

Following the adoption of the Convention in 1958, the U.S. delegation to the New York Conference initially recommended against U.S. ratification of the treaty, asserting that this was necessary to avoid potential conflicts between the Convention and existing U.S. law.⁶³ That recommendation was followed for the next decade, with the United States taking no steps to ratify the Convention, notwithstanding the accessions of a number of other major trading states.⁶⁴

The position of the United States “changed as the nation’s transnational commerce increased.”⁶⁵ On June 10, 1968, exactly ten years after the

History and Background, 6 J. INT’L ARB. 43, 49 (1989) (The Convention “has been the “most effective instance of international legislation in the entire history of commercial law.”); J. Gillis Wetter, *The Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 AM. REV. INT’L ARB. 91, 93 (1990) (“single most important pillar on which the edifice of international arbitration rests”).

60. See BORN, *supra* note 1, § 1.03, at 94; TOWARD A SCIENCE OF INTERNATIONAL ARBITRATION: COLLECTED EMPIRICAL RESEARCH, 341 app. 1 (Christopher R. Drahozal & Richard W. Naimark eds., 2005).

61. See France No. 35, 2005 Y.B. COMM. ARB. 499, 502 (Ct. App. Paris) (“usual means”); Messrs. Eckhardt & Co. v. Mohammad Hanif, (1993) 1 PLD (SC) 42, 52 (Pak.) (“very common nowadays”); Pierre Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 293 (Pieter Sanders ed., 1987) (“*the*’ ordinary and normal method”) (emphasis in original).

62. For commentary on the U.S. ratification of the Convention, see Leonard V. Quigley, *Acceiption by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049 (1961) [hereinafter Quigley, *Accession by the United States*]; see also Aksen, *American Arbitration Accession*, *supra* note 23; Drahozal, *Convention*, *supra* note 14, at 102–04.

63. See H.R. REP. NO. 91-1181, at 1 (1970) (“Although the United States participated in the [New York] [C]onference, the convention was not signed on behalf of our government at that time because the American delegation felt that certain provisions were in conflict with some of our domestic laws.”).

64. Between 1958 and 1968, 33 states acceded to the Convention, including France, Germany, and Switzerland. *Contracting States*, N.Y. ARB. CONVENTION, <http://www.newyorkconvention.org/countries> (last visited Nov. 28, 2018).

65. Louis Del Duca & Nancy A. Welsh, *Enforcement of Foreign Arbitration Agreements and Awards: Application of the New York Convention in the United States*, 62 AM. J. COMP. L. 69, 70 (2014); see also S. EXEC. REP. NO. 90-10, at 5, 7 (2d Sess. 1968) (statement of Richard D. Kearney) [hereinafter *1968 Kearney Statement*] (“Our failure to become a party to the convention has resulted in difficulties for American businessmen seeking to enforce arbitral awards against parties located in foreign countries” and that he was

Convention was opened for signature, President Johnson signed the Convention and submitted it to the Senate for advice and consent.⁶⁶ U.S. international businesses and the legal profession strongly supported U.S. ratification, emphasizing the importance of international arbitration to cross-border trade and investment.⁶⁷ Virtually no opposition was recorded to the Convention, including from the Department of State, which previously opposed U.S. accession.⁶⁸ As discussed below, in addition to supporting ratification of the Convention, the Departments of State and Justice also recommended federal implementing legislation to ensure effective application of the Convention in U.S. courts.⁶⁹

After receiving the Senate's consent—by a vote of 57-0—President Nixon ratified the Convention in 1970.⁷⁰ At the same time, Congress enacted Chapter 2 of the FAA, which added eight sections to the Act addressing various procedural aspects of the Convention's application in U.S. federal courts.⁷¹ The new provisions of Chapter 2 included sections on federal subject matter jurisdiction, venue, removal, injunctive authority, and similar ancillary matters.⁷² Chapter 2 supplemented the original FAA, enacted in 1925, which addressed, in a skeletal and relatively archaic fashion, the enforcement of domestic and some international arbitration agreements and awards.⁷³ After the enactment of Chapter 2 of the FAA, the instrument of the accession of the United States to the Convention was filed

not aware of “any indication that any segment of the community is opposed to this convention”).

66. 114 CONG. REC. 10487–88 (1968) (message of President Johnson).

67. H.R. REP. NO. 91-1181, at 2 (1970) (House Judiciary Committee reporting receipt of “a number of communications from lawyers and businessmen urging early and favorable action on [the Senate bill to enact Chapter 2 of the FAA], and so far as is known, there is no opposition to the bill. It has the support of the American Bar Association, the Association of the Bar of the City of New York, the American Arbitration Association, the Inter-American Commercial Arbitration Association, the International Chamber of Commerce, Office and Professional Employees International Union, the Department of State, the Department of Justice, and the Bureau of the Budget.”).

68. See 1968 *Kearney Statement*, *supra* note 65, at 5 (“[T]here was no known opposition to the convention in the business or the foreign trade community [T]he Secretary of State should recommend to the President that the Convention be sent to the Senate for its advice and consent.”).

69. See *infra* note 139.

70. 114 CONG. REC. 29605 (1968); Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 2560, Dec. 11, 1970, 21 U.S.T. 2517, 330 U.N.T.S. 3 (1958).

71. See 9 U.S.C. §§ 201–208 (2012); see also *infra* Part. II.B.3.A; Drahozal, *Convention*, *supra* note 14, at 104, 107–11.

72. 9 U.S.C. §§ 202–203 (federal subject matter jurisdiction), 204 (venue), 205 (removal), 206 (injunctive authority) and 207 (statute of limitations) (2012).

73. See 9 U.S.C. §§ 1–16 (2012). The domestic FAA, now contained in a retitled “Chapter 1” of the Act, has only been amended in minor respects since 1925. See LARRY E. EDMONSON, *DOMKE ON COMMERCIAL ARBITRATION* ch. 4 (3d ed. 2010); Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 353–57 (2007).

with the United Nations on September 30, 1970, and the Convention entered into force for the United States on December 29, 1970.⁷⁴

II. THE NEW YORK CONVENTION IS SELF-EXECUTING

Despite the New York Convention's importance, there is a degree of uncertainty in the United States about whether it is self-executing and directly applicable in national court proceedings. One U.S. appellate decision concluded, with limited analysis, that Article II of the Convention is not self-executing,⁷⁵ and dicta of the Supreme Court in *Medellin v. Texas* arguably suggests that Article V of the Convention is not self-executing either.⁷⁶ In contrast, other U.S. authorities, at both the federal and state level, instead hold that various provisions of the Convention, and in some cases the Convention itself, are self-executing.⁷⁷ Some observers, including the current version of the *Restatement of the U.S. Law of International Commercial and Investment Arbitration* (the "*Restatement*"), take no position at all on the matter,⁷⁸ concluding that the Convention's status is in "murky waters"⁷⁹

74. *U.S. Accedes to Convention on Foreign Arbitral Awards*, 63 DEP'T ST. BULL. 598, 598 (1970).

75. *Stephens v. Am. Int'l Ins.*, 66 F.3d 41, 45 (2d Cir. 1995).

76. *See Medellin v. Texas*, 552 U.S. 491, 521 (2008); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

77. *See infra* note 79 (citing authorities); *see also Safety Nat'l Cas. Corp v. Certain Underwriters at Lloyd's*, 587 F.3d 714, 732 (5th Cir. 2009) (Clement, J., concurring) ("I would hold that the relevant treaty provision, Article II of the Convention, is self-executing"); *Martin v. Certain Underwriters of Lloyd's London*, No. SACV10-1298 AG(AJWx), 2011 WL 13227729, at *5-7 (C.D. Cal. Sept. 2, 2011) (holding that the relevant provision in Article II of the Convention is self-executing). Both federal and state courts have repeatedly applied provisions of the Convention directly, without expressly holding that the Convention is self-executing. *See, e.g., Lloyds Underwriters v. Netterstrom*, 17 So. 3d 732, 737 (Fla. Dist. Ct. App. 2009); *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408, 414-16 (N.Y. 1982); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 980 N.Y.S.2d 21, 25 (N.Y. App. Div. 2014); *Drexel Burnham Lambert, Inc. v. Ruebsamen*, 531 N.Y.S.2d 547, 550-52 (N.Y. App. Div. 1988); *Faberge Int'l Inc. v. Di Pino*, 491 N.Y.S.2d 345, 348 (N.Y. App. Div. 1985); *Shah v. E. Silk Indus. Ltd.*, 493 N.Y.S.2d 150, 151 (N.Y. App. Div. 1985); *CanWest Glob. Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 562-63 (N.Y. Sup. Ct. 2005); *Composite Concepts Co. v. Berkenhoff GmbH*, No. CA2009-11-149, 2010 WL 2371991, at *4 (Ohio Ct. App. June 14, 2010).

78. *See* RESTATEMENT OF U.S. LAW OF INT'L COMMERCIAL & INV. ARBITRATION § 1-2 reporters' note a(iv) (AM. LAW INST., Tentative Draft No. 6, 2018) ("[W]hether [Article II(3) of the Convention] is self-executing is unresolved.").

79. *ESAB Grp., Inc. v. Zurich Ins.*, 685 F.3d 376, 387-88 (4th Cir. 2012); *see also Drahozal, Convention, supra* note 14, at 116 ("relationship between the New York Convention and state arbitration law in the United States is not at all settled."). There is limited commentary on the Convention's status. *See* S.I. Strong, *Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration*, 53 VA. J. INT'L L. 499, 514, 571 (2013) ("judicial analyses of the self-executing nature of the New York Convention are limited and in conflict"); Angela D.

Despite this uncertainty, the status of the Convention—as self-executing or non-self-executing—has substantial theoretical and practical significance in the United States and elsewhere. If the Convention were self-executing, then its terms would apply directly in both U.S. federal and state courts,⁸⁰ ensuring that the United States’ commitments to recognize and enforce international arbitration agreements and awards are fully honored and realizing the Convention’s objective of facilitating the arbitral process. In contrast, if the Convention were non-self-executing, then its terms would not apply directly in either state or federal courts. As a consequence, international arbitration agreements and awards would be subject to a confusing array of different and uncertain legal rules in different American courts,⁸¹ with, on any view, state law being applicable to significant categories of such agreements and awards in U.S. state courts.⁸² As discussed below, the shortcomings resulting from this approach are illustrated by the difficulties that arise from the *Restatement’s* efforts to prescribe rules of U.S. international arbitration law without treating the Convention as self-executing.⁸³ Finally, if the Convention is not regarded as self-executing, then the McCarran-Ferguson Act arguably overrides Chapter 2 of the FAA.⁸⁴

Krupar, Note, *The McCarran-Ferguson Act’s Intersection with Foreign Insurance Companies*, 58 CLEV. ST. L. REV. 883 (2010); Brooke L. Myers, Note, *Treaties and Federal Question Jurisdiction: Enforcing Treaty-Based Rights in Federal Court*, 40 LOY. L.A. L. REV. 1449, 1499 (2007). Compare Conor Colasurdo, Note, *Preventing Reverse-Preemption of the United States’ Obligations Under the New York Convention*, 36 FORDHAM INT’L L.J. 941, 971–75 (2013) (“Article II of the New York Convention should be treated as self-executing”), and Douglas D. Reichert, Note, *Provisional Remedies in the Context of International Commercial Arbitration*, 3 BERKELEY J. INT’L L. 368 (1986) (arguing that Article II(3) of the Convention is self-executing), with Campbell McLachlan, *Are National Courts and International Arbitral Tribunals in Two Worlds or One?*, 7 J. INT’L DISP. SETTLEMENT 577, 587 (2016) (“Article II (3) . . . is not self-executing.”), David A. Rich, *Deference to the “Law of Nations”: The Intersection between the New York Convention, the Convention Act, the McCarran-Ferguson Act, and State Anti-Insurance Arbitration Statutes*, 33 T. JEFFERSON L. REV. 81, 104–12 (2010) [hereinafter Rich, *Deference*] (arguing that Convention is non-self-executing), Alexander Kamel, Note, *Cooperative Federalism: A Viable Option for Implementing the Hague Convention on Choice of Court Agreements*, 102 GEO. L.J. 1821, 1833–34 (2014) (“Convention is not self-executing.”), Amber A. Ward, Note, *Circumventing the Supremacy Clause? Understanding the Constitutional Implications of the United States’ Treatment of Treaty Obligations Through an Analysis of the New York Convention*, 7 SAN DIEGO INT’L L.J. 491, 508 n.115 (2006) (“New York Convention is a non-self-executing treaty.”).

80. See *infra* Part II.B.3.a.

81. See *infra* Appendix A.

82. See *infra* Part II.B.3.a.

83. See *infra* Part II.C.3.

84. See authorities cited *supra* note 79 & *infra* notes 288–92. The McCarran-Ferguson Act provides that certain state laws regulating insurance reverse-preempt inconsistent “Acts of Congress,” but not U.S. treaties. 15 U.S.C. §§ 1011–1015 (2012).

This Part argues that, despite the uncertainty currently surrounding the issue, both Article II of the Convention, dealing with arbitration agreements, and Articles III, IV, V, and VI, dealing with arbitral awards, are best considered as self-executing treaty provisions, directly applicable in U.S. and other domestic courts. That conclusion is true for both sets of provisions for closely related reasons.

A. *Self-Executing and Non-Self-Executing Treaty Provisions*

As a treaty of the United States, the New York Convention is the “supreme Law of the Land” under the Supremacy Clause of the U.S. Constitution.⁸⁵ Under the Constitution, treaties of the United States are a *sui generis* category of law, with different characteristics than other types of U.S. law. In *Missouri v. Holland*, the Supreme Court’s leading treatment of the treaty power, the Court held that treaties are different from Acts of Congress, with distinct legal consequences.⁸⁶ Among other things, a treaty is negotiated and made by the President pursuant to his authority over the Nation’s foreign affairs and the Treaty Clause of Article II,⁸⁷ rather than by both houses of Congress under Article I’s provisions for enacting federal legislation.⁸⁸ Similarly, as the Court held in *Missouri v. Holland*, a treaty may prescribe federal law regarding issues that do not otherwise fall within Congress’ Article I legislative authority.⁸⁹ And in construing a treaty, the views of foreign courts and treaty partners have particular weight, whereas these sources play no role in construing a U.S. statute.⁹⁰

Under long-standing U.S. authority, there is an important distinction between “self-executing” and “non-self-executing” treaties. A self-

85. U.S. CONST. art. VI, cl. 2.

86. See *Missouri v. Holland*, 252 U.S. 416, 431–34 (1920). The Court distinguished between Acts of Congress and treaties: “Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States.” *Id.*

87. U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . .”). The Treaty Clause grants the President the power to “make” treaties, while requiring the President to obtain the “advice and consent” of the Senate in doing so. *Id.*

88. U.S. CONST. art. I, § 7; see Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1908 (2015) (“The treatymaking process is different from the process of passing legislation.”) [hereinafter Sitaraman & Wuerth, *Normalization*]; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 615–16 (2008) [hereinafter Vázquez, *Treaties as Law*].

89. In *Holland*, the Supreme Court upheld legislation implementing a U.S. treaty against constitutional challenge. The Court held the Treaty Clause granted constitutional authority even where Article I did not, and that this authority was a sufficient basis for subsequent implementing legislation. *Holland*, 252 U.S. at 431–34.

90. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 306 cmts. a, e reporters’ note 3 (AM. LAW INST. 2018); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 reporters’ note 4 (AM. LAW INST. 1987).

executing treaty has direct, binding effect in U.S. courts and “operates of itself without the aid of any legislative provision.”⁹¹ In contrast, and notwithstanding the unqualified text of the Supremacy Clause,⁹² a “non-self-executing” treaty is not ordinarily directly applicable in U.S. courts. It must be “executed” by Congress through implementing legislation that provides the applicable rules of decision in U.S. courts.⁹³ In addition, the distinction between self-executing and non-self-executing treaties can apply to individual provisions of treaties: within a single treaty, some provisions may be self-executing, whereas other provisions of the same treaty are non-self-executing.⁹⁴ Although commentators criticize the distinction between self-executing and non-self-executing treaties,⁹⁵ the Supreme Court and other U.S. courts uniformly continue to apply the doctrine.⁹⁶

As contemplated by the Supremacy Clause, a self-executing treaty has many of the same effects in U.S. courts as a federal statute.⁹⁷ Self-executing treaties preempt inconsistent state law in the same manner as an Act of Congress.⁹⁸ Similarly, a self-executing treaty will supersede prior federal

91. Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829); see also *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008); GARY B. BORN & PETER RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 16 (6th ed., 2018) [hereinafter BORN & RUTLEDGE, INTERNATIONAL CIVIL LITIGATION].

92. The Supremacy Clause provides, in unqualified terms, that all “Treaties” are the “supreme Law of the Land” without any reference to “self-executing” or “non-self-executing” treaties. Despite this text, the Supreme Court has held since the early 19th century that only “self-executing” treaties prescribe rules of federal law applicable in U.S. courts. See *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Foster*, 27 U.S. at 314–15; see also Carlos Manuel Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1113, 1129 (1992) [hereinafter Vázquez, *Rights and Remedies*]; Vázquez, *Treaties as Law*, *supra* note 88, 605–06; Tim Wu, *Treaties’ Domains*, 93 VA. L. REV. 571, 577–78 (2007).

93. See *Medellín*, 552 U.S. at 514.

94. See *Lidas, Inc. v. United States*, 238 F.3d 1076, 1080 (9th Cir. 2001) (“[I]t is far from uncommon for a treaty to contain both self-executing and non-self-executing provisions.”) (citation omitted); *United States v. Postal*, 589 F.2d 862, 884 n.35 (5th Cir. 1979); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. h (AM. LAW INST. 1987).

95. See, e.g., Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT’L L. 760, 760 (1988); Vázquez, *Rights and Remedies*, *supra* note 92, at 1113–14.

96. See, e.g., *Bond v. United States*, 572 U.S. 844, 850–51 (2014); *Medellín*, 552 U.S. at 504–05; *United States v. M.H. Pulaski Co. (The Five Percent Disc. Cases)*, 243 U.S. 97, 105–06 (1917); *De Geofroy v. Riggs*, 133 U.S. 258, 267–68 (1890); *Whitney*, 124 U.S. at 194; *United States v. Rauscher*, 119 U.S. 407, 410–11, 429–30 (1886); *Edye v. Roberston (The Head Money Cases)*, 112 U.S. 580, 598–99 (1884); *Am. Ins. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 542 (1828).

97. As noted above, the Supremacy Clause categorizes treaties as the supreme Law of the Land, in terms equivalent to the Constitution and federal legislation. See *supra* note 85; see also Vázquez, *Treaties as Law*, *supra* note 88, at 622.

98. See *Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (“[T]he treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments.”)

legislation (and be superseded by subsequent federal legislation) under the “last in time” rule.⁹⁹ And like a federal statute, a self-executing treaty will provide the basis for federal subject matter jurisdiction under the “arising under” provisions of the Constitution and federal legislation.¹⁰⁰ In contrast, a non-self-executing treaty will have none of these effects unless implemented by federal legislation; it will not preempt state law, supersede federal legislation, or provide the basis for “arising under” jurisdiction.¹⁰¹

Distinguishing between self-executing and non-self-executing treaties involves consideration of a number of factors directed at ascertaining the intentions of the federal political branches regarding a treaty’s status. In the words of the *Restatement (Fourth) of Foreign Relations Law of the United States*: “In assessing whether a treaty provision is self-executing, courts consider whether the provision would have been intended or understood by the U.S. treaty-makers to be directly enforceable by the courts, in light of the considerations relevant to the doctrine of self-execution.”¹⁰²

As with other issues of treaty (and statutory) interpretation, the language of a treaty is central to determining whether or not it is self-executing.¹⁰³ Thus, the Supreme Court has held that determining whether a

(citations omitted); *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 556 (5th Cir. 1946) (“A treaty lawfully entered into stands on the same footing of supremacy as does the Constitution and Laws of the United States.”) (citation omitted).

99. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 cmt. a (AM. LAW INST. 1987) (“An act of Congress and a self-executing treaty of the United States are of equal status in United States law, and in case of inconsistency the later in time prevails.”).

100. U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority”); 28 U.S.C. § 1331 (2012) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(2) (AM. LAW INST. 1987).

101. See generally *Cameron Septic Tank Co. v. City of Knoxville*, 227 U.S. 39 (1913); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829); *Sei Fujii v. State*, 242 P.2d 617 (Cal. 1952); see also Roger P. Alford, *Judicial Barriers to the Enforcement of Treaties*, in SUPREME LAW OF THE LAND?: DEBATING THE CONTEMPORARY EFFECTS OF TREATIES WITHIN THE UNITED STATES LEGAL SYSTEM 333 (Gregory H. Fox et al. eds., 2017) [hereinafter FOX ET AL., SUPREME LAW].

102. See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 310 reporters’ note 8 (AM. LAW INST. 2018). Some commentators suggest that, although the intent of U.S. treaty-makers is relevant and entitled to deference, the treaty-makers’ intent is not binding. See Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639, 1660–61 (2016); Carlos Manuel Vázquez, *Four Problems with the Draft Restatement’s Treatment of Treaty Self-Execution*, 2015 BYU L. REV. 1747, 1770–74 (2016). The Restatement (Fourth) and weight of judicial authority focus, however, on the intentions of the U.S. political branches do not give decisive weight to the views or intentions of other states.

103. *Medellín v. Texas*, 552 U.S. 497, 519 (2008) (“[W]e have held treaties to be self-executing when the textual provisions indicate that the President and Senate intended for the agreement to have domestic effect.”).

treaty provision is self-executing “begins with its text.”¹⁰⁴ In doing so, the Court emphasized the importance of examining whether the treaty provision includes mandatory language, such as the terms “shall” or “must[,]” and whether the provision constitutes “a directive to domestic courts,” as distinguished from the legislative and executive branches.¹⁰⁵ Relatedly, the extent to which treaty provisions are specific and comprehensive, rather than aspirational or partial, is also relevant to the provision’s self-executing status.¹⁰⁶

In addition to treaty text, a number of other factors are relevant to determining whether a treaty is self-executing. These factors include the character of the agreement and the content of the rights that it confers;¹⁰⁷ statements in the U.S. ratification process;¹⁰⁸ the content of related agreements;¹⁰⁹ and the post-ratification views of the United States.¹¹⁰ There appears to be no presumption that treaties or other U.S. international agreements either are or are not self-executing.¹¹¹ Some early authorities suggested a presumption that treaties are self-executing¹¹² based on the federal political branches’ presumed desire to ensure treaty compliance by the United States.¹¹³ More recently, however, the Supreme Court arguably

104. *Id.* at 506.

105. *Id.* at 508 (Article 94 of the U.N. Charter is non-self-executing because it “is not a directive to domestic courts[,]” and “does not provide that the United States ‘shall’ or ‘must’ comply with an ICJ decision”); *see also Foster*, 27 U.S. at 314–15 (holding treaty provision non-self-executing based on its text).

106. RESTATEMENT (FOURTH) § 310 reporters’ note 5.

107. *See Medellín*, 552 U.S. at 550 (Breyer, J., dissenting) (“[D]oes it concern the adjudication of traditional private legal rights such as rights to own property, to conduct a business, or to obtain civil tort recovery? If so, it may well address itself to the judiciary.”); RESTATEMENT (FOURTH) § 110 reporters’ note 10 (AM. LAW INST., Tentative Draft No. 2, 2017) (“Courts also have been more likely to find self-execution when treaty provisions address matters of individual or private rights as opposed to the rights of the state.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters’ note 5 (AM. LAW INST. 1987) (“Provisions in treaties of friendship, commerce, and navigation . . . conferring rights on foreign nationals.”).

108. *See Medellín*, 552 U.S. at 534 (“[W]hereas the Senate has issued declarations of non-self-execution when ratifying some treaties, it did not do so with respect to the United Nations Charter.”) (footnote omitted); RESTATEMENT (THIRD) § 111 cmt. h (“[A]ccount must be taken of any statement by the President in concluding the agreement or in submitting it to the Senate for consent or to the Congress.”).

109. *See Medellín*, 552 U.S. at 517–18.

110. *See id.* at 506–07.

111. *See id.* at 512–14; *id.* at 551–62 (Breyer, J., dissenting) (describing factors bearing on whether a treaty is self-executing); RESTATEMENT (FOURTH) § 310 reporters’ note 3 (AM. LAW INST. 2018). *See infra* notes 114 & 115.

112. *See* RESTATEMENT (THIRD) § 111 reporters’ note 5; RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 141(1)(a), (2)(a) (1965); Ingrid Wuerth, *Self-Execution*, in FOX ET AL., SUPREME LAW, *supra* note 101, at 148, 150–51.

113. *See* RESTATEMENT (THIRD) § 111 reporters’ note 5; LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 201 (2d ed. 1996).

rejected this view,¹¹⁴ with commentary now observing that “[t]he case law has not established a presumption for or against self-execution.”¹¹⁵

It is well-settled under U.S. law that “[w]hether [a treaty] is or is not self-executing in the law of another state party to the agreement is not controlling for the United States.”¹¹⁶ This is in part because not all nations distinguish between self-executing and non-self-executing treaties in the same manner that U.S. law does, making their treatment of a treaty of little relevance to the status of the treaty under U.S. law.¹¹⁷ In the United Kingdom, for example, treaties are generally non-self-executing and require domestic legislation to have effect in U.K. courts.¹¹⁸ Conversely, the Netherlands and some other civil law jurisdictions directly incorporate most treaties into domestic law without parliamentary approval.¹¹⁹ More fundamentally, the positions of foreign states regarding a treaty’s character are not determinative for purposes of U.S. law because the intentions of the U.S. political branches in ratifying the treaty are regarded as decisive for a treaty’s self-executing status as a matter of U.S. law.¹²⁰

Nonetheless, the publicly held views of other Contracting States regarding a treaty’s meaning can provide indirect evidence of how, absent contrary indication by the United States, the United States understands the same treaty. In ratifying a treaty, the United States undertakes international obligations, defined by the treaty’s terms, whose content is materially

114. See *Medellin*, 552 U.S. at 506–16.

115. RESTATEMENT (FOURTH) § 310 reporters’ note 3; see also Wuerth, *Self-Execution*, in FOX ET AL., SUPREME LAW, *supra* note 101, at 148, 148–149; Vázquez, *Treaties as Law*, *supra* note 88.

116. RESTATEMENT (THIRD) § 111 cmt. h.

117. See *id.* § 111 reporters’ note 5 (“[F]ew other states distinguish between self-executing and non-self-executing treaties.”).

118. Ian Sinclair et al., *Chapter 19: United Kingdom*, in NATIONAL TREATY LAW AND PRACTICE 733 (Duncan B. Hollis et al. eds., 2005) (“Generally speaking, in the United Kingdom . . . no treaty is self-executing”).

119. *Medellin*, 552 U.S. at 548 (Breyer, J., dissenting); Jan. G. Brouwer, *Chapter 14: The Netherlands*, in NATIONAL TREATY LAW AND PRACTICE 483 (Duncan B. Hollis et al. eds., 2005); see also David Sloss, *Domestic Application of Treaties*, in THE OXFORD GUIDE TO TREATIES, 386–87 (Duncan B. Hollis ed., 2012), (“[C]ourts in Germany, Poland and the Netherlands . . . generally hold that treaty provisions designed to benefit private parties are invokable by private parties and directly applicable by the courts”).

120. See *Medellin*, 552 U.S. at 521 (“Our cases simply require courts to decide whether a treaty’s terms reflect a determination by the President who negotiated it and the Senate that confirmed it that the treaty has domestic effect.”); *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979); *Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1017 (E.D. Cal. 2012); *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976); RESTATEMENT (THIRD) § 111 cmt. h.

The fact that a treaty is non-self-executing (and not directly applicable) as a matter of U.S. domestic law does not relieve the United States of its international obligations under international law. RESTATEMENT (FOURTH) § 310(1) (“Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law.”).

affected by the interpretations of those terms by foreign states and other international authorities.¹²¹ The content of those obligations is necessarily one of the factors that bear on the understanding and intentions of the U.S. political branches regarding the self-executing character of a treaty.¹²²

B. *Article II Is Self-Executing*

Applying the standards outlined above for determining the self-executing character of U.S. treaties, there is substantial evidence that Article II of the Convention is self-executing. That conclusion is supported by the language, object, and purposes of Article II. It is confirmed by the terms of Chapter 2 of the FAA, the ratification and legislative history of both the Convention and Chapter 2, the weight of authority in U.S. state and federal courts considering the status of Article II, and the position of the U.S. government.

1. Text of Article II

The starting point for analysis of the Convention's status, as the Supreme Court has emphasized,¹²³ is the text of Article II. That text argues fairly clearly for self-executing status. Article II(1) provides:

Each Contracting State *shall recognize* an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.¹²⁴

Article II(3) then gives effect to Article II(1), providing:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, *shall*, at the request of one of the parties, *refer the parties to arbitration*, unless *it finds* that the said agreement is null and void, inoperative or incapable of being performed.¹²⁵

These provisions plainly set forth binding substantive rules of international law, requiring that international arbitration agreements “shall” be

121. RESTATEMENT (FOURTH) § 306; RESTATEMENT (THIRD) § 325.

122. RESTATEMENT (FOURTH) § 310 cmts. c, d, reporters' note 4 (“[T]he nature of the international obligations assumed by the United States informs the question whether a treaty provision is self-executing,” although this issue is ultimately governed by U.S., not international, law).

123. *Medellin*, 552 U.S. at 506 (“[I]nterpretation of a treaty, like the interpretation of a statute, begins with its text.”).

124. New York Convention, *supra* note 13, art. II, ¶ 1 (emphasis added).

125. *Id.* art. II, ¶ 3 (emphasis added).

recognized and that parties to such agreements “shall” be referred to arbitration. Consistent with this text, U.S. and other courts have uniformly held that Article II imposes mandatory international rules.¹²⁶

The text of Article II provides weighty evidence that these provisions are self-executing. As the Supreme Court has repeatedly emphasized, the use of mandatory terms, including “shall,” are strong indications that a treaty is self-executing.¹²⁷ These decisions rest on the premise that, where a treaty imposes clear-cut, mandatory obligations on the United States, the U.S. treaty-makers presumptively intend those obligations to be immediately complied with, consistent with the text and objectives of the Supremacy Clause. Here, Article II, as both a textual matter and as interpreted by U.S. and foreign courts, is unequivocally mandatory.

Article II is also directed specifically to national courts rather than to legislative or executive authorities. That is most apparent from Article II(3)’s direction to “the court[s] of a Contracting State,” requiring those courts to “refer the parties to arbitration”¹²⁸—an action that only a court “seized of an action” can perform.¹²⁹ Article II(1) is not materially different in requiring “Contracting States” to “recognize” arbitration agreements. Rather than the “recognition” being an action performed by other governmental authorities, it is characteristically and necessarily performed by national courts, where dispute resolution agreements are invoked and

126. See, e.g., *Answers in Genesis of Kentucky, Inc. v. Creation Ministries Int’l, Ltd.*, 556 F.3d 459, 469 (6th Cir. 2009) (“nothing discretionary about Article II(3)”) (quoting *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974)); *InterGen N.V. v. Grina*, 344 F.3d 134, 141 (1st Cir. 2003) (“[E]nforcing arbitration clauses under the New York Convention is an obligation, not a matter committed to district court discretion.”) (citations omitted); *Smith/Enron Cogeneration L.P. v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 93 (2d Cir. 1999) (“[T]he courts of a signatory to the Convention should abide by its goal of enforcing international agreements to arbitrate disputes.”); *CanWest Glob. Commc’ns Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 562–63 (N.Y. Sup. Ct. 2005); *Hi-Fert Pty Ltd v. Kiukiang Mar Carriers Inc.*, (1998) 86 FCR 374, 393 (Austl.) (“[c]ourt must stay the proceedings and refer the parties to arbitration”); *The Rena K* [1979] QB 377, 393 (Eng.) (“Section 1 of the Arbitration Act 1975, giving effect to [Article II(3) of the New York Convention], compels the recognition and enforcement of convention (*i.e.*, non-domestic arbitration agreements”); see also *supra* Part I.B.1.

127. *Medellin*, 552 U.S. at 508; *Asakura v. City of Seattle*, 265 U.S. 332, 340–42 (1924) (“shall have”; “shall receive”); *Smith v. Canadian Pac. Airways, Ltd.*, 452 F.2d 798, 800–801 (2d Cir. 1971) (treaty is “absolute and mandatory[.]”).

128. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346–47 (2006) (“[W]here a treaty provides for a particular judicial remedy, there is no issue of intruding on the constitutional prerogatives of the States or the other federal branches. Courts must apply the remedy as a requirement of federal law.”) (citation omitted).

129. National legislative and executive branch officials cannot readily be characterized as being “seized of an action.” In the United States, in particular, it is courts, not Congress or the Executive Branch, that are seized of civil “action[s]” and can “refer” parties to arbitration. Drahozal, *Convention*, *supra* note 14, at 112 (noting “strong argument that at least one provision [Article II(3)] of the Convention is self-executing.”).

where Article II(3)'s enforcement mechanism expressly applies.¹³⁰ Thus, Article II's provisions are not only mandatory but are also "directive[s] to domestic courts," which is regarded as powerful evidence of self-executing status.¹³¹

It is also significant that the provisions of Article II are complete and comprehensive, requiring nothing further to be applied in national courts in order to effectuate the Convention's purposes.¹³² National courts can apply these provisions directly to give effect to arbitration agreements and refer parties to arbitration—as Article II mandates—without any need for further substantive elaboration or detail.¹³³ No additional substantive terms, beyond the obligations to recognize arbitration agreements and to refer parties to arbitration, are needed for Article II to fulfill its intended objectives.

This is confirmed by the language of arbitration statutes to implement the Convention enacted in a number of Contracting States where treaties are not self-executing. In all these statutes, the provisions implementing Article II repeat virtually verbatim the text of Article II, adding nothing to the Convention's terms. For example, approximately 80 countries base their arbitration legislation on the UNCITRAL Model Law on International Commercial Arbitration (the "UNCITRAL Model Law").¹³⁴ Articles 7 and 8 of the Model Law mirror Articles II(1) and II(3) of the Convention, providing that "[a] court before which an action is brought in a matter which

130. One commentator suggested that Article II(1) imposes a "discretionary commitment on the part of the United States to take future legislative action." Rich, *Deference*, *supra* note 79, at 107. That suggestion is wrong for multiple reasons, including because Article II(1) is plainly mandatory ("Each Contracting State *shall* . . ."); because the concept of a "discretionary commitment" is unknown in international law; and because U.S. and other judicial authority is contrary to any such interpretation of Article II. *See supra* and *infra* Part II.B.

131. One commentator suggested that the Convention's references to "Contracting States" implies non-self-executing status. Rich, *Deference*, *supra* note 79, 106–08. That analysis ignores the text of Article II(3) and misreads the remainder of Article II. The actions required by Article II (and, as discussed below, Articles III, IV, V and VI, *see infra* Part II.C.1) are judicial in nature and fairly clearly directed to national courts, rather than to political branches.

132. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 310 reporters' notes 4, 5 (AM. LAW INST. 2018) ("courts focus on whether a treaty provision is appropriate for direct judicial application"; courts "will consider whether the treaty provision is sufficiently precise or obligatory to be suitable for direct application by the judiciary"); *see also* *British Caledonian Airways, Ltd. v. Bond*, 665 F.2d 1153, 1161 (D.C. Cir. 1981) (treaty provisions "require no legislation or administrative regulations to implement them") (quoting *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

133. U.S. courts have routinely interpreted and directly applied Article II of the Convention. *See infra* Part II.B.5.

134. U.N. COMM. ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 1985 WITH AMENDMENTS AS ADOPTED IN 2006, U.N. Sales No. E.08.V.4 (2008) [hereinafter UNCITRAL MODEL LAW]; *Status*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html (last visited Nov. 28, 2018).

is the subject of an arbitration agreement shall . . . refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.”¹³⁵ These provisions, as well as cognate provisions of other national arbitration statutes,¹³⁶ confirm that Article II requires no further text or implementation to be fully effective in Contracting States.

As discussed below, the FAA’s terms confirm that Article II is self-executing for similar reasons.¹³⁷ In contrast to non-self-executing treaty provisions whose substantive terms must be implemented by federal legislation, nothing in Chapter 2 of the FAA repeats or restates the substantive terms of Article II as U.S. law. In particular, there is no provision in Chapter 2 giving effect to either Article II(1) or II(3) of the Convention, mandating the validity of arbitration agreements and requiring their enforcement by orders referring parties to arbitration.¹³⁸ Instead, the FAA contains only ancillary provisions regarding subject matter jurisdiction, removal, venue, and similar procedural issues, none of which restate or make the substantive terms of Article II applicable in American courts.¹³⁹

The U.S. government has made this point in submissions to the Supreme Court. In particular, the U.S. government has explained that Articles II(1) and II(3) do not “envisage that steps beyond ratification [of the Convention] are necessary before the Convention creates binding

135. UNCITRAL MODEL LAW art. 8, ¶ 1.

136. Similarly, sections 6 and 9 of the English Arbitration Act, 1996 impose almost identical obligations. The Arbitration Act 1996, c. 23, § 6(1) (“In this Part an ‘arbitration agreement’ means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).”), § 9(1) (“A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.”), § 9(4) (“On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.”); *see also* Arbitration Ordinance, (2013) Cap. 609, 7, § 20(1) (H.K.); Arbitration and Conciliation Act, No. 26 of 1996, INDIA CODE (1996) §§ 44–45; Arbitration Act, Act No. 138 of 2003, art. 14 (Japan); Arbitration Act, 2002, ch. 10, § 8 (Sing.).

137. *See infra* Part II.B.3.a.

138. *See supra* Part II.B.1.

139. *See* 9 U.S.C. §§ 203 (subject matter jurisdiction), 204 (venue), 205 (removal), 206 (injunctive power) (2012). The legislative history of the FAA confirms that Chapter 2 was regarded as serving these ancillary purposes. *See infra* Part II.B.3.a. Testimony by the Deputy Legal Adviser to the Department of State before the Senate Foreign Relations Committee confirmed this characterization: “The Department of Justice . . . has suggested that implementing legislation . . . is desirable . . . to insure the coverage of the act extends to all cases arising under the treaty and . . . to take care of related venue and jurisdictional requirement problems.” 1968 *Kearney Statement*, *supra* note 65, at 5–6.

obligations enforceable in domestic courts.”¹⁴⁰ As that submission makes clear, the provisions of Article II are a complete set of substantive rules, expressly directed to national courts, regarding the enforcement of international arbitration agreements by those courts.¹⁴¹ From a textual perspective, Article II’s provisions are very close to textbook examples of treaty obligations that are meant to have direct effect.

2. Purposes of Article II

The conclusion that Article II is self-executing is supported by the object and purposes of both that provision and the Convention more generally. These purposes are relevant to interpretation of the treaty¹⁴² and, consequently, to the understanding and intentions of the United States in ratifying the Convention.¹⁴³

As with other international treaties addressing issues of private international law, the drafters of Article II sought to establish a single uniform set of international legal standards, in this case for enforcing arbitration agreements in the courts of Contracting States.¹⁴⁴ A delegate to the New York Conference made this point, noting that Contracting States should not be permitted to decline enforcement of arbitration agreements based on parochial local laws and that Article II’s provisions were thus essential to the “whole purpose of the Convention.”¹⁴⁵ Likewise, a leading commentator on the Convention observed that, “[f]or the enforcement of the arbitration agreement, the Convention contains internationally uniform provisions.”¹⁴⁶

National courts consistently recognize the Convention’s purpose of establishing internationally uniform rules for the enforcement of arbitration agreements. In the words of one court:

[T]he Convention and its implementing federal legislation express a *clear federal interest in uniform rules by which agreements to arbitrate will be enforced*. . . . The application of parochial rules . . . to agreements arising under the Convention would

140. Brief for the United States as Amicus Curiae, at 9 (Aug. 26, 2010), *Louisiana Safety Ass’n of Timbermen—Self Insurers Fund v. Certain Underwriters at Lloyd’s*, 562 U.S. 827 (2010) (cert. denied) [hereinafter *Louisiana Safety* Amicus Brief].

141. *Id.* at 8–9.

142. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346 (2006); Vienna Convention on the Law of Treaties, art. 31, ¶ 1, May 31, 1969, 1155 U.N.T.S. 331 (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 306(1) (AM. LAW INST. 2018).

143. See RESTATEMENT (FOURTH) § 306 reporters’ note 11, § 310 reporters’ note 8.

144. See BORN, *supra* note 1, § 1.04[A][1][c], at 106.

145. HAIGHT, SUMMARY ANALYSIS, *supra* note 10, at 24–25; *accord Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

146. VAN DEN BERG, CONVENTION, *supra* note 3, at 123.

*frustrate one of the primary objectives of the United States in becoming a signatory to the Convention: securing uniform standards by which agreements to arbitrate international disputes are governed.*¹⁴⁷

The Supreme Court made the same point, observing that the Convention's purpose was to "unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced"¹⁴⁸ Similarly, as the Canadian Supreme Court declared, "[t]he purpose of the Convention is to facilitate the cross-border recognition and enforcement of arbitral awards by establishing a single, uniform set of rules that apply world-wide."¹⁴⁹ To the same effect, the United Nations General Assembly emphasized the importance of "uniform interpretation and effective implementation" of the Convention by Contracting States.¹⁵⁰

Relatedly, like other private international law treaties applicable in multiple national jurisdictions, another objective of the Convention is harmonization—the development over time of common, uniform standards for the enforcement of international arbitration agreements and awards in the courts of all Contracting States. The Convention's terms inevitably leave room for interpretation. Given the Convention's objective of uniformity in multiple jurisdictions, it is important that the courts of Contracting States interpret these terms in a harmonized manner. As a leading commentator on the Convention reasons, "[t]he significance of the New York Convention for

147. *Certain Underwriters at Lloyd's London v. Argonaut Ins.*, 500 F.3d 571, 579–80 (7th Cir. 2007) (emphasis on 'primary' in original, all other emphasis added).

148. *Scherk*, 417 U.S. at 520 n.15.

149. *Yugraneft Corp. v. Rexx Mgmt. Corp.*, [2010] S.C.R. 649, 657 (Can.) (emphasis added); *see also* *Smith/Enron Cogeneration L.P. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 96 (2d Cir. 1999) (Convention's "goal of simplifying and unifying international arbitration law"); *I.T.A.D. Assocs., Inc. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981); *URS Corp. v. Lebanese Co. for the Dev. & Reconstr. of Beirut Cent. Dist. SAL*, 512 F.Supp.2d 199, 208 (D. Del. 2007) ("The primary purpose of the New York Convention . . . is to efficiently 'encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed.'" (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)); *Gas Auth. of India Ltd. v. Spie Capag, S.A. And Others*, AIR 1994 (Del.) 75, ¶ 86 (India) (Convention "lays down one uniform code" for the recognition of international arbitration agreements, and "provides a common yard stick . . . [that] generat[es] confidence in the parties, who may be unfamiliar with the diverse laws prevailing in different countries with which they are trading").

150. G.A. Res. 62/65, at 1–2, U.N. Doc. A/RES/62/65 (Dec. 6, 2007) ("Emphasizing the necessity for further national efforts and enhanced international cooperation to achieve universal adherence to the Convention and its uniform interpretation and effective implementation, with a view to fully realizing the objectives of the Convention . . . Requests the Secretary-General to increase efforts to promote wider adherence to the Convention and its uniform interpretation and effective implementation.") (emphasis in original).

international commercial arbitration makes it even more important that the Convention is interpreted uniformly by the courts.”¹⁵¹

These purposes, and the intentions of the Convention’s Contracting States, are clearly best achieved by treating Article II as self-executing. Doing so means that courts in the United States—and other Contracting States that treat treaties as self-executing—will directly apply and interpret a single international text, informed by decisions in other Contracting States, rather than a multiplicity of individual national or sub-national legislative instruments. This significantly enhances the likelihood that international arbitration agreements will be subject to uniform international standards in all Contracting States. In contrast, treating Article II as non-self-executing would materially increase the risk that different Contracting States would adopt different implementing legislation for the Convention or divergent lines of judicial interpretation. This result would reduce the likelihood that uniform international rules will be applied under the Convention—contrary to the Convention’s basic purpose.

These intentions of the Convention’s Contracting States, reflected in the Convention’s object and purposes, bear directly on the meaning of the Convention and the United States’ obligations under the Convention. Just as the text of a treaty is relevant to its status as self-executing or not, because it informs the intentions of the U.S. political branches,¹⁵² other means of interpretation of a treaty, including the treaty’s object and purposes, must also be relevant to the understanding of the U.S. treaty-makers and the treaty’s status. That conclusion is consistent with the Supreme Court’s applications of the self-executing treaty doctrine, which include consideration of the intentions of U.S. treaty counterparts.¹⁵³

151. VAN DEN BERG, CONVENTION, *supra* note 3, at 1, 6, 54–55, 168–69, 262–63, 274, 357–58; *see also* *Lindo v. NCL (Bahamas), Ltd.*, 652 F.3d 1257, 1285 (11th Cir. 2011) (“need for uniformity in the enforcement of arbitration agreements.”); *Certain Underwriters at Lloyd’s*, 500 F.3d, at 580 (“[U]niformity in determining the manner by which agreements to arbitrate will be enforced is a critical objective of the Convention”); *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] 282 ALR 717, ¶ 35 (Austl.); *IPCO (Nigeria) Ltd. v. Nigerian Nat’l Petroleum Corp.* [2008] EWCA (Civ) 1157 [19] (Eng.) (“importance of uniformity in the interpretation of international conventions”); *Hebei Imp. & Exp. Corp. v. Polytek Eng’g Co.*, [1999] 2 H.K.C.F.A.R. 11, ¶ 28 (“When a number of states enter into a treaty to enforce each other’s arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.”).

152. *See supra* Part II.A; *Medellín v. Texas*, 552 U.S. 497, 506–07 (2008).

153. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 850–51 (2014) (citing international commentary for the conclusion that, “[a]lthough the [Chemical Weapons] Convention is a binding international agreement, it is ‘not self-executing.’”); *United States v. Percheman*, 32 U.S. 51, 88 (1833) (holding treaty self-executing after considering Spanish text, after previously concluding that English text required treating treaty as non-self-executing: “If the English and the Spanish parts can, without violence, be made to agree, that construction which

Finally, the nature of the Convention and the rights it confers confirm the self-executing character of Article II.¹⁵⁴ As noted above, treaties addressing commercial matters, such as friendship, navigation, and commerce treaties and the Vienna Convention on Contracts for the International Sale of Goods, are particularly likely to be categorized as self-executing.¹⁵⁵ That is especially true where the treaty addresses private rights and obligations.¹⁵⁶ Here, the Convention is a commercial treaty (focusing on international *commercial* arbitration), with Article II conferring private rights that arise only in national courts.¹⁵⁷ These provisions are prime examples of the types of treaty provisions that have been, and should be, regarded as self-executing in the United States.

3. U.S. Ratification of the New York Convention

In ratifying the Convention, the United States also adopted implementing legislation, which added Chapter 2 to the original, domestic FAA. There is nothing in the language of Chapter 2, or in the history of the United States' ratification of the Convention or enactment of Chapter 2, that contradicts the conclusion that the Convention is self-executing. On the contrary, the text and structure of the FAA, and the U.S. ratification process more generally, provide additional support for Article II's self-executing status, despite customary caveats regarding the value of legislative history.¹⁵⁸

establishes this conformity ought to prevail.”); *United States v. Postal*, 589 F.2d 862, 878 (5th Cir. 1979) (citing foreign and international authority in concluding that treaty was non-self-executing); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 310(2) (AM. LAW INST. 2018) (“Courts will evaluate whether the text and context of the provision, along with other treaty materials, are consistent with an understanding by the U.S. treaty-makers that the provision would be directly enforceable in courts in the United States.”).

154. See *supra* Part II.A. and note 107; RESTATEMENT (FOURTH) § 310 reporters' note 10.

155. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 reporters' note 5 (AM. LAW INST. 1987).

156. See *Medellin*, 552 U.S. at 550 (Breyer, J., dissenting); *Edye v. Robertson*, 112 U.S. 580, 598–99 (1884); *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (“act[s] directly” on property rights); RESTATEMENT (FOURTH) § 310 reporters' note 10 (“Courts also have been more likely to find self-execution when treaty provisions address matters of individual or private rights as opposed to the rights of the state.”); see also *VLM Food Trading Int'l, Inc. v. Ill. Trading Co.*, 748 F.3d 780, 787 (7th Cir. 2014) (contractual rights of private party under UN Convention on Contracts for the International Sale of Goods).

157. See generally BORN, *supra* note 1, ch. 8. The Convention permits a “commercial” reservation that many Contracting States, including the United States, have made use of. *Id.*

158. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (“[L]egislative history is itself often murky, ambiguous, and contradictory. . . . [J]udicial reliance on legislative materials like committee reports . . . may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legal history to secure results they were unable to achieve through the statutory text.”).

a. Chapter 2 of the Federal Arbitration Act

Some authorities have concluded, with little analysis, that the enactment of Chapter 2 of the FAA implementing the Convention suggests that the Convention is non-self-executing.¹⁵⁹ As discussed below, the language and structure of Chapter 2 of the FAA do not suggest that the Convention is non-self-executing. Instead, both the text and the legislative history of Chapter 2 confirm that the Convention, and particularly Article II, is self-executing.

Chapter 2 of the FAA was adopted notwithstanding the existence of the original FAA enacted in 1925. These relatively brief provisions, which were re-titled “Chapter 1” in 1970, address the enforcement of arbitration agreements and awards involving “commerce among the several States or with foreign nations”¹⁶⁰ Most importantly, Section 2 of the Act provides that arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[.]” while Sections 3 and 4 provide for stays of litigation and orders compelling arbitration where parties have validly agreed to arbitrate.¹⁶¹ In turn, Sections 9 and 10 of the Act provide for the recognition of arbitral awards, subject to specified exceptions.¹⁶² Other provisions of what became Chapter 1 of the FAA address miscellaneous issues, including the ability to appeal, injunctive authority, and the act of state doctrine.¹⁶³

Chapter 2 added eight brief sections to the FAA in order to implement the Convention. Section 201 is an introductory section, which provides that “[t]he Convention . . . shall be enforced in United States courts in accordance with this chapter.”¹⁶⁴ Sections 202 and 203 define, in relatively broad terms, the scope of federal subject matter jurisdiction over actions arising under the Convention and grant U.S. district courts jurisdiction over those actions.¹⁶⁵ Section 204 deals with venue in federal district courts, and

159. See, e.g., Drahozal, *Convention*, *supra* note 14, at 112 (“[I]t may seem odd to consider whether the New York Convention is self-executing when Congress has in fact enacted legislation implementing it.”).

160. 9 U.S.C. §§ 1–16 (2012).

161. *Id.* §§ 2–4. Sections 5 and 7 deal with the appointment of arbitrators and taking of evidence in aid of arbitration. *Id.* §§ 5, 7.

162. *Id.* §§ 9–10.

163. *Id.* §§ 6, 8, 12, 15, 16.

164. 9 U.S.C. § 201 (2012).

165. *Id.* § 202 (“An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”); *id.* § 203.

Section 205 addresses removal of actions to federal district courts.¹⁶⁶ Section 206 authorizes federal courts to order arbitration in foreign arbitral seats (remedying a limitation on the injunctive powers of federal district courts under Chapter 1 of the FAA).¹⁶⁷ Finally, Section 207 provides for the recognition of foreign awards by federal courts, subject to a three-year statute of limitations, “unless [the court] finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention[,]”¹⁶⁸ and Section 208 is a residual savings clause for Chapter 1’s provisions.¹⁶⁹ As noted above, nothing in Chapter 2 incorporates the terms of Article II, much less provides more detailed or comprehensive substantive provisions than those in Article II.¹⁷⁰

Preliminarily, the fact that Chapter 2 provides implementing measures for the Convention in federal courts does not suggest that the Convention is non-self-executing. In the words of the *Restatement (Fourth) of Foreign Relations Law of the United States*:

[T]he adoption of related legislation is an unreliable indication of the understanding of U.S. treatymakers with regard to self-execution. Congress may adopt legislation necessary and proper to implement any valid treaty commitment. The adoption of U.S. legislation implementing some aspects of a treaty, or establishing related procedures, however, does not necessarily suggest that other, substantive aspects of the treaty are not self-executing.¹⁷¹

It is particularly unsurprising that a treaty like the Convention, which imposes significant obligations directly affecting the rights of private parties in U.S. courts, in a field subject to existing federal legislation, would be accompanied by legislation containing ancillary provisions addressing issues such as venue, subject matter jurisdiction, removal, and injunctive

This jurisdictional grant expands upon the scope of § 2 of Chapter 1 of the FAA (which applies to foreign and interstate commerce).

166. *Id.* §§ 204–205.

167. *Id.* § 206. Many lower courts had interpreted § 4 of the FAA as limiting orders compelling arbitration to arbitrations seated in the district of the federal court ordering arbitration. *See BORN, supra* note 1, § 14.08[B][1], at 2107–11. Section 206 remedies this gap in the FAA’s treatment of international arbitration agreements. *Id.* § 14.08[B][2], at 2111.

168. 9 U.S.C. § 207 (2012).

169. Section 208 provides that Chapter 1 of the FAA applies to actions under Chapter 2 (which implements the Convention), but only to the extent that Chapter 1 “is not in conflict with this chapter [2] or the Convention as ratified by the United States.” *Id.* § 208.

170. *See supra* Part II.B.1.

171. RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 310 reporters’ note 8 (AM. LAW INST. 2018) (citation omitted). *See, e.g., id.* (citing S. EXEC. REP. NO. 110–12, at 7 (2008)) (“noting in relation to 28 extradition treaties that the ‘legal procedures for extradition are governed by both federal statute and self-executing treaties’ and that “[s]ubject to a contrary treaty provision, existing federal law implements aspects of these treaties”).

authority.¹⁷² These types of provisions address the procedural issues that inevitably arise and must be resolved in order to allow effective enforcement of the Convention's substantive terms. As an international instrument with 159 Contracting States, the Convention does not, and could not sensibly, address the types of jurisdictional, venue, and procedural issues that local law regulates.¹⁷³

The enactment of Chapter 2 therefore does not suggest that Congress regarded the Convention's provisions as non-self-executing, but only that Congress wanted to ensure the effective and efficient enforcement of the Convention's self-executing substantive terms in U.S. courts.¹⁷⁴ This is precisely how the legislative history describes Chapter 2, explaining that it addresses issues of "civil procedure" and "establish[es] adequate procedures" for federal courts to apply to the Convention.¹⁷⁵ Indeed, as also discussed below, Sections 201 and 208 provide that the terms of the

172. See David H. Moore, *Treaties and the Presumption Against Preemption*, 2015 BYU L. REV. 1555, 1557 n.10 (2016) ("Although a self-executing treaty might be the subject of facilitating legislation—legislation that, for example, 'detail[s] specific legal procedures, burdens of proof, and remedies for courts applying' the treaty—the treaty itself would remain directly enforceable in U.S. courts and should be treated, for preemption purposes, like self-executing treaties that lack facilitating legislation.") (alteration in original) (citing John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655, 666–67, nn.4–45 (2010)).

173. Indeed, this is expressed in Article III. See New York Convention, art. III ("Each Contracting State 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 . . .").

174. Notably, Chapter 2 does not contain provisions giving effect to Article II's substantive terms.

175. See, e.g., *1968 Kearney Statement*, *supra* note 65, at 5–6, 8 ("The Department of Justice . . . has suggested that implementing legislation amending certain sections of titles 9 and 28 of the United States Code is desirable. These amendments would be additions to the Federal Arbitration Act to insure the coverage of the act extends to all cases arising under the treaty and some changes in Federal civil procedure to take care of related venue and jurisdictional requirement problems. We will not submit the U.S. ratification of the convention until this legislation establishing adequate procedures has been approved by the Congress."); see also *infra* pp. 42–43, 52–53.

Unsurprisingly, as the legislative history makes clear, the United States did not ratify the Convention until Chapter 2's procedures were in place. That does not suggest that the Convention is non-self-executing, instead only indicating that the self-executing terms of the Convention required procedural and ancillary mechanisms to be effectively applied in U.S. federal courts. See e.g., *Hearing to Implement the Convention in the Recognition of Foreign Arbitral Awards Before the Sen. Comm. on Foreign Relations*, 91st Cong. 32 (1970) (statement of Richard D. Kearney) as reprinted in S. REP. NO. 91-702, at 5 (1970) ("The bill which is presently before you sets up the legal structure that is required to implement the Convention.") [hereinafter *1970 Kearney Statement*]; MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, S. EXEC. DOC. E 90-2, at 1 (1968) ("The United States instrument of accession to the Convention will be executed only after the necessary legislation is enacted."); S. EXEC. REP. NO. 90-10, at 2 (1968) ("Changes in the [FAA] . . . will be required before the United States becomes party to the Convention.").

Convention itself—not the substantive terms of a U.S. statute—will be enforced in U.S. courts. This conclusion is impossible to reconcile with treatment of the Convention as a non-self-executing treaty.¹⁷⁶

There are a number of additional aspects of the text and structure of Chapter 2 of the FAA that confirm that the Convention was understood by the federal political branches in 1970 to be self-executing. First, as detailed below, it is clear that Chapter 2 addresses only the application of the Convention by U.S. *federal* (and not *state*) courts. As a consequence, unless the Convention is self-executing, its substantive terms would not be applicable at all in state courts. This is an untenable result that, as discussed below, would likely have placed the United States in violation of its obligations to enforce international arbitration agreements and awards under the Convention in 1970 and which neither the President nor Congress would reasonably have intended.¹⁷⁷

Chapter 2 defines the courts in which its provisions are applicable. Section 201 provides that the Convention “shall be enforced in *United States courts*” in accordance with Chapter 2’s provisions.¹⁷⁸ Other provisions of Chapter 2 either repeat and clarify the same reference to “United States courts”¹⁷⁹ or refer to Chapter 2’s federal subject matter jurisdiction provisions.¹⁸⁰ It is evident from the text of these provisions that the term “United States courts,” as used in Chapter 2, means U.S. *federal*, not *state*, courts.

The phrase “United States courts” refers most naturally to a court “of” or “established by” the United States—namely, a U.S. federal court, established pursuant to the U.S. Constitution—not a state court established pursuant to the laws of one of the several states. The term “United States court” plainly means federal (and not state) courts in other statutory

176. See *infra* note 231 and accompanying text. Consistent with this, courts have directly applied provisions of the Convention, even after noting that Chapter 2 of the FAA provides implementing legislation. See, e.g., *Jain v. de Méré*, 51 F.3d 686, 688–89 (7th Cir. 1995); *CRT Capital Grp. v. SLS Capital, S.A.*, 63 F. Supp. 3d 367, 372–74 (S.D.N.Y. 2014); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 980 N.Y.S.2d 21, 25, 25 n.3 (N.Y. App. Div. 2014); *Composite Concepts Co. v. Berkenhoff GmbH*, No. CA2009-11-149, 2010 WL 2371991, at *3, *5 (Ohio Ct. App. June 14, 2010); *Martinez v. Colombian Emeralds, Inc.*, Nos. 2007-06, 2007-11, 2009 WL 578547, at *12–13 (V.I. Mar. 4, 2009).

177. See *infra* pp. 36–37.

178. 9 U.S.C. § 201 (2012) (emphasis added).

179. *Id.* § 203 (providing that “[t]he *district courts of the United States* . . . shall have original jurisdiction” over an action or proceeding falling under the Convention.) (emphasis added).

180. *Id.* § 206 (providing that “[a] *court having jurisdiction under this chapter*” may compel arbitration or appoint arbitrators in accordance with an arbitration agreement); *id.* § 207 (providing that a party may apply to “any *court having jurisdiction under this chapter*” for an order confirming an award) (emphasis added). See *supra* note 165 and accompanying text (discussing 9 U.S.C. §§ 202–03).

settings,¹⁸¹ including, for example, the Foreign Sovereign Immunities Act, which grants foreign states immunity from the jurisdiction of “courts of the United States and of the States”¹⁸² Indeed, the Supreme Court distinguishes “United States courts” and “courts of the United States” as compared to state courts in a variety of statutory settings.¹⁸³ Even more directly, Chapter 1 itself uses the term “courts of the United States” or “United States courts” to refer to what are clearly federal, and not state, courts.¹⁸⁴ The Supreme Court concluded, in fairly clear terms, that Chapter 1’s language has this meaning.¹⁸⁵ It is unlikely that Congress intended the

181. See, e.g., 12 U.S.C. § 632 (2012) (providing that “a case so removed shall have a place on the calendar of the United States court to which it is removed relative to that which it held on the State court from which it was removed.”); 28 U.S.C. § 451 (2012) (defining the term “court of the United States” as “the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.”); 29 U.S.C. § 104 (2012) (distinguishing between “any action or suit in any court of the United States or of any State” in circumstances involving limitations on injunctive relief in labor disputes); FED. R. CRIM. P. 1 cmt. 2 (providing that “[t]he courts of the United States” include “[f]ederal courts in the continental United States” as well as federal “district courts in Alaska, Hawaii, Puerto Rico, and the Virgin Islands.”).

182. 28 U.S.C. § 1602 (2012).

183. See, e.g., *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 245–47 (1970) (providing that “court of the United States” in 29 U.S.C. § 104 applies only to federal courts, not state courts); *Adams v. Maryland*, 347 U.S. 179, 181–82 (1954) (distinguishing between “United States courts” (which are federal courts) and “courts” (which include state courts)); see also *Woodson v. McCollum*, 875 F.3d 1304, 1306 (10th Cir. 2017) (“A state court is not a ‘court of the United States’ as defined for Title 28 of the United States Code.”); *Steckelberg v. Rice*, 184 F. Supp. 3d 746, 758 (D. Neb. 2016) (“[A] ‘court of the United States’ is a federal court, not a state court”); *Bloodworth v. United States*, 623 F. App’x 976, 978 (11th Cir. 2015) (“The phrase ‘court of the United States’ refers to Article III courts and the courts specified in 28 U.S.C. § 451.”); *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031, 1035 n.2 (11th Cir. 2000) (“As defined in Title 28 U.S.C. § 451, the phrase ‘court of the United States’ in § 1985(2) refers only to Article III courts and certain federal courts created by act of Congress, but not to state courts.”) (*Shaw v. Garrison*, 391 F. Supp. 1353, 1370 (E.D. La. 1975) (“As defined in 28 U.S.C. § 451, ‘court of the United States’ refers only to the Article III courts and certain federal courts created by Act of Congress. It does not include the various state courts.”), *aff’d*, 545 F.2d 980 (5th Cir. 1977), *rev’d on other grounds sub nom. Robertson v. Wegmann*, 436 U.S. 584 (1978)).

184. 9 U.S.C. § 3 (2012) (“courts of the United States”); *id.* § 4 (“United States district court”); *id.* § 7 (“United States courts”; “courts of the United States”); *id.* §§ 9–11 (“United States court in and for the district”). Similarly, the reference in § 203 to “district courts of the United States” suggests that the reference to “United States courts” in § 201 is a reference to federal courts.

185. The Supreme Court has made clear that §§ 3 and 4 of the FAA, referring to “courts of the United States” includes only federal, and not state, courts. *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.10 (1984); *id.* at 29 n.18 (O’Connor, J., dissenting) (“§ 3’s ‘courts of the United States’ is a term of art whose meaning is unmistakable. State courts are ‘in’ but not ‘of’ the United States.”); see also *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 n.6 (1989); *Drahozal, Convention, supra* note 14, at 109 (“section 3 by its terms applies to ‘courts of the United States – a term that means federal courts.’”).

reference in Chapter 2 to “United States courts” to mean something different from “courts of the United States” and “United States courts” in Chapter 1 of the same statute.¹⁸⁶

The content and structure of Chapter 2 confirm this conclusion. As noted above, Section 201 provides that “[t]he Convention . . . shall be enforced in United States courts in accordance with this chapter.”¹⁸⁷ Importantly, the remainder of “this chapter” only concerns U.S. *federal* courts. Sections 202 to 208 of Chapter 2 all apply only in U.S. *federal* courts, defining federal subject matter jurisdiction, venue, injunctive power, removal, and other provisions, with no mention of the Convention’s application in state courts.¹⁸⁸ Thus, when Section 201 refers to the Convention being enforced in “United States courts in accordance with this chapter,” it must refer to federal courts because the remainder of “this chapter” deals only with the application of the Convention in federal courts and says nothing about enforcement of the Convention in state courts.

The legislative history of Chapter 2 confirms that the chapter’s provisions apply only in federal courts. According to Richard Kearney, the Chairman of the State Department’s Advisory Committee on Private International Law, Chapter 2 provided a “system of implementation *through the United States District Courts*.”¹⁸⁹ Indeed, Ambassador Kearney testified to the Senate Foreign Relations Committee that the statutory provisions of Chapter 2 would not “have any effect whatever on state laws” and that the legislation concerns “solely the *jurisdiction of the Federal district courts*.”¹⁹⁰ These explanations confirm the relatively unambiguous text of Chapter 2, which limits the provisions of that chapter to U.S. federal courts.¹⁹¹ Notably,

186. Where the same term is used within a statute or among related statutes, it is presumed to have the same meaning. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”); *Dep’t of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994).

187. 9 U.S.C. § 201 (2012).

188. *See supra* pp. 36–37. The only arguable exception is § 205, dealing with removal of actions arising under the Convention from state courts. That provision does not deal with enforcement but instead removal of actions arising under the Convention from state courts, so the Convention can then be enforced in federal courts. Nothing in Chapter 2 addresses how the Convention is to be enforced in state courts if actions are not removed from those courts. Instead, and naturally, procedural and jurisdictional issues relating to enforcement of the Convention in state courts are left to state law.

189. 1970 *Kearney Statement*, *supra* note 175, at 8 (emphasis added).

190. *Id.* at 10 (emphasis added) (“The Chairman: . . . Does this legislation have any effect whatever on State laws? Mr. Kearney: No, Mr. Chairman, it does not. It concerns in effect solely the jurisdiction of Federal district courts.”). Notably, this colloquy did not refer to the Convention itself, as distinguished from Chapter 2 of the FAA. As discussed below, the Convention obviously was regarded as having effects on state law, but this was not the subject of Ambassador Kearney’s testimony; *see also* Drahozal, *Convention*, *supra* note 14, at 111.

191. The Restatement of the U.S. Law of International Commercial and Investment Arbitration apparently takes the position that some, but not all, of Chapter 2 of the FAA applies in state courts. Although the text is unclear, the Restatement appears to treat § 201 as

these comments were confined to only the jurisdictional and procedural provisions in the statutory text of Chapter 2 and did not address the substantive terms of the Convention itself, which were, as discussed below, regarded as self-executing and applicable in both state and federal courts.¹⁹²

In short, nothing in Chapter 2 makes the Convention's terms applicable in state courts. As a consequence, if the Convention were non-self-executing, nothing in Chapter 2 or otherwise would implement the Convention in state courts, leaving the Convention's substantive terms wholly inapplicable in state courts. It is extremely unlikely that this was the intention of Congress or the President in ratifying the Convention and enacting Chapter 2 in 1970—a result that, as discussed further below, would have placed the United States in almost immediate breach of the Convention by leaving its terms inapplicable in a substantial majority of American courts.¹⁹³

As discussed above, Article II(3) of the Convention imposes mandatory requirements for the recognition of arbitration agreements in the courts of Contracting States: “[t]he court of a Contracting State . . . shall . . . refer the parties to arbitration.”¹⁹⁴ Relatedly, Articles III, IV, V, and VI of the Convention also impose mandatory requirements for the recognition of arbitral awards in Contracting States' courts.¹⁹⁵ Inevitably, U.S. state courts address numerous disputes over the recognition of international arbitration agreements and awards.¹⁹⁶ In 1970, however, arbitration legislation in nearly one-third of all U.S. states clearly did not provide for the effective recognition of arbitration agreements¹⁹⁷ or arbitral awards.¹⁹⁸

applicable only in federal courts (with the result, according to the Restatement, that only § 2 of Chapter 1 of the FAA applies to the recognition and enforcement of international arbitration agreements in state courts). See RESTATEMENT OF U.S. LAW OF INT'L COMMERCIAL & INV. ARBITRATION § 1-2 cmt. b, note a(iii), b(i). As discussed in text, the conclusion that § 201 applies only in federal courts is fairly clearly correct, given the unambiguous text and legislative history of the provision. Elsewhere, however, the Restatement appears to conclude that § 207 of Chapter 2 of the FAA applies in state courts (and provides for recognition of awards in state courts in accordance with the Convention). *Id.* § 1-5 cmt. b. The *Restatement's* approach is contradicted by the text of § 207, which applies only in “courts having jurisdiction under this chapter,” which is unquestionably a reference to federal courts, exercising the federal subject-matter jurisdiction conferred by § 202 and § 203. The *Restatement's* approach to § 207 is also contradicted by Chapter 2's legislative history (discussed elsewhere), which repeatedly states that Chapter 2 of the FAA was not intended to have any effect on state courts or state law. As discussed below, the *Restatement's* approach is untenable. See *infra* p. 81.

192. See *infra* Part II.B.3.b.

193. See *infra* p. 44.

194. See *supra* Part I.B.1.

195. See *supra* Part I.B.2 and *infra* Part II.C.1.

196. See cases cited *infra*, notes 233–35.

197. As discussed below, *infra* note 264 and accompanying text, statutes and judicial decisions in a number of states when Chapter 2 of the FAA was enacted in 1970 continued to deny effect to arbitration agreements or awards. See 1968 *Kearney Statement*, *supra* note 65,

Moreover, as of 1970, the Supreme Court had not held that Section 2 of the FAA applied in state courts, and the Court would not do so for another 15 years.¹⁹⁹ As a consequence, if the Convention were not self-executing, then, because Chapter 2 of the FAA applies only in federal courts, a substantial number of state courts would have applied state law (as it existed in 1970) to international arbitration agreements, which would have not infrequently denied effect to such agreements. Likewise, the Supreme Court had not yet held in 1970 (and still has not held) that Sections 9 and 10 of the FAA apply in state courts.²⁰⁰ As a consequence, if the Convention were non-self-executing, state courts considering requests for recognition of either arbitration agreements or awards in 1970 would very likely have applied existing state law and, equally clearly, would have also denied recognition frequently.

Given the limited scope of Chapter 2, the result of treating the Convention as non-self-executing would likely have been to place the United States in violation of its obligations under the Convention following ratification in 1970. As noted above, nearly one-third of all state arbitration statutes in 1970 would not have permitted recognition and enforcement of international arbitration agreements or awards in accordance with the mandatory requirements of the Convention,²⁰¹ a result that would have constituted material non-compliance with the Convention. As discussed below, the federal political branches carefully examined the substantive terms of existing state arbitration legislation prior to ratifying the Convention.²⁰² It is difficult to imagine that, given this knowledge, Congress and the President would have intended, in ratifying the Convention and enacting Chapter 2, to put the United States into almost immediate breach of the Convention's terms. The most plausible conclusion, rather, is that the political branches understood that the Convention was self-executing and therefore applicable in state courts, thereby ensuring U.S. compliance with the Convention.

Second, although U.S. arbitration law has evolved materially since 1970, Chapter 2's structure would continue even today to produce untenable results in state and potentially in federal courts if the Convention were non-self-executing. In particular, as discussed below and as illustrated in

at 7 (testifying before the Senate Foreign Relations Committee that, based on a review of state statutes and judicial decisions in 1970, it was possible to enforce an arbitration agreement for future disputes in only 36 states).

198. See *infra* pp. 75–76.

199. *Southland Corp. v. Keating*, 465 U.S. 1, 14–15 (1984).

200. See BORN, *supra* note 1, § 1.04[B][1][e][iv], at 161–65; RESTATEMENT OF U.S. LAW OF INT'L COMMERCIAL & INV. ARBITRATION § 1-2 reporters' note a(ii) (AM. LAW INST., Tentative Draft No. 6, 2018). As also discussed below, U.S. state courts are divided on the question whether §§ 9 and 10 of the FAA apply (and have preemptive effects) in state courts, with several state courts rejecting this conclusion. See *infra* note 340 and accompanying text.

201. See *supra* note 197.

202. See *infra* Part II.B.3.b.

Appendix A, significant uncertainties and complexities would arise from treating the Convention as non-self-executing.

If the Convention were non-self-executing, it is unclear what substantive rules of law would apply today in either federal or state courts to international arbitration agreements and awards. In federal courts, possible alternatives for implementation of the Convention would include (a) the Convention, incorporated by Section 201 of the FAA, for both arbitration agreements and awards; (b) Chapter 1 of the FAA, incorporated by Section 208, for arbitration agreements, and the Convention, incorporated by Section 207, for awards; (c) Chapter 1 of the FAA for both arbitration agreements and awards, incorporated by Section 208. In state courts, most of these possibilities also arise, as well as the application of state law to arbitration agreements and/or awards in a significant category of cases.

Neither the text of Chapter 2—which is terse and, on these issues, equivocal—nor its legislative history allows easy determination of which of these various alternatives is correct.²⁰³ That produces uncertainty as to the effect of the Convention in American courts and, regardless of which of these interpretations is accepted, an unsatisfying checkerboard of results for enforcement of the Convention. These uncertainties and complexities argue against treating the Convention as non-self-executing because it is unlikely that the federal political branches would have intended such an uncertain and confused implementation of U.S. treaty obligations. In contrast, none of these difficulties arise if the Convention is self-executing.

Third, under any of the legal regimes that would arise from treating the Convention as non-self-executing, there would be a number of very substantial differences between the standards applicable to recognition of international arbitration agreements and awards under the Convention itself, on the one hand, and those applicable under domestic law, on the other hand. These differences would exist regardless of whether existing state arbitration laws or Chapter 1 of the FAA were applied. These differences between the substantive provisions of the Convention and domestic U.S. law, which are detailed below,²⁰⁴ would, again, very likely leave the United States in material breach of the Convention in significant categories of cases.

203. Assuming that the Convention is non-self-executing, it is unclear whether § 201 of the FAA could be read as incorporating the Convention into the FAA (in federal courts). Section 201 provides that the Convention “shall be enforced in United States courts in accordance with this chapter[,]” which arguably incorporates the Convention’s substantive terms into Chapter 2. On the other hand, § 207 contains a separate provision arguably incorporating only Article V of the Convention (which would appear to be redundant if § 201 incorporated the entire Convention). Moreover, § 201 appears to be in the nature of an introductory provision, making it clear that the remainder of Chapter 2 provides jurisdictional and procedural provisions for application of the self-executing terms of the Convention. Section 208 is equally terse, and equally unclear, providing a residual savings provision for Chapter 1’s terms.

204. See *infra* p. 47.

Initially, there are a number of very substantial differences between contemporary state arbitration laws and the Convention's terms. These differences vary from state to state but continue to include state laws that permit revocation of agreements to arbitrate future disputes, exclude particular disputes from arbitration, impose non-arbitrability rules, apply idiosyncratic contract law rules, and permit review of the merits of arbitral awards.²⁰⁵ Application of these various state laws to international arbitration agreements and awards would entail violation of the Convention's requirements that Contracting States recognize and enforce arbitration agreements and awards, subject to only limited exceptions. Although it is likely that Section 2 of the FAA now preempts state law applicable to many international arbitration agreements, including in state courts, this conclusion is not free from doubt.²⁰⁶ Insofar as state arbitration law applies to international arbitration agreements subject to the Convention, it is clear that these standards will frequently differ materially from those under the Convention.

Moreover, even if one assumed that Section 2 of the domestic FAA preempted the application of state arbitration laws, there is a lengthy catalogue of material differences between the treatment of international arbitration agreements under Article II of the Convention and the treatment of such agreements under Section 2 of Chapter 1 of the FAA. Among other things, U.S. courts have consistently held that the Convention and Chapter 1 of the FAA differ materially with respect to: (a) the choice-of-law rules governing the existence and validity of arbitration agreements (with Articles II(3) and V(1)(a) prescribing international standards and Chapter 1 providing for U.S. state choice-of-law rules);²⁰⁷ (b) the available substantive grounds for challenging the validity of international arbitration agreements

205. See Sebastien Besson, *The Utility of State Laws Regulating International Commercial Arbitration and Their Compatibility with the FAA*, 11 AM. REV. INT'L ARB. 211, 226, 233 (2000); Daniel A. Zeff, *The Applicability of State International Arbitration Statutes and the Absence of Significant Preemption Concerns*, 22 N.C. J. INT'L L. & COM. REG. 705, 790 n.269 (1997).

206. Section 2 of the FAA presumably preempts state law applicable to international arbitration agreements and awards which are subject to Chapter 1 of the FAA. See *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) (stating that in domestic contexts, § 2 of the FAA applies as preemptive federal law in state courts). Arguably, however, if Congress enacted Chapter 2 of the FAA with the intention of excluding state courts and state law from the Convention's coverage, to preserve state prerogatives in that field, then Chapter 1 of the FAA should not be interpreted to apply to international arbitration agreements and awards which are subject to the Convention. Despite Chapter 1's application to arbitration agreements and awards relating to "interstate" and "foreign" commerce generally, the more specific provisions of Chapter 2 should arguably govern arbitration agreements and awards subject to the Convention.

207. See BORN, *supra* note 1, § 4.04[A][2][j][iv], at 535–36; RESTATEMENT OF U.S. LAW OF INT'L COMMERCIAL & INV. ARBITRATION § 1-2 reporters' note a(iv) (AM. LAW INST., Tentative Draft No. 6, 2018) (noting "differences in the applicable law" under Article II and § 2 of FAA); *supra* pp. 8–9. I.B.1.

(with Article II(3) prescribing limited international grounds and Chapter 1 prescribing broader domestic grounds);²⁰⁸ (c) the scope of the non-arbitrability exception to the enforceability of arbitration agreements (which is narrower under Article II than Chapter 1);²⁰⁹ (d) the form requirements for international arbitration agreements (with Article II(1) and (2) providing different written form requirements than Chapter 1);²¹⁰ (e) the courts' obligation to "refer the parties to arbitration" under Article II(3) of the Convention and the absence of such a requirement under Section 2 of the FAA (in contrast to Sections 3 and 4 of the FAA);²¹¹ (f) the courts' power to enforce an agreement to arbitrate in a non-U.S. arbitral seat (which is required under the Convention and unavailable under Chapter 1);²¹² (g) the United States' reciprocity reservation, establishing an exception to the Convention's obligations for arbitration agreements and awards made in non-Convention states (which is not included in Chapter 1);²¹³ and (h) the federal policies favoring enforcement of international arbitration agreements subject to the Convention (which have repeatedly been held to be more expansive than under Chapter 1).²¹⁴

208. See *supra* Part I.B.1. Compare New York Convention, art. II, ¶ 3 ("null and void, inoperative or incapable of being performed"), with 9 U.S.C. § 2 (2012) ("such grounds as exist at law or in equity for the revocation of any contract").

209. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 638–39 (1985) (antitrust claims are arbitrable pursuant to Convention, even if they would not be under domestic FAA); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516–17 (1974) (securities law claims are arbitrable pursuant to Convention, even if they would not be under domestic FAA); *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 370–71 (4th Cir. 2012) (New York Convention "expressly compels the federal courts to enforce arbitration agreements," notwithstanding jurisdiction conferred on such courts to adjudicate Seaman's Wage Act claims.); *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 273–74 (5th Cir. 2002); see also 1 BORN, *supra* note 1, § 6.02[A], at 946–47, § 6.03[C][4], at 964–65. Compare New York Convention, arts. II, ¶ 1, V, ¶ 2(a)–(b), with 9 U.S.C. § 2.

210. See BORN, *supra* note 1, § 5.02[A][5][c], at 700. Compare New York Convention, art. II, ¶¶ 1–2, with 9 U.S.C. § 2.

211. Compare New York Convention, art. II, ¶ 3 ("refer the parties to arbitration"), with 9 U.S.C. § 2. Chapter 1's requirements regarding enforcement of arbitration agreements by stays or orders compelling arbitration are contained in §§ 3 and 4, not § 2. See also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 346–47 (2006) ("[W]here a treaty provides for a particular judicial remedy . . . Courts must apply the remedy as a requirement of federal law").

212. See BORN, *supra* note 1, § 14.07[C], at 2097–98. Compare New York Convention, art. II, ¶ 3, with 9 U.S.C. § 4.

213. See BORN, *supra* note 1, § 2.03[G], at 342–43, § 22.02[F], at 2970–78. Compare New York Convention, arts. I, ¶ 1, XIV, with 9 U.S.C. §§ 1–16. The reciprocity reservation is of limited (but some) practical importance today, because 159 states have ratified the Convention; the situation was very different in 1970, when the United States was the 36th Contracting State to ratify the Convention.

214. See *Mitsubishi Motors*, 473 U.S. at 631 ("[S]ince this Nation's accession in 1970 to the Convention and the implementation of the Convention in the same year by amendment of the [FAA], that federal policy applies with special force in the field of international commerce.") (internal citation and footnote omitted); *Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 393 (2d Cir. 2011) (federal policy favoring arbitration "is even stronger in the

The *Restatement of U.S. Law of International Commercial and Investment Arbitration* suggests that Section 2 of the domestic FAA and Article II of the Convention provide “essentially equivalent” standards for recognition of arbitration agreements.²¹⁵ That suggestion is incorrect; as outlined above, there are material differences in the standards currently applicable to arbitration agreements under Section 2 and Article II.²¹⁶ These (and other) differences reflect the unsurprising fact that the standards applicable to domestic arbitration agreements under a domestic U.S. statute, enacted by Congress in 1925,²¹⁷ differ significantly from those applicable under an international treaty, negotiated without material U.S. involvement in 1958, binding on 159 Contracting States and prescribing standards for international arbitration agreements.²¹⁸ It is almost inevitable, but in any event clear, that the standards under Article II of the Convention are materially different from those under Section 2 of the FAA. Harmonizing divergent national laws is a central objective of the Convention,²¹⁹ and those divergences are what plainly appear from a comparison of the Convention and Chapter 1 of the FAA.

The existence of these material differences between the standards under Article II of the Convention and Section 2 of the FAA produces a highly unsatisfactory result, entailing non-trivial U.S. non-compliance with its obligations under the Convention.²²⁰ That is because Section 2 currently

context of international business transactions where arbitral agreements promote the smooth flow of international transactions by removing the threats and uncertainty of time-consuming and expensive litigation.”) (alteration and quotations omitted); *Sourcing Unlimited, Inc. v. Asimco Int’l, Inc.*, 526 F.3d 38, 45 (1st Cir. 2008) (“[T]he national policy favoring arbitration has extra force when international arbitration is at issue.”); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd. (London)*, 923 F.2d 245, 248 (2d Cir. 1991) (“This treaty—to which the United States is a signatory—makes it clear that the liberal federal arbitration policy applies with special force in the field of international commerce.”) (internal quotation omitted).

215. RESTATEMENT OF U.S. LAW OF INT’L COMMERCIAL & INV. ARBITRATION § 1-2 reporters’ note a(iv) (AM. LAW INST., Tentative Draft No. 6, 2018).

216. See *supra* pp. 47–48; see also *Suazo v. NCL (Bahamas), Ltd.*, 822 F.3d 543, 546–48 (11th Cir. 2016) (“[T]he broad defenses applicable in the context of domestic arbitration are not generally available in cases governed by the New York Convention.”); *Variblend Dual Dispensing Sys., LLC v. Seidel GmbH & Co., KG*, 970 F. Supp. 2d 157, 164 (S.D.N.Y. 2013) (“The New York Convention supplies a limitation on the FAA’s ordinary standard that state-law principles determine whether an arbitral contract has been formed.”).

217. See *supra* note 73 and accompanying text; Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 250–51 (1928).

218. See *supra* Part I.A.

219. See *supra* Parts I.A–B.

220. Treating the Convention as non-self-executing, and subjecting international arbitration agreements to Chapter 1 of the FAA, also leaves the future enforcement of international arbitration agreements subject to the domestic FAA’s local standards. Those standards are developed principally for a different (domestic) context and set of different (domestic) agreements, and they will almost certainly diverge at various points in the future from the Convention’s international standards. Again, one of the principal objects of any

provides, in many material respects, less favorable standards for recognition and enforcement of arbitration agreements than Article II of the Convention. Moreover, treating the Convention as non-self-executing also results in the application of different standards to international arbitration agreements in U.S. state and federal courts, with Article II of the Convention applying in federal courts, through either Section 201 or Section 208 of the FAA, and Section 2 of the FAA applying in state courts.²²¹ This result would frustrate the objectives of uniformity, both generally in U.S. treaty application²²² and specifically with regard to the Convention (as discussed above).²²³ It is again difficult to imagine that the federal political branches intended such results when they ratified the Convention and enacted Chapter 2 of the FAA.

Fourth, there is a further difficulty arising from treating the Convention as non-self-executing, which results from the jurisdictional reach of the domestic FAA. It is clear that the Convention applies more broadly (to all international arbitration agreements and to all “foreign” and “non-domestic” awards) than Chapter 1 of the FAA (which applies only to agreements and awards that involve the “foreign commerce” of the United States).²²⁴ Thus, Section 1 of the FAA (requiring U.S. commerce “with foreign nations”) would not apply to a substantial category of international arbitration agreements between non-U.S. parties (e.g., Chinese and German; South African and Brazilian) engaged in non-U.S. transactions or to an equally substantial category of awards made in non-U.S. arbitral seats (e.g., Paris;

international treaty, and particularly the Convention, is to prevent such divergences. *See supra* Parts I.A–B.

221. As discussed below, the possibility of removal from state to federal court would not bring the United States into compliance with the Convention and would not have been regarded by the U.S. political branches as a tenable means of implementing the Convention. *See infra* pp. 60–61.

222. *See* *Lozano v. Montoya Alvarez*, 572 U.S. 1, 13 (2014) (emphasizing the “need for uniform international interpretation of the [Hague] Convention.”); *Abbott v. Abbott*, 560 U.S. 1, 16 (2010) (“[U]niform international interpretation’ of the [Hague] Convention is part of the Convention’s framework.”); *Medellín v. Dretke*, 544 U.S. 660, 677 (2005) (discussing whether an ICJ interpretation of the Vienna Convention should be followed “for sake of uniform treaty interpretation . . . ?”); *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 157 (1999) (“[Warsaw] Convention’s central endeavor to foster uniformity . . .”).

223. *See supra* Parts I.A–B.

224. *Compare* New York Convention, art. I, ¶ 1 (“arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards are sought”), *and id.* art. II, ¶ 2 (international “arbitration agreement”), *with* 9 U.S.C. § 1 (2012) (“commerce among the several States or with foreign nations”). Section 1 of the FAA extends to the limits of Congress’ domestic authority over interstate commerce and, presumably, over foreign commerce. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995). Importantly, however, on any view, foreign commerce with the United States requires some connection to the United States; *see also* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432 (1941); Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 VA. L. REV. 949, 962 (2010). A very significant proportion of all international contracts and arbitration agreements, between wholly non-U.S. parties and involving entirely foreign transactions, have no such connection.

Singapore) in arbitrations between non-U.S. parties. It is fair to say, notwithstanding the breadth of Congress's foreign commerce power, that substantially more international arbitration agreements and awards fall outside Congress's legislative authority—but within the Convention's scope²²⁵—than those which fall within Congress's authority.

The jurisdictional limitation of Section 1 of the FAA restricts the reach of the substantive rules prescribed by Section 2 of the Act, in both federal and state courts.²²⁶ As a consequence, if the Convention were not self-executing, and only Section 2 of the FAA implemented Article II of the Convention, then a significant number of international arbitration agreements that are within the Convention's scope but do not involve U.S. "foreign commerce" would be subject to state, not federal, law in U.S. state courts.²²⁷ The same analysis applies to Sections 9 and 10 of the FAA as applied to arbitral awards.²²⁸ As already discussed, these results would almost certainly place the United States in serious breach of its obligations under the Convention with respect to these agreements and awards.

Again, it is unlikely that the U.S. political branches intended the unsatisfactory and uncertain results summarized above. Rather, the straightforward, sensible result that the federal political branches much more plausibly intended in ratifying the Convention and enacting Chapter 2 was that the Convention would be self-executing and therefore applicable in both state and federal courts alike; in turn, Chapter 2 provided the procedural rules necessary to facilitate the Convention's application in federal courts, while analogous jurisdictional, venue, and other procedural issues in state courts would be addressed by state law. Indeed, this is precisely how the FAA's legislative history describes Chapter 2: "These amendments would be additions to the Federal Arbitration Act to insure the coverage of the act extends to all cases arising under the treaty and some changes in Federal civil procedure to take care of related venue and jurisdictional requirement problems."²²⁹

Under this analysis, Section 201 rests on the premise, and expressly provides, that it is the Convention itself, as a self-executing treaty, that is applicable in state and federal courts, with Chapter 2 of the FAA supplying

225. It is clear that the treaty power gives the United States the authority to conclude treaties governing international matters that are not within U.S. foreign commerce. *See Missouri v. Holland*, 252 U.S. 416, 433–34 (1920); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 302 cmt. d, 303 cmt. c (AM. LAW INST. 1987).

226. Section 2 of the domestic FAA applies to "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce[.]" defined in § 1 as commerce of the United States with foreign nations. Section 2's preemptive effects extend no further than prescribed by § 1.

227. Indeed, if § 201 of Chapter 2 of the FAA does not incorporate the Convention, and Article II of the Convention is enforceable in federal courts only by reason of § 2 of the FAA, applied through § 208's saving clause, then the same issues arise in federal court.

228. *See infra* p. 75.

229. 1968 *Kearney Statement*, *supra* note 65, at 5–6.

ancillary provisions to facilitate enforcement of the Convention in federal courts.²³⁰ This is the most natural reading of Section 201's language, which provides that "*the Convention . . . shall be enforced in United States courts in accordance with this Chapter.*" This is a formula declaring that it is the substantive terms of the Convention itself, as a self-executing treaty, that are "enforced in U.S. courts" rather than the terms of a federal statutory provision."²³¹

This is also the most straightforward approach to the Convention—simply treating it as the supreme Law of the Land, in both federal and state courts, rather than leaving the recognition of international arbitration agreements to a checkerboard of uncertain standards, some of which fairly clearly do not satisfactorily implement the Convention's terms. As outlined above, the various permutations of U.S. arbitration law that would result from treating the Convention as non-self-executing are complex and uncertain (involving various possible combinations of Chapter 1 and Chapter 2 of the FAA and state law).²³² These complexities defy accessible description and are illustrated in Appendix A. As noted above, it is difficult to imagine that the United States—in ratifying a treaty intended to provide uniform international standards to enforce international arbitration agreements more effectively and efficiently—would have intended such uncertain and unsatisfying results.

Unsurprisingly, but importantly, this is also exactly the conclusion that state courts have reached. They have consistently applied the Convention directly in state court proceedings, a result that can only be reached, given the terms of Chapter 2 of the FAA, if the Convention is self-executing.²³³ As

230. See *supra* note 139 and accompanying text.

231. This conclusion has force with respect to Article II of the Convention. Unless the Convention were self-executing, it is very difficult to see how Article II would be "enforced in United States courts" because nothing in Chapter 2 of the FAA further implements the substantive provisions of that Article. Moreover, § 208 provides that Chapter 1 of the FAA applies to actions under Chapter 2 only to the extent that Chapter 1 "is not in conflict with this chapter [2] or the Convention as ratified by the United States." 9 U.S.C. § 208 (2012) (emphasis added). The italicized phrase again indicates that it is the substantive terms of the Convention itself, not the FAA's implementing legislation, that applies in U.S. courts.

232. As illustrated in Appendix A, if the Convention is self-executing, then its provisions apply identically in both state and federal courts – just as one would expect of a treaty. If, however, the Convention were not self-executing then a bewildering range of possible results arises under Chapters 1 and 2 of the FAA.

233. See *Lloyds Underwriters v. Netterstrom*, 17 So. 3d 732, 737 (Fla. Dist. Ct. App. 2009); *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408 (N.Y. 1982) (Convention does not permit state courts to issue pre-arbitration orders of attachment); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 980 N.Y.S.2d 21, 25 (N.Y. App. Div. 2014) ("motion court properly held that the purported document containing an arbitration clause did not meet the writing requirements of the New York Convention . . ."); *Drexel Burnham Lambert, Inc. v. Ruebsamen*, 531 N.Y.S.2d 547, 550–52 (N.Y. App. Div. 1988) (same); *Shah v. E. Silk Indus. Ltd.*, 493 N.Y.S.2d 150, 151 (N.Y. App. Div. 1985) ("[T]his arbitration is governed by the UN Convention, and pursuant to the terms thereof, we find that pre-judgment attachment is prohibited."); *Faberge Int'l Inc. v. Di Pino*, 491 N.Y.S.2d 345, 348 (N.Y. App.

one state court held, “[a]n arbitration agreement between residents of different countries is governed by the New York Convention . . . provided both countries are signatory nations to the Convention.”²³⁴ Or, in the words of another state court, “since the New York Convention applies, [the plaintiff] cannot raise an unconscionability defence to the enforcement of the arbitration clause against it.”²³⁵ In contrast, no state court appears to have held that the Convention is not self-executing.

Finally, the *Charming Betsy* presumption also argues in favor of treating the Convention as self-executing. The *Charming Betsy* canon provides that U.S. statutes are presumed not to conflict with the United States’ obligations under international law: “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”²³⁶ The *Charming Betsy* presumption generally is not applied in considering the self-executing status of treaties.²³⁷ Nonetheless, the presumption ought, in principle, to apply in ascertaining legislative intentions in cases where Congress enacts implementing legislation in conjunction with the United States’ ratification of a treaty, such as with the New York Convention. The combined actions of the federal political branches in ratifying a treaty and enacting implementing legislation ought not to be interpreted as violating U.S. treaty obligations “if any other possible construction remains.” Indeed, one would expect that, in concluding a formal treaty and enacting implementing legislation, the U.S. political branches would be particularly attentive to ensuring that their combined actions comply with international law.²³⁸

Here, given the relatively clear limitations of Chapter 2 of the FAA to federal courts, compliance with U.S. obligations under the Convention requires interpreting the Convention as self-executing. If the Convention were non-self-executing, then state law would apply to a substantial number of international arbitration agreements and awards not involving U.S.

Div. 1985) (pre-arbitration attachment is “unavailable by reason of the existing [state] case law and the UN Convention”); *CanWest Glob. Commc’ns Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 562–63 (N.Y. Sup. Ct. 2005) (holding that the arbitration agreements at issue “are subject to the [New York] Convention enforcement rules.”).

234. *Lloyds Underwriters*, 17 So.3d at 737.

235. *Composite Concepts Co. v. Berkenhoff GmbH*, No. CA2009-11-149, 2010 WL 2371991, at *4 (Ohio Ct. App. June 14, 2010).

236. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see, e.g., Weinberger v. Rossi*, 456 U.S. 25, 32 (1982) (*Charming Betsy* presumption “has been a maxim of statutory construction”); *see also Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (“[T]he courts will always endeavor to construe [treaties and statutes] so as to give effect to both, if that can be done without violating the language of either”).

237. *See, e.g., RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 310 cmt. b (AM. LAW INST. 2018).

238. A treaty typically imposes more specific, clear-cut obligations than customary international law. Similarly, U.S. ratification of a treaty necessarily entails the political branches’ focus on U.S. obligations, which is not necessarily the case where enactment of legislation against the general backdrop of customary international law is concerned.

foreign commerce in state courts, resulting in significant violations of the Convention by those courts. Moreover, even application of the domestic provisions of Section 2 of the FAA would result in material violations of the Convention by American courts. As the *Charming Betsy* presumption instructs, it is difficult to imagine that the federal political branches intended to materially violate the U.S.'s obligations in ratifying the Convention and enacting Chapter 2 of the FAA.

b. History of the Ratification of the New York Convention

The actions and statements of the U.S. political branches during the process of ratification further support the conclusion that the Convention is self-executing. Although these views are confused about some issues,²³⁹ they display a consistent recognition that the Convention would be applicable in both state and federal courts and that the Convention's terms would produce materially different results from those under existing state arbitration legislation.²⁴⁰

Preliminarily, there is no indication in the U.S. ratification process that the Convention was considered non-self-executing. In particular, nothing in the 1958 Report of the U.S. Delegation to the New York Conference,²⁴¹ the 1968 Report of the U.S. State Department to President Lyndon Johnson,²⁴² or President Johnson's Letter of Transmittal of the Convention to the Senate²⁴³ suggests that the Executive Branch viewed the Convention or any of its particular provisions as non-self-executing. Likewise, as discussed above, none of the legislative materials associated with Chapter 2 of the FAA, enacted in conjunction with ratification of the Convention in 1970, contain any such statement or suggestion on the part of Congress.²⁴⁴

In contrast, there are important affirmative indications of the Convention's self-executing status. At the conclusion of the Conference, the U.S. Delegation advised against ratification of the Convention on the

239. Among other things, statements by the State Department during the ratification process incorrectly suggested that the Convention was outside the federal treaty power, *Delegation Report, supra* note 8, at 116 ("Commercial arbitration does not lie within the traditional limits of the treaty power"); that the Convention would result in domestic awards made in one U.S. state being treated as "foreign" awards under the Convention in other U.S. states, *id.* at 111–12; and that the Convention would apply to domestic arbitration agreements. *Id.* at 112 (Article II would "extend the treaty rule to purely domestic contracts").

240. There is virtually no evidence, apart from the text of the FAA and the testimony of Executive Branch officials to Congress, regarding the views of either the Senate or the House of Representatives. The limited comments from congressional members were directed almost entirely to extraneous matters, not relevant to the Convention's status. The Senate devoted much of its attention to Ambassador Kearney's rank and to the International Court of Justice's role in international affairs. *See, e.g., 1970 Kearney Statement, supra* note 175, at 8–9, 11–15.

241. *Delegation Report, supra* note 8, at 95.

242. KATZENBACH, LETTER, *supra* note 17.

243. S. EXEC. DOC. NO. 90–118 (1968).

244. *See* H.R. REP. NO. 91-1181, at 1–2 (1970).

grounds that its provisions would override state law in a substantial number of states.²⁴⁵ In the words of the Delegation's Report, "[t]he convention, if accepted on a basis that assures [meaningful advantages on the United States], will override the arbitration laws of a substantial number of States and entail changes in State and possibly Federal court procedures"²⁴⁶ and "make rather substantial changes in United States domestic law."²⁴⁷ Similarly, "the United States would be able as a constitutional matter to adhere to the convention without any reservations whatsoever, [but to] do so, however, would entail interference with the laws and judicial procedures of a substantial number of the States."²⁴⁸

The Delegation concluded that neither the Executive Branch nor the Senate would support such results as a matter of either politics or policy.²⁴⁹ The Delegation also raised the possibility of a U.S. "federal-state" reservation under Article XI of the Convention, which would declare the Convention inapplicable where the law of a particular U.S. state conflicted with the Convention's terms²⁵⁰ but ultimately rejected this as

245. *Delegation Report, supra* note 8, at 112 (Article II "raises the greatest difficulty from the standpoint of United States law," because "[t]his provision is in conflict with the laws of a majority of the States."). The Delegation's Report observed that a majority of state arbitration laws at the time provided that "a contract for the submission of future disputes to arbitration is held to be revocable by either of the parties at any time before the award is actually rendered" and that "[i]n fact, only 17 States have expressly recognized the irrevocability of agreements to arbitrate future disputes." *Id.* The Delegation noted similar conflicts between state laws and Articles IV and V of the Convention. *Id.* at 112–13 (noting differing treatment of proof of awards (under Article IV) and exceptions to obligation to recognition (under Article V)).

246. *Id.* at 95 (emphasis added). The Delegation also concluded, less clearly, "[t]he legal situation . . . is plainly untenable, since adherence to the convention in a manner entailing full acceptance of the principle of irrevocability [as provided by Article II] would require so extensive an overriding of State laws." *Id.* at 112 (emphasis added). In contrast to the statements quoted in text, this latter comment might arguably contemplate future legislative action to implement the Convention. In contrast, statements that the Convention "will . . . override" state law and "make rather substantial changes" in U.S. law are fairly clearly statements that the Convention itself would have direct legal effects.

247. *Id.* at 117 (emphasis added).

248. *Id.* at 115 (emphasis added).

249. *Id.* at 116 (Convention's effects on state law make it doubtful that "any proposal for adherence on such a basis would prove acceptable to the Senate"); *id.* at 117 (United States could only adhere to Convention "in a meaningful and effective way" by accepting "substantial changes in United States domestic law" and "exacerbating Federal-State relations").

250. *Id.* at 115 ("The United States would be required as a practical matter to exclude from coverage, by invoking the 'federal state clause,' arbitrations cognizable and awards enforceable under State law.").

impracticable.²⁵¹ The Delegation therefore recommended “strongly” against U.S. signature or ratification of the Convention.²⁵²

The explicit basis for the Delegation’s recommendation was that, absent a reservation regarding state law, the Convention would “override,” “make rather substantial changes in,” or “entail interference with” the laws of a majority of the several States.²⁵³ In the Delegation’s view, these consequences of U.S. ratification were untenable. These views, which were central to the Delegation’s recommendation, rested on the premise that the Convention was self-executing. This is reflected in its references to “overriding” or “changing” state law. Particularly when considered in the context of Article XI of the Convention, addressing the Convention’s application in federal or non-unitary states,²⁵⁴ and in light of the fact that the Delegation considered, but rejected, a federal-state reservation, it is very difficult to avoid a conclusion that the Convention was understood by the Delegation to be self-executing.

Despite the Delegation’s negative views, the United States took steps a decade later, beginning in 1968, to ratify the Convention. Those steps occurred with the Delegation’s views regarding the Convention’s self-executing status clearly in mind, in part because the Executive Branch needed to justify its reversal of the U.S. attitude toward the Convention.²⁵⁵ A central element of the Executive Branch’s support for ratification of the Convention in 1968 and 1970 was its view that state arbitration law changed materially since 1958, with the result that U.S. ratification of the Convention would no longer have the sweeping impact on state law that the Delegation previously emphasized.²⁵⁶

Ambassador Kearney testified in 1968 that the Executive Branch carefully considered the Delegation’s previous concerns regarding “the extent to which *this convention might change the law in the various States of the Union and the effect it might have on the State courts.*”²⁵⁷ Responding to that concern, Ambassador Kearney did not say that these concerns were misplaced because the Convention would be non-self-executing or would

251. *Id.* at 116 (noting possibility of “reservation specially adjusted to the United States federal system” but rejecting this possibility on multiple grounds, including that adherence “on the basis for the ‘federal state clause’” would “be of little practical value”).

252. *Id.* at 115 (“Delegation recommends strongly that the United States not sign or adhere to the convention”).

253. *See supra* Part II.B.3.b.

254. *See supra* p. 6.

255. *See 1968 Kearney Statement, supra* note 65, at 6 (“[The] situation has changed rather dramatically over the past 10 years”); H.R. REP. NO. 91-1181, at 1–2 (1970).

256. *1968 Kearney Statement, supra* note 65, at 4 (“[T]he judicial attitude has now changed in partial consequence, at least, of the widespread enactment of statutes which in varying degrees declare arbitration agreements to be irrevocable and provide for their specific enforcement.”); *id.* at 7 (1968) (“[T]here have been a number of other changes in State law which support the enforceability of an agreement to arbitrate in the future.”).

257. *Id.* at 6 (emphasis added).

not have effects on state law. Instead, he explained that the adoption of the Uniform Arbitration Act in a number of states in the years following 1958, combined with other developments in state arbitration law,²⁵⁸ meant that concerns about the Convention's impact on state law were now much more limited than they had been in 1958:

[A]s compared to 10 years ago when our delegation felt there was a majority of State law opposed to the general theory of the convention this is now completely reversed, and there is a substantial majority of State law in favor of it and this will continue to increase.²⁵⁹

As a consequence, in contrast to the situation in 1958, ratification of the Convention would no longer result in dramatic changes in the law in a substantial majority of the States. Instead, state law now prescribed rules that were materially more similar to those of the Convention than in 1958, thereby significantly reducing the policy and political objections raised by the Delegation's Report. Relatedly, Ambassador Kearney also raised—but firmly rejected—the possibility of a U.S. reservation limiting the effect of the Convention to federal courts²⁶⁰ (as also had occurred when such a reservation was considered in 1958).²⁶¹

The most reasonable interpretation of these actions is that the Executive Branch continued to understand in 1968 and 1970, as the U.S. Delegation understood in 1958, that the Convention would be self-executing. There are reasonably clear statements to this effect in the ratification process in 1968

258. *Id.* at 6 (“At that time the delegation said in its report that there were, I think, some 25 [sic] States whose laws might be affected by the convention. That situation has changed rather dramatically over the past 10 years. For one thing, the Conference of Commissioners on Uniform State Laws was just around this time introducing its uniform law on arbitration procedures, and this uniform law has been and is being accepted by an increasing number of States, and the uniform law, in effect covers all of the requirements for internal U.S. practice which are contained in the convention for foreign problems.”).

259. *Id.* at 7. Ambassador Kearney also testified that, contrary to the views of the U.S. Delegation in 1958, it was clear that arbitration agreements affecting interstate or foreign commerce were within the federal government's authority. *1970 Kearney Statement, supra* note 175, at 7 (“In the *Prima Paint Case* . . . , however, the Supreme Court made it quite clear that arbitration agreements relating to interstate or foreign commerce were fully within the ambit of Federal Law.”).

260. KATZENBACH, LETTER, *supra* note 17, at 22 (“It would, however, run counter to the express provisions of [Article XI] for the United States to seek to take advantage of its provisions with respect to foreign arbitral awards arising out of the commercial relationships. The Federal Arbitration Act . . . and the decisions of U.S. Courts relating thereto show that legislation on arbitration is clearly within the competence of the Federal Government.”); *see also* KATZENBACH, LETTER, *supra* note 17, at 34 (1968) (“In addition to the ground that you mention, there is Article XI of the Convention which would permit our Government to limit its adherence to the federal jurisdiction.”).

261. *See supra* p. 56.

and 1970²⁶² and no contrary statements. Moreover, the Executive Branch devoted careful attention to the Delegation's Report and its concerns about the Convention's effects on state law. This branch responded not by disagreeing or suggesting that the Convention would have no effect on state law, but by emphasizing the developments in state arbitration law since 1958, which brought U.S. law more closely into line with the Convention's provisions. It was this changed attitude of the several states toward arbitration that the Executive Branch saw as providing the political and policy basis for a change in U.S. attitude toward the Convention.²⁶³ At the same time, however, the Executive Branch's analysis also made clear that, while many state laws changed, there remained a non-trivial number of states (at least 14) whose arbitration law was still inconsistent with the Convention in 1968.²⁶⁴ Thus, unless the Convention were regarded as self-executing, the limited scope of Chapter 2 of the FAA and the content of these state arbitration laws would have left the United States in breach of its obligations under the Convention, a result that both the 1958 Delegation and the Executive Branch in 1968 and 1970 firmly rejected.

Equally important, the Convention's self-executing status also dissuaded the United States from making a "federal-state" reservation to the Convention, despite considering the possibility²⁶⁵ and a material number of states whose arbitration law still conflicted with the Convention. As discussed above, if the Convention were not self-executing, and the United States made no Article XI reservation, then the existence of some state laws that conflicted with the Convention would have put the United States in immediate violation of its treaty obligations.²⁶⁶ Simply put, the Executive Branch concluded that the impact of the self-executing Convention on state law in 1970 would be less sweeping than in 1958 and therefore politically acceptable. The Convention's self-executing status would, at the same time, ensure U.S. compliance with the treaty, thereby making a reservation under Article XI unnecessary to ensure U.S. compliance with the treaty. Again,

262. See, e.g., KATZENBACH, LETTER, *supra* note 17, at 18 ("The purpose of [Article II] is to *provide an appropriate treaty rule* with respect to agreements to arbitrate.") (emphasis added); 1968 Kearney Statement, *supra* note 65, at 8 ("[W]ith respect to the filing of an action in a court without going through the arbitral procedure, if you have agreed to the arbitral procedure, *the convention only requires the court to reject the suit* and to refer the party back to arbitration.") (emphasis added); *id.* at 6 ("Another aspect of concern to the delegation was the extent to which *this convention might change the law in the various States of the Union and the effect it might have on the State courts.*") (emphasis added).

263. See *supra* p. 57. The State Department's Advisory Committee on Private International Law included representatives of the National Conference of Commissioners on Uniform State Laws, but there was no reported objection to the Convention or its self-executing status from the Conference.

264. See 1968 Kearney Statement, *supra* note 65, at 7 (1968) (stating that thirty-six states provided for enforcement of agreement to arbitrate future disputes).

265. See *supra* notes 250–51, 260 and accompanying text.

266. See *supra* pp. 44, 54.

the most sensible explanation for these actions was an understanding that the Convention was self-executing.

Finally, it seems very unlikely that the federal political branches intended the Convention to be non-self-executing, applying only in federal (and not state) courts, with the possibility of removal of actions arising under the Convention to federal courts (under § 205 of the FAA) providing the only avenue for U.S. compliance with its obligations under the Convention. That approach contradicts all of the analysis above—of the text and purposes of Article II, the character of the Convention, and the ratification history of the Convention—which fairly clearly demonstrates that Article II is self-executing. Moreover, an approach that left Article II only enforceable in federal courts, coupled with rights to remove from state courts, would not comply with the Convention, which mandates that “[t]he court of a Contracting State . . . shall . . . refer the parties to arbitration”²⁶⁷ and “shall recognize arbitral awards . . .”²⁶⁸ The Convention does not provide that “some” courts of the United States (that is, only federal courts or just some federal or state courts) must refer parties to arbitration and recognize arbitral awards; it provides that every court in a Contracting State must do so.

In particular, the Convention does not allow the United States to require parties to give up the benefits that state courts, state procedural rules, or other factors might, in particular circumstances, provide those parties as a price of obtaining the Convention’s protections. As noted above, state courts comprise the substantial majority of all American courts, and numerous cases involving the Convention are not removed from state courts²⁶⁹—because parties not infrequently prefer state courts to their federal counterparts. In these cases, the Convention’s terms are clear, mandatorily requiring that all American courts, state and federal, refer parties to arbitration and recognize arbitral awards.²⁷⁰ Likewise, imposing requirements of removal from state to federal courts is inconsistent with the Convention’s fundamental objectives of providing for the prompt and efficient recognition of international arbitration agreements and awards without idiosyncratic local procedural hurdles and costs.²⁷¹

267. New York Convention, *supra* note 13, art. II, ¶ 3 (emphasis added).

268. *Id.* art. III (emphasis added).

269. *See supra* p. 53.

270. Moreover, as noted above, treating the Convention as non-self-executing would also result in state law applying in federal courts to arbitration agreements and, arguably, awards that fall outside of Chapter 1’s jurisdictional scope. *See supra* p. 45.

271. *See supra* Parts I.A–B. As discussed above, Article II(3) requires courts, when “seized of an action” subject to arbitration, to refer the parties to arbitration, ensuring that their dispute can be efficiently resolved. *See supra* Part II.B.1. Nothing permits courts of a Contracting State to instead refer a party, seeking to enforce an international arbitration agreement, to some other forum or court. Similarly, Article IV was designed expressly to permit prompt, efficient recognition of awards. *See supra* Part I.B.2. Again, nothing permits courts of Contracting States to instead refer parties to other forums for recognition.

Moreover, Article XI of the Convention is impossible to reconcile with application of the Convention in some (federal), but not all (state), courts of a Contracting State. Under Article XI(b), if a federal state cannot implement the Convention in constituent states, it must immediately give those states notice of the Convention and favorably recommend that they adopt the Convention.²⁷² It is very difficult to see how this provision would permit the United States simply not to implement the Convention in state courts, notwithstanding the legislative authority under the U.S. Constitution to do so,²⁷³ and also not make any recommendation that states take steps to implement the Convention. Again, the Executive Branch's deliberate consideration, and rejection, of the possibility of an Article XI reservation argues decisively against the notion that the United States intended to comply with the Convention in federal, but not state, courts.

More fundamentally, the proposition of a U.S. treaty that would apply in federal courts, but not state courts, contradicts both the text and the purposes of the Supremacy Clause and instead produces a balkanized treatment of U.S. treaties that is the exact opposite of what the Framers generally contemplated with respect to the Nation's international obligations.²⁷⁴ That same proposition also contradicts the basic objectives of the Convention to ensure the application of uniform and harmonized international rules to arbitration agreements²⁷⁵ by further balkanizing the Convention even within one Contracting State.

Indeed, the suggestion that the Convention applies only in federal and not state courts would produce a unique approach toward implementation of a U.S. treaty, which has apparently never been adopted for any other U.S. treaty or international agreement. At a minimum, if such an unusual approach was intended, it surely would have been discussed in the legislative history of the FAA and ratification history of the Convention. Instead, there is no mention whatsoever in either source that this approach toward compliance with the Convention's terms was ever considered, much

272. New York Convention, *supra* note 13, art. XI(b); *see supra* p. 6.

273. In any event, it is very doubtful that the United States could in fact rely on Article XI(b), because of the scope of the federal treaty power, which clearly extends to international commercial arbitration. This was apparent to the federal political branches in 1968 and 1970. *See* Drahozal, *Convention*, *supra* note 14, at 108; KATZENBACH, LETTER, *supra* note 17, at 22.

274. *See, e.g.*, THE FEDERALIST NO. 3, at 43 (John Jay) (Clinton Rossiter ed., 1961) (“[A]rticles of treaties, as well as the law of nations, will always be expounded in one sense and executed in the same manner—whereas adjudications on the same points and questions in thirteen States, or in three or four confederacies, will not always accord or be consistent . . .”); John Jay, *Continental Congress* (Apr. 13, 1787), *reprinted in* THE FOUNDERS’ CONSTITUTION 589, 590 (Philip B. Kurland & Ralph Lerner eds., 1987) (finding it “irrational” to claim that “the same Article of the same treaty might by law be made to mean one thing in New Hampshire, another thing in New York, and neither the one nor the other of them in Georgia.”).

275. *See supra* Parts I.A–B.

less implemented. On the contrary, as discussed above, the FAA's legislative history clearly reflects the opposite understanding and expectation—that the Convention would apply in state courts.²⁷⁶

In sum, the history of the Convention's ratification in the United States does not suggest that the Convention is non-self-executing and instead decisively supports the opposite conclusion. There are no statements in the ratification history that the Convention is non-self-executing. Instead, Chapter 2 provides ancillary jurisdictional and procedural provisions applicable in federal courts based on the premise that it is the Convention's substantive terms themselves that will be enforced in accordance with these ancillary provisions. Likewise, Chapter 2 does nothing to make the Convention applicable in state courts—a result which strongly indicates that the Convention must have been regarded as self-executing in order for U.S. state courts to comply with the United States' obligations under the Convention.

4. Position of the U.S. Government

The self-executing nature of Article II of the Convention in the United States is also confirmed by the position of the U.S. government. It is well-settled that the Executive Branch's understanding of a treaty to which the United States is a party is "entitled to great weight" in the interpretation of the treaty by U.S. courts, including in assessing whether the treaty is self-executing.²⁷⁷ The Supreme Court frequently defers to the Executive Branch's interpretation of treaties and has explained that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."²⁷⁸ Federal appellate courts and the

276. See *supra* Part II.B.3.

277. See *Medellin v. Texas*, 552 U.S. 491, 513 (2008) (citing U.S. government amicus curiae brief in considering the relevant treaty's status); *Abbott v. Abbott*, 560 U.S. 1, 15 (2010) ("It is well settled that the Executive Branch's interpretation of a treaty is entitled to great weight.") (internal quotation omitted). Compare *infra* note 278.

278. *El Al Isr. Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168 (1999); see also *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) ("[T]he meaning given [to treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight."); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–85, n.10 (1982) (deferring to Executive Branch's interpretation of treaty).

Commentators have suggested that the Supreme Court may afford less deference to the Executive Branch's interpretation of a treaty in circumstances where the treaty's interpretation is dispositive as to the Executive Branch's authority. Sitaraman & Wuerth, *Normalization*, *supra* note 88, at 1968–70; see also *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–32 (2006) (declining to defer to Executive Branch's interpretation of Common Article 3 of the Geneva Conventions, where this interpretation defined the President's authority to use military commissions). This rationale does not apply to the Executive Branch's interpretation of the Convention.

Restatement (Third) of Foreign Relations Law of the United States have adopted the same position.²⁷⁹

In *amicus curiae* submissions to the Supreme Court, the U.S. government expressed its view that “Article II of the Convention is self-executing.”²⁸⁰ In so doing, the U.S. government emphasized that “[b]oth the mandatory nature of Article II(3)’s text, and its direction to the ‘court[s]’ (rather than to the governments) of the contracting States, suggest that the provision was intended to be immediately enforceable in domestic courts” and is, therefore, self-executing.²⁸¹ The U.S. government also observed that “neither Article II(3) nor Article II(1) . . . appears to envisage that steps beyond ratification are necessary before the Convention creates binding obligations enforceable in domestic courts.”²⁸² These considered views of the U.S. government argue again for the Convention’s self-executing status.

Other Contracting States have generally adopted the same view of the Convention as the U.S. government. The UNCITRAL Secretariat published a report in 2008 addressing how Contracting States to the Convention have incorporated it into national law.²⁸³ Based on responses of 108 of the 142 Contracting States (in 2008), the Secretariat reported that “[f]or a vast majority of States, the New York Convention was considered as ‘self-executing’, ‘directly applicable’ and becoming a party to it put the Convention and all of its obligations in action.”²⁸⁴

These views of Contracting States support a conclusion that the Convention, and in particular Article II, is self-executing. As noted above, it

279. See, e.g., *CBF Industria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 72 n.6 (2d Cir. 2017) (holding that the U.S. government’s interpretation of the Convention is “entitled to great weight”); *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96, 117 (2d Cir. 2017) (accepting the U.S. government’s position that “we owe particular deference to the interpretation [of a treaty and its enabling act] favored by the United States”); *Georges v. United Nations*, 834 F.3d 88, 94 (2d Cir. 2016) (“It is also significant that the Executive Branch’s interpretation of the [treaty]—an interpretation ‘entitled to great weight’—accords with our own.”); *Swarna v. Al-Awadi*, 622 F.3d 123, 135–36 (2d Cir. 2010) (noting the deference given to executive branch treaty interpretation); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 326(2) (AM. LAW INST. 1987) (“Courts in the United States . . . will give great weight to an interpretation made by the Executive Branch.”); *RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 310 reporters’ note 8 (AM. LAW INST. 2018).

280. *Louisiana Safety* Amicus Brief, *supra* note 140, at 7.

281. *Id.* at 9.

282. *Id.*

283. Comm’n on Int’l Trade Law, Rep. on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, U.N. Doc. A/CN.9/656, at 5 (June 5, 2008).

284. *Id.* ¶ 10 (emphasis added). The Secretariat’s report does not further specify the number of Contracting States that regard the Convention as directly applicable in national courts. The UNCITRAL Secretariat also notes that “[f]or a number of other States, the adoption of an implementing legislation was required for the Convention to gain the force of law in their internal legal order.” *Id.* ¶ 11.

is of course the intentions and understanding of the U.S. political branches that are decisive with regard to a treaty's self-executing status.²⁸⁵ Nonetheless, the views of other Contracting States and the UNCITRAL Secretariat about the meaning of the Convention are also relevant in considering a treaty's self-executing status, especially where the U.S. political branches have not indicated that a treaty is non-self-executing.²⁸⁶ The Supreme Court has emphasized, including in *Medellin*, the relevance of this type of " 'postratification understanding' of signatory nations."²⁸⁷ Here, the U.S. government has expressed the same position regarding the Convention's self-executing status as that of many other Contracting States, adding further weight to these conclusions.

5. Judicial Decisions

Although only a limited number of courts have addressed the issue, the self-executing character of Article II of the Convention is also supported by the weight of considered authority in U.S. federal and, even more decisively, state courts. Moreover, the conclusions of U.S. courts are consistent with the weight of well-reasoned authority from courts in other Contracting States.

The best-reasoned U.S. judicial analysis of Article II's status is a concurring opinion in a Fifth Circuit case that considered whether the McCarran-Ferguson Act provides that state law reverse-preempts federal law governing the validity of arbitration agreements in insurance policies.²⁸⁸ A majority of the Court of Appeals did not reach the question whether Article II is self-executing.²⁸⁹ The self-executing character of Article II was addressed, however, in a concurring opinion by Judge Edith Brown Clement, who concluded that "the plain text of Article II of the Convention compels a finding of self-execution."²⁹⁰ She also emphasized that Article II(3) "is addressed to the courts of contracting States, not to the States

285. See *supra* Part II.A.

286. See *supra* p. 26.

287. *Medellin v. Texas*, 552 U.S. 491, 507 (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)); see also *id.* at 517 ("The lack of any basis for supposing that any other country would treat ICJ judgments as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts."); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 384–85 (2006) (Breyer, J., dissenting) (citing decisions of other contracting states). The *Medellin* Court did not explain how the decisions of other contracting states, with different conceptions of self-executing status, were relevant to analysis of this issue under U.S. law, although it appears to have considered these decisions as relevant to the treaty's interpretation, with the treaty's meaning in turn being relevant to the U.S. political branches' understanding regarding its status.

288. See *Safety Nat'l Cas. Corp. v. Certain Underwriters at Lloyd's*, 587 F.3d 714, 732–37 (5th Cir. 2009) (Clement, J., concurring).

289. *Id.* at 731 (majority opinion) ("[I]mplemented treaty provisions, self-executing or not, are not reverse-preempted by state law pursuant to the McCarran-Ferguson Act . . .").

290. *Id.* at 733 (Clement, J., concurring).

themselves or to their respective legislatures” and that “[r]eferral to arbitration is mandatory, not discretionary[,]”²⁹¹ concluding that “Article II of the Convention is self-executing and fully enforceable in domestic courts by its own operation. It is entitled to recognition as ‘the supreme Law of the Land’ under the Supremacy Clause.”²⁹²

Similarly, the weight of U.S. authority in other contexts applies Article II directly (albeit usually without discussion or analysis) to give effect to international arbitration agreements.²⁹³ This includes a substantial body of U.S. federal court authority holding that Article II limits the types of national law that may be applied to international arbitration agreements under the Convention.²⁹⁴ Other U.S. federal courts have directly applied the provisions of Article II requiring a “written” arbitration agreement.²⁹⁵

In contrast, the very limited U.S. federal authority concluding that the Convention is not self-executing is dated and rests on cursory reasoning. The only decision holding Article II as non-self-executing is the Second Circuit’s 1995 ruling in *Stephens v. American International Insurance*.²⁹⁶ As Judge Clement noted in *Safety National*, however, the panel of the Second Circuit that rendered this decision “undertook no textual analysis and set forth no reasons to support its conclusion.”²⁹⁷ Moreover, *Stephens* was

291. *Id.* at 734–35. Judge Clement also observed that Article II’s directive to domestic courts “leaves no discretion to the political branches of the federal government whether to make enforceable the [arbitration] agreement-enforcing rule it prescribes; instead, that rule is enforceable by the Convention’s own terms.” *Id.* at 735. She reasoned that “[i]treaty provisions setting forth international obligations in such mandatory terms tilt strongly toward self-execution.” *Id.*

292. *Id.* at 735–36 (footnote omitted). A dissenting opinion also argued that the argument that the Convention was self-executing had been waived and that, under the McCarran-Ferguson Act, the FAA does not preempt state law enacted for regulating the business of insurance. *Id.* at 737–53 (Elrod, J., dissenting).

293. *See, e.g.*, *Bautista v. Star Cruises*, 396 F.3d 1289, 1301–02 (11th Cir. 2005); *InterGen N.V. v. Grina*, 344 F.3d 134, 141 (1st Cir. 2003); *Rhone Mediterranee Comagnia Francese di Assicurazioni E Riassicurazioni v. Lauro*, 712 F.2d 50, 54–55 (3d Cir. 1983); *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 187 (1st Cir. 1982); *I.T.A.D. Assocs. v. Podar Bros.*, 636 F.2d 75, 77 (4th Cir. 1981); *McCreary Tire & Rubber Co. v. Ceat S.p.A.*, 501 F.2d 1032, 1037 (3d Cir. 1974).

294. *See supra* p. 10.

295. *See, e.g.*, *Todd v. S.S. Mut. Underwriting Ass’n (Berm.)*, 601 F.3d 329, 334–35 n.11 (5th Cir. 2010); *Sphere Drake Ins. v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir. 1994); *Bitúmenes Orinoco S.A. v. New Brunswick Power Holding Corp.*, No. 05 Civ. 9485(LAP), 2007 WL 485617, at *11–18 (S.D.N.Y. Feb. 13, 2007); *Chloe Z Fishing Co. v. Odyssey Re (London) Ltd.*, 109 F. Supp. 2d 1236, 1247–48 (S.D. Cal. 2000); *Coutinho Caro & Co. U.S.A. v. Marcus Trading, Inc.*, No. 3:95CV2362 AWT, 2000 WL 435566, at *11 (D. Conn. Mar. 14, 2000); *Sen Mar, Inc. v. Tiger Petrol. Corp.*, 774 F. Supp. 879, 882 (S.D.N.Y. 1991).

296. *Stephens v. Am. Int’l Ins.*, 66 F.3d 41, 45 (2d Cir. 1995). One district court assumed that the Convention is non-self-executing with no substantive analysis. *See Foresight Energy, LLC v. Certain London Mkt. Ins.*, 311 F. Supp. 3d 1085, 1099 (E.D. Mo. 2018).

297. *Safety Nat’l*, 587 F.3d at 737 (Clement, J., concurring).

decided before the Supreme Court's decision in *Medellin*, which prescribed the current standards for determining when treaty provisions are self-executing and supports the conclusion that Article II of the Convention is self-executing.²⁹⁸

More importantly, a number of state courts have also applied the terms of Article II directly,²⁹⁹ which must result from the Convention's status as a self-executing treaty.³⁰⁰ Moreover, in applying the Convention, U.S. state courts have frequently made it clear that it is the Convention—not Chapter 2 of the FAA—that they are applying.³⁰¹ The reasons include, among others, that “[a]n arbitration agreement between residents of different countries is governed by the New York Convention[,]”³⁰² an international arbitration agreement is “subject to the [New York] Convention enforcement rules[,]”³⁰³ and “this arbitration is governed by the [New York] Convention”³⁰⁴ In contrast, much like federal courts, no reported U.S. state court decision holds the Convention non-self-executing. These state court decisions are of particular significance given that the self-executing character of the Convention has its most obvious and important consequences in state courts—where, as discussed above, Chapter 2 of the FAA does not apply.

The Supreme Court's decision in *Medellin* has occasionally been interpreted as suggesting that Article V of the Convention is non-self-executing.³⁰⁵ Those interpretations are ill-considered: *Medellin* does not argue for the non-self-executing status of the Convention and, instead, is best read as confirming that the Convention is self-executing.³⁰⁶ *Medellin* did not, of course, involve the Convention; instead, it involved the effect of an International Court of Justice (“ICJ”) judgment in U.S. courts. In

298. *Id.*

299. *See supra* notes 233–35.

300. As discussed above, Chapter 2 plainly does not apply in state (as distinguished from federal) courts. *See supra* pp. 39–43. As a consequence, state court applications of Article II must result from the Convention's self-executing status.

301. *See supra* notes 233–35.

302. *Lloyds Underwriters v. Netterstrom*, 17 So. 3d 732, 737 (Fla. Dist. Ct. App. 2009).

303. *CanWest Glob. Commc'ns Corp. v. Mirkaei Tikshoret Ltd.*, 804 N.Y.S.2d 549, 562–63 (N.Y. Sup. Ct. 2005).

304. *Shah v. E. Silk Indus. Ltd.*, 493 N.Y.S.2d 150, 151 (N.Y. App. Div. 1985).

305. RESTATEMENT OF U.S. LAW OF INT'L COMMERCIAL & INV. ARBITRATION § 1-5 reporters' note b(iv) (AM. LAW INST., Tentative Draft No. 6, 2018) (stating, incorrectly, that “[i]n *Medellin*, the Supreme Court indicated that, in order for a treaty to have self-executing status, an express determination to that effect must be found either in the treaty itself or in a pronouncement by the Senate, and the New York Convention presents neither. Indeed, in dictum in *Medellin*, the Court went on to cite the New York Convention as an example of a non-self-executing treaty.”); *id.* § 1-2 reporters' note a(iv) (stating, incorrectly, that “the Supreme Court listed FAA Chapter 2 as an example of legislation implementing a non-self-executing treaty.”).

306. *See supra* Parts II.B.1–2.

addressing this issue, however, the Supreme Court referred briefly, and by analogy, to the FAA's implementation of Article V of the Convention.³⁰⁷ In particular, the Court cited Chapter 2 of the FAA as one example of legislative action that illustrated the statement that "[t]he judgments of a number of international tribunals enjoy a different status because of implementing legislation enacted by Congress."³⁰⁸

Initially, as the U.S. government has observed, this statement implicated only Article III of the Convention, which provides for the enforceability of foreign arbitral awards, not Article II, which addresses arbitration agreements;³⁰⁹ nothing in *Medellin* suggests that Article II of the Convention is non-self-executing. Moreover, the Court's statement was very brief dictum—a sentence that reasoned by analogy about a different treaty than that which was before the Court and as to which the Court received no submissions or argument. It would make no sense for passing dicta of this sort to be elevated above the standards for determining self-executing status that the Court set out in *Medellin* (and which, as discussed above, mandate treating the Convention as self-executing).

Most importantly, the *Medellin* dicta does not in fact address whether the Convention is self-executing. Instead, the Court only observed that arbitral awards subject to the New York Convention enjoy a different status than ICJ judgments because of the implementing provisions of Chapter 2 of the FAA.³¹⁰ That observation does not state that the Convention is non-self-executing and instead only observes, correctly, that, unlike ICJ judgments, Convention awards are the subject of federal implementing legislation.³¹¹ Critically, however, the fact that the FAA implements the Convention in federal courts does not suggest that the Convention is non-self-executing. As discussed in detail above, a self-executing treaty may very well require or benefit from a degree of implementation to ensure that its provisions can be efficiently and effectively applied in domestic courts.³¹² Indeed, as also discussed above, the text of Chapter 2 confirms the self-executing status of the Convention by providing that it is the substantive terms of the Convention itself that apply in federal courts, while supplying ancillary jurisdictional and procedural provisions to ensure the effective application of those terms by federal courts.³¹³ In sum, the *Medellin* Court's observation

307. See *Medellin v. Texas*, 552 U.S. 491, 521–22 (2008).

308. *Id.* at 521.

309. See *Louisiana Safety* Amicus Brief, *supra* note 140, at 9–10.

310. *Medellin*, 552 U.S. at 521–22.

311. The Court's observation regarding Convention awards is entirely consistent with the conclusion, set forth above, that Chapter 2 of the FAA implements the Convention in federal courts. See *supra* Part II.B.3.a.

312. See *supra* pp. 37–38; RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 310 reporters' note 8 (AM. LAW INST. 2018).

313. See *supra* pp. Part II.B.3.a. As previously discussed, § 201 of the FAA provides that the Convention shall be "enforced in United States courts in accordance with this

that Chapter 2 of the FAA gives Convention *awards* a different status than ICJ judgments is both correct but irrelevant to the Convention's self-executing status.

Finally, the views of U.S. courts regarding the self-executing status of Article II are not unique. Instead, they are consistent with holdings in other Contracting States, which, as noted above, may be relevant to the determination of a treaty's self-executing status in the United States.³¹⁴ Courts in a number of other Contracting States have held that the Convention is directly applicable in national courts, making observations similar to those relevant in determining whether a treaty is self-executing under U.S. law. For example, the Italian Corte di Cassazione held that the Convention

[C]reate[s] a *fully autonomous micro-system*, either because treaty provisions (in respect of both the requirements for enforcement of the foreign award and the grounds to oppose enforcement) prevail over the provision in the [Italian] Code of Civil Procedure, or *because of the Convention's completeness and self-sufficiency*.³¹⁵

Similarly, the Singapore High Court has referred to the "self-execution" regime that Article II(3) creates.³¹⁶ Courts in Switzerland and Japan have also treated the Convention as self-executing, without the need for statutory incorporation into domestic law.³¹⁷ These decisions, like the results of the UNCITRAL survey of Contracting States,³¹⁸ provide additional, if indirect, confirmation for the conclusion that Article II is also self-executing as a matter of U.S. law.

chapter," plainly giving the Convention (and Convention awards) a status not possessed by ICJ judgments. *See supra* p. 52.

314. *See supra* Part II.A.

315. Cass., 8 ottobre 2008, n. 24856, 34 Y.B. COMM. ARB. 644, 647 (It.) (emphasis added).

316. *See* FirstLink Invs. Corp. Ltd. v. GT Payment Pte Ltd., [2014] S.G.H.C.R. 12, ¶ 19 (Sing.) ("Art II(3) of the New York Convention . . . may be considered a self-executing provision which prescribes *substantive rules of international law* applicable to the formation and validity of [an] international arbitration agreement.").

317. *See, e.g.*, Tribunal fédérale [TF] [Federal Tribunal] Feb. 7, 1984, 110 DECISIONI DEL TRIBUNALE FEDERALE SVIZZERO [DTF] II 54 (Switz.) (reasoning that Article II of the Convention is directly applicable in Swiss courts); Elliott Geisinger, *Implementing the New York Convention in Switzerland*, 25 J. INT'L ARB., 691, 693 (2008) ("[N]o implementing legislation was necessary for the New York Convention to come into force in Switzerland. The New York Convention is thus applied as a self-executing treaty in the Swiss legal system."); Yasuhei Taniguchi & Tatsuya Nakamura, *Japanese Court Decisions on Article V of the New York Convention*, 25 J. INT'L ARB., 857, 857 (2008) (arguing that Japanese courts directly apply Convention as self-executing under Japanese law).

318. *See supra* pp. 64–65.

*C. Articles III, IV, V, and VI of the
New York Convention Are Self-Executing*

The foregoing analysis of Article II applies with nearly equal force to Articles III, IV, V, and VI of the Convention. Although there is limited authority on the question, it is relatively clear that Articles III, IV, V, and VI are self-executing for the same reasons that Article II is self-executing.

1. Text of Articles III, IV, V, and VI

Like the text of Article II, the language of Articles III, IV, V, and VI is mandatory. As discussed above, Article III provides that all Contracting States “shall recognize arbitral awards as binding and enforce them” in accordance with local procedural rules.³¹⁹ Article V is equally mandatory, providing that recognition of an award may be refused “only if” one of the exceptions specified in Articles V(1) and V(2) is applicable.³²⁰ As discussed above, U.S. and other national courts have uniformly held that these provisions are mandatory.³²¹

Articles III, IV, V, and VI are also plainly, if in somewhat different terms than Article II(3), directed specifically to national courts. Article III requires recognition of awards “in accordance with the rules of procedure of the territory where the award is relied upon”³²² National courts—unlike other branches of government—characteristically recognize awards and apply procedural rules and thus are the only arm of government that can carry out this mandate. Similarly, Article IV is addressed to “application[s]” for recognition and the proof of awards.³²³ This directive again plainly references national court proceedings, where applications are typically made, and not executive or legislative bodies. Even more clearly, Article V repeatedly refers to the “competent authority” of the recognition forum, prescribing the circumstances in which those “authorities” may deny

319. New York Convention, *supra* note 13, art. III (emphasis added). Article III goes on to provide that there “shall” not be imposed more onerous conditions or fees for foreign awards than for domestic awards.

320. *Id.* art. V.

321. *See supra* note 43.

322. New York Convention, *supra* note 13, art. III. Unsurprisingly, U.S. courts (but not executive or legislative authorities) have frequently applied Article III. *See, e.g.*, *Monegasque De Reassurances S.A.M. v. Nak Naftogaz*, 311 F.3d 488 (2d Cir. 2002); *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 517–18 (2d Cir. 1975) (“The conclusion that we must enforce the award as a valid determination on the merits is mandated by the United Nations Convention, which provides in Article III”); *NTT DoCoMo, Inc. v. Ultra d.o.o.*, No. Civ. 3823(RMB)(JFC), 2010 WL 4159459, at *2 (S.D.N.Y. Oct. 12, 2010).

323. New York Convention, *supra* note 13, art. IV. Again, unsurprisingly, Article IV has been applied by U.S. courts (but not legislative or executive authorities). *See, e.g.*, *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 (11th Cir. 2004); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.*, 334 F.3d 274, 286 (3d Cir. 2003); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 368 (5th Cir. 2003).

recognition of an award.³²⁴ Article VI is likewise directed to “competent authorit[ies]” and “authorit[ies],”³²⁵ which are permitted to “adjourn” their “decision on the enforcement of [an] award” and “order [a] party to give suitable security.”³²⁶ All of these references to “competent authorities” are again plainly to national courts and not to the executive or legislative branches.

Thus, as with Article II, Articles III, IV, V, and VI of the Convention are not only mandatory, but are also specifically directed to national courts, addressing classic judicial functions of “recognizing and enforcing” awards, applying “rules of procedure,” and deciding “applications.” These are hallmarks of self-executing treaties, pointing decisively toward treating Articles III, IV, V, and VI as self-executing.

Moreover, the text of the Convention’s provisions dealing with awards is complete and comprehensive. No additional provisions are required beyond those of Articles III, IV, V, and VI for the effective recognition and enforcement of foreign awards. This is evident from the text of contemporary national arbitration statutes that repeat Articles III, IV, V, and VI verbatim. Articles 35 and 36 of the UNCITRAL Model Law are representative examples,³²⁷ but other arbitration statutes are comparable.³²⁸ In each case, arbitration statutes merely repeat the text of the Convention’s provisions regarding recognition and enforcement of awards.³²⁹ As with Article II, these textual aspects of Articles III, IV, V, and VI argue strongly for the self-executing status of these provisions.

324. New York Convention, *supra* note 13, art. V, ¶ 1 (“Recognition and enforcement of the award may be refused . . . only if that party furnishes to the *competent authority* where the recognition and enforcement is sought . . .”), *id.* art. V, ¶ 1(e) (“The award . . . has been set aside or suspended by a *competent authority* . . .”), *id.* art. V., ¶ 2 (“Recognition and enforcement of an arbitral award may also be refused if the *competent authority* . . . finds that . . .”) (emphases added).

325. “Competent authorities” clearly refers to national courts, although it might also conceivably include other types of tribunals in some legal systems. In the U.S. legal system, however, it is very difficult to conceive what the term “competent authority” would refer to in addition to national courts. *See* BORN, *supra* note 1, § 26.01, at 3395 n.4 (“The term ‘competent authority’ refers in particular to national courts.”); *see also* Drahozal, *Convention*, *supra* note 14, at 113.

326. New York Convention, *supra* note 13, art. VI (“If an application for the setting aside or suspension of the award has been made to a competent authority . . . the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award . . .”).

327. UNCITRAL MODEL LAW, *supra* note 134, arts. 35–36.

328. *See, e.g.*, The Arbitration Act 1996, c. 23 §§ 101–103 (Eng.); Arbitration Ordinance, (2013) Cap. 609, 33–34, ¶¶ 87–89 (H.K.); Arbitration and Conciliation Act, 1996, No. 26 of 1996, INDIA CODE (1996) §§ 46–48; Arbitration Act 2002, c. 10, §§ 29–31 (Sing.).

329. A few national arbitration statutes go further and either incorporate the Convention’s provisions regarding arbitral awards by reference or provide for recognition and enforcement of awards in accordance with the Convention. *See* SR 291.435.1 (1987), art. 194 (Switz.); The Arbitration Act 1996, c. 23 §§ 100–103 (Eng.).

2. Purposes of Articles III, IV, V, and VI

The purposes of the Convention also argue for treating Articles III, IV, V, and VI as self-executing. As discussed above, the Convention's goals of uniform treatment of foreign and non-domestic arbitral awards are best fulfilled by treating Articles III, IV, V, and VI as self-executing.³³⁰ Doing so reduces the risks of divergent national legislative and judicial application of the Convention, both by legislative and judicial action.³³¹ Consistent with this, a decisive majority of Contracting States to the Convention regard its provisions—including Articles III, IV, V, and VI—as directly applicable in national courts.³³²

3. U.S. Ratification of the New York Convention

The history of U.S. ratification of the Convention and enactment of Chapter 2 of the FAA confirm the self-executing status of Articles III, IV, V, and VI. As with Article II of the Convention, this ratification history reflects an understanding that the Convention would override state law, thereby ensuring that the United States would comply with its obligations under the Convention to recognize and enforce foreign awards.

Preliminarily, Section 201 of the FAA confirms that the Convention is self-executing, providing that “*the Convention . . . shall be enforced*” in U.S. courts “in accordance with this chapter,” a prescription which rests on the premise that the Convention is self-executing and that it is therefore the Convention itself that applies in U.S. federal courts.³³³ Section 207 adopts the same approach for the recognition of awards. As discussed above, Section 207 provides that, “[w]ithin three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply” to a U.S. federal court for confirmation of the award and that the court “shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention.”³³⁴ This text reflects Chapter 2's basic approach of providing ancillary provisions for application of the Convention's self-executing terms in U.S. federal courts, all on the express premise (reflected in the text of §§ 201, 207, and 208³³⁵) that the Convention's terms are self-executing and themselves applicable in U.S. courts.³³⁶

330. See *supra* Parts I.A–B.

331. See *id.*

332. See, e.g., Cass., 8 ottobre 2008, n. 24856, 34 Y.B. COMM. ARB. 644, 647 (It.); S.T.S., Jan. 14, 1983, (11 Y.B. COMM. ARB., p. 523) (Spain); App. Milano, 3 maggio 1997, 4 Y.B. COMM. ARB. 284, 285 (It.). See *supra* pp. 64–65.

333. 9 U.S.C. § 201 (2012) (emphasis added).

334. *Id.* § 207.

335. See *supra* pp. 36–37.

336. This is confirmed by the absence of any reference in § 207 (or otherwise in Chapter 2) to Articles IV and VI of the Convention, dealing with very significant issues of proof of the

Moreover, Section 207 plainly applies only to the recognition of awards in federal courts.³³⁷ At the same time, the Supreme Court had not held in 1970, when the Convention was ratified—and still has not held—that Sections 9 and 10 of the FAA apply in state courts.³³⁸ By their terms, those sections apply only to “courts of the United States,” making arguments that their provisions have preemptive effects in state courts difficult.³³⁹ State courts are divided on the question whether Section 9 or Section 10 of the FAA apply in state court; several such courts have held that they do not and that state law governs the vacatur and confirmation of awards in state courts.³⁴⁰

Thus, if the Convention is non-self-executing, the recognition of foreign awards in state courts would be subject only to state law in a number of states, a result that very likely would have been assumed in 1970 (prior to *Southland v. Keating*).³⁴¹ Critically, however, state law regarding the recognition of awards in 1970 diverged in a number of states very significantly from the mandatory requirements of Articles III, IV, V, and VI of the Convention.³⁴² Substantial differences continue to exist between state

arbitral award and suspension of recognition proceedings. Compare New York Convention, arts. IV, VI, with 9 U.S.C. § 207. Just as Chapter 2 omits any provision providing for application of the substantive terms of Article II of the Convention, it also omits such provisions for Articles IV and VI.

337. See *supra* pp. 39–43.

338. See BORN, *supra* note 1, § 1.04(B)(1)(e)(iv), at 160–65; Drahozal, *Convention*, *supra* note 14, at 109; RESTATEMENT OF U.S. LAW OF INT’L COMMERCIAL & INV. ARBITRATION § 1-2 reporters’ note a(ii) (AM. LAW INST., Tentative Draft No. 6, 2018).

339. See *supra* pp. 39–43.

340. Currently, some states apply the FAA § 10 vacatur grounds, while other states apply state law. Compare *U.S. Elecs., Inc. v. Sirius Satellite Radio, Inc.*, 958 N.E.2d 891, 892 (N.Y. 2011) (“As this matter affects interstate commerce, the vacatur of the arbitration award is governed by the Federal Arbitration Act.”), *Vold v. Broin Assocs.*, 699 N.W.2d 482, 487 (S.D. 2005), *Hecla Mining Co. v. Bunker Hill Co.*, 617 P.2d 861, 865 (Idaho 1980), *Hilton Constr. Co. v. Martin Mech. Contractors, Inc.*, 308 S.E.2d 830, 832 (Ga. 1983), *Dowd v. First Omaha Secs. Corp.*, 495 N.W.2d 36, 41 (Neb. 1993), *Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 379 (Ala. 2009), and *A.G. Edwards & Sons, Inc. v. Petrucci*, 525 So. 2d 918, 921 (Fla. Dist. Ct. App. 1988), with *Commonwealth ex rel. Kane v. Phillip Morris USA, Inc.*, 114 A.3d 37, 56–57 (Pa. Commw. Ct. 2015) (vacating award under state vacatur standards; construed to be identical to FAA vacatur standards), *State v. Philip Morris, Inc.*, 123 A.3d 660, 675 (Md. Ct. Spec. App. 2015) (same), and *Trombetta v. Raymond James Fin. Servs.*, 907 A.2d 550, 569–76 (Pa. Super. Ct. 2006) (state law vacatur grounds not preempted by FAA; court still refused to apply de novo review provision). Many states have not addressed the issue. Cf. Gary B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* (2d ed. 2001), § 13(A)(2)(f), at 892 (maintaining that the more appropriate interpretation is that sections 9 and 10, like section 2, apply in state courts).

341. See *supra* pp. 43–44.

342. See Quigley, *Accession by the United States*, *supra* note 62, at 1057 (“In the United States, no state arbitration statute makes any provision for the enforcement of foreign arbitral awards; therefore, there is no summary procedure to confirm an interstate or foreign award in the state courts.”) (footnote omitted); Aksen, *American Arbitration Accession*, *supra* note 23,

law and the Convention today.³⁴³ Moreover, even if one were to assume that all of Chapter 1 of the domestic FAA, including Sections 9 and 10, applied in state courts to awards involving U.S. foreign commerce, there are significant differences between the standards applicable to awards under Sections 9 and 10 of the FAA and Articles III, IV, V, and VI of the Convention.³⁴⁴ And, as discussed above, state law would continue to apply to awards that are subject to the Convention but not within U.S. foreign commerce under Section 1 of the domestic FAA.³⁴⁵

Because of the foregoing, if the Convention were non-self-executing, the political branches would have, in ratifying it, been placing the United States into either very serious breach (if state law applied to awards in state courts) or serious breach (if Sections 9 and 10 of the FAA applied in state courts). As with Article II of the Convention, it is difficult to imagine that this is what the federal political branches intended,³⁴⁶ particularly given the Convention's objectives of uniformity.³⁴⁷

Instead, the better and more straightforward conclusion is that the federal political branches understood that the Convention was self-executing, with Chapter 2 only providing ancillary mechanisms for application of the Convention in federal courts. Consistent with this, there is no suggestion in either the Convention's ratification process in the United States or the legislative history of Chapter 2 that Articles III, IV, V, and VI are non-self-executing.³⁴⁸ On the contrary, and again for the same reasons as

at 10 ("[T]he only state with a modern arbitration statute that provides for the enforcement of foreign awards is Florida.").

343. See BORN, *supra* note 1, § 1.04(B)(1)(e)(iv), at 164.

344. Among other things, the differences between the Convention and the domestic FAA include: (a) the grounds for denying recognition of awards (with Articles III, IV and V of the Convention prescribing limited grounds for non-recognition that differ materially from those in § 10 of Chapter 1); (b) the existence of a requirement that parties agree in their arbitration agreement that the award shall be confirmed by court order (which is imposed by § 9 of Chapter 1 of the FAA but not by the Convention); (c) the requirements for proof of the existence of a foreign award (imposed by Article IV of the Convention but not by Chapter 1 of the FAA); and (d) differences in jurisdictional requirements, reciprocity reservations, non-arbitrability exceptions, and federal policies favoring arbitration.

345. See *supra* pp. 50–51.

346. Finally, if the Convention were non-self-executing, there would also be uncertainty regarding its application in federal courts. It is unclear what provisions of Chapter 2 of the FAA would implement Articles II, III, IV and VI of the Convention. Section 207 of Chapter 2 provides for implementation of Article V's exceptions to the recognition of awards. See *supra* p. 74. Nothing in Chapter 2 appears, however, to provide for similar implementation of Article II's provisions for recognition of arbitration agreements or of Articles III, IV and VI with respect to awards. Arguably, § 201's general provision that the Convention shall be enforced in accordance with Chapter 2 of the FAA provides for the application of the substantive terms of Articles II, III, IV and VI, but, as discussed above, this is difficult to reconcile with § 207's specific implementation of Article V's exceptions or with the text of § 201 (which is not readily interpreted as incorporating the Convention's terms). See *id.*

347. See *supra* Parts I.A–B.

348. See *supra* Part II.B.3.

detailed above in the context of Article II, the ratification history of the Convention in the United States provides strong evidence that all of the Convention—including Articles III, IV, V, and VI—was regarded as self-executing.³⁴⁹

* * * * *

A concluding observation about the current draft of the *Restatement of the U.S. Law of International Commercial and Investment Arbitration* is necessary. The American Law Institute describes a Restatement’s objective as “explicat[ing] what the law is, or should be, in the area addressed” in order to “promote the clarification and simplification of the law.”³⁵⁰ Despite that objective, the *Restatement* takes no position on the self-executing status of the Convention, instead only commenting that the issue is “unresolved,”³⁵¹ although also opining that, “[u]nder the requirements set forth in *Medellin v. Texas* . . . the Convention would have difficulty meeting the criteria of a self-executing treaty.”³⁵²

The *Restatement*’s failure to resolve the Convention’s status beyond its general expression of doubt is surprising: as detailed above, the text of the Convention, its ratification history, and other factors argue decisively that the Convention’s provisions are self-executing.³⁵³ The *Restatement* unhesitatingly states U.S. law on other topics, often in the absence of Supreme Court or other clear authority,³⁵⁴ and it is anomalous that the *Restatement* does not do so with respect to the Convention’s status.

The *Restatement*’s silence is particularly surprising—and also unfortunate—because of the foundational character of the Convention’s status. Unless one answers the question whether the Convention is self-executing, it is impossible to go on to “restate” the law governing international arbitration in American courts in a principled manner. The uncertain and unsatisfying results of leaving this foundational issue unresolved, set forth in Appendix A, again illustrate this point. At a minimum, the *Restatement*’s approach is a missed opportunity to assist in

349. See *id.*

350. The American Law Institute describes its objectives in AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 1–2 (2015).

351. RESTATEMENT OF U.S. LAW OF INT’L COMMERCIAL & INV. ARBITRATION § 1-2 reporters’ note a(iv) (AM. LAW INST., Tentative Draft No. 6, 2018); *id.* § 1-5 reporters’ note b(iv) (“[B]ecause it is not necessary for this Restatement to take a position on whether the New York Convention is self-executing, it does not do so.”).

352. *Id.* § 1-5 reporters’ note b(iv); see also *supra* pp. 48–49.

353. See *supra* Parts II.B–C.

354. See, e.g., RESTATEMENT OF U.S. LAW OF INT’L COMMERCIAL & INV. ARBITRATION § 1-5 (AM. LAW INST., Tentative Draft No. 6, 2018) (providing annulment standards for non-domestic awards made in the United States).

clarification of a critical aspect of the law governing international arbitration in American courts.

The *Restatement* attempts to remedy its silence regarding the Convention's status by fashioning a set of substantive rules governing arbitration agreements and awards, which are assertedly applicable in both federal and state courts, even if the Convention were non-self-executing. The *Restatement* creates two constructs separately addressing arbitration agreements and arbitral awards.

First, the *Restatement* asserts that the domestic FAA prescribes "essentially equivalent" standards to those of Article II of the Convention, proceeding on the basis that the Convention's status is irrelevant insofar as the recognition of international arbitration agreements is concerned.³⁵⁵ The *Restatement* then goes on to base its substantive rules governing arbitration agreements, applicable identically in both U.S. state and federal courts, in significant part on Section 2 of the domestic FAA.³⁵⁶ Second, the *Restatement* postulates that Section 207 of the FAA is applicable in state courts,³⁵⁷ thus assertedly providing a statutory as opposed to a treaty basis for the recognition of awards pursuant to the Convention's standards in state courts; this enables the *Restatement* to proceed on the basis that the grounds for recognition of foreign and non-domestic awards in both state and federal courts are those prescribed by the Convention.³⁵⁸

Putting aside their unfortunate failure to confirm the Convention's self-executing status, both of the *Restatement's* positions are very difficult to accept as plausible statutory interpretations of the FAA. Both positions are also bad policy: they aggravate the problems resulting from failure to resolve the Convention's self-executing status, would place the United States out of step with other Contracting States to the Convention, and miss an opportunity to enhance the Convention's efficacy.

First, the *Restatement's* approach to international arbitration agreements is inconsistent with existing U.S. authority. The *Restatement's* suggestion that the domestic standards of Section 2 of the FAA are "essentially equivalent" to the international standards of the Convention is surprising, because it presumes that a domestic U.S. statute, enacted in 1925, produces "essentially" the same rules as an international instrument negotiated with limited U.S. participation in 1958. Even apart from that inherent

355. *Id.* § 1-2 reporters' note a(iv) ("[W]hether Article II(3) of the New York Convention is self-executing does not affect the scope of FAA preemption because as construed in the Restatement . . . the Article II defenses to enforcement of international arbitration agreements are essentially equivalent (subject to differences in the applicable law) to the defenses applicable under the savings clause of FAA § 2.").

356. *Id.* § 1-2 reporters' notes b(i), (ii); *id.* §§ 2-12 to 2-20 (citing, interchangeably, U.S. decisions under Chapter 1 of the FAA and decisions under the Convention).

357. *Id.* § 1-5, cmt. b ("FAA § 207 thus applies to both federal courts and state courts, and makes the grounds in Article V of the New York Convention applicable in both federal court and state court.").

358. *Id.* § 1-5, cmts. a, b.

implausibility, the suggestion of “essential equivalence” is incorrect because it ignores multiple, substantial differences between the Convention and the domestic FAA, which, as discussed above, have been applied consistently by U.S. courts.³⁵⁹ Relatedly, the *Restatement’s* suggestion also rests on the faulty presumption that Section 2 of the FAA applies to all arbitration agreements and awards that are subject to the Convention. As discussed above, that is incorrect because the jurisdictional scope of Section 1 of the FAA is significantly more limited than that of the Convention, thus leaving substantial numbers of international arbitration agreements and awards subject only to state law—and not the federal standards of Section 2 of the FAA—in state (and possibly federal) courts.³⁶⁰

More fundamentally, the *Restatement’s* approach should not be what U.S. law provides: the *Restatement* substitutes domestic U.S. standards—or, more accurately, a *sui generis* amalgamation of domestic and international standards—in place of the terms of the Convention in a manner that contradicts the treaty’s basic objectives.³⁶¹ That approach would require ignoring the separate text and purposes of both the domestic FAA, applicable under Chapter 1 to domestic arbitration agreements, and the Convention, applicable under Chapter 2 and the Convention itself to international arbitration agreements, instead amalgamating two separate instruments into a new corpus of general arbitration law. Neither the Convention nor the FAA provide for, or should provide for, such an approach. The better approach is that which courts in other countries have adopted,³⁶² which the UNCITRAL Model Law prescribes³⁶³ and U.S. state

359. See *supra* pp. 47–50. Relatedly, the *Restatement* also ignores, and contradicts, the largely unanimous body of U.S. authority that applies different standards to international arbitration agreements, subject to the Convention, than to domestic arbitration agreements, subject to Chapter 1. See *supra* pp. 48–49.

360. See *supra* pp. 51–52.

361. See *supra* Parts I–A–B.

362. See, e.g., Milano Trib., 8 gennaio 1990, 17 Y.B. COMM. ARB. 539, 539–40 (It.) (“[The arbitration] clause . . . meets the requirement of Art. II of the [Convention] The further requirement of a specific approval of the clause in writing, provided for in Art. 1341 CC: is not necessary for the arbitration clause to be valid. According to Art. 26 of the Preliminary Provisions to the CC; the clause is regulated by Italian law only as far as the Italian law is not derogated from by the said international Convention, which does not provide for such a specific approval.”) (footnotes omitted); *Bharat Aluminium Co. v. Kaiser Aluminium Tech. Serv., Inc.*, (2012) 9 SCC 552, ¶ 149 (India) (“The underlying motivation of the New York Convention was to reduce the hurdles and produce a uniform, simple and speedy system for enforcement of foreign arbitral award. Therefore, it seems to be accepted by the commentators and the courts in different jurisdictions that the language of Article V(1)(e) referring to the “second alternative” is to the country applying the procedural law of arbitration if different from the arbitral forum and not the substantive law governing the underlying contract between the parties.”).

363. See UNCITRAL MODEL LAW, art. 2A(1); see also BORN, *supra* note 1, § 1.04(A)(1)(e), at 117.

courts have held the Convention requires:³⁶⁴ international arbitration agreements are governed by the mandatory international terms of the Convention, regardless of what rules and policies apply to domestic agreements under Chapter 1 of the domestic FAA.

Second, the *Restatement's* approach to the recognition of arbitral awards is also flawed. Contrary to the *Restatement's* suggestions, Section 207 of the FAA is applicable only in U.S. federal, not U.S. state, courts; there is no tenable way to interpret Chapter 2 of the FAA to reach the *Restatement's* apparent conclusion.³⁶⁵ As a result, if the Convention were non-self-executing, the standards applicable to the recognition of foreign and non-domestic awards would differ materially between federal and state courts. Among other things, as discussed above, Article IV's standards of proof of awards and Article V's narrow and exclusive grounds for non-recognition of awards would not apply in U.S. state courts. Instead, materially more demanding standards of proof and more expansive and non-exclusive grounds for non-recognition would apply in state courts, with different standards likely applicable in each of the several states.³⁶⁶

These results, which the *Restatement's* approach would produce, are both unsatisfactory and implausible. They are unsatisfactory because the existence of two—or fifty-one—materially different legal regimes for the recognition of international arbitral awards in American courts contradicts the basic objectives of both the Convention and the Supremacy Clause. That is particularly true where a number of those legal regimes (in those states with archaic arbitration legislation) are plainly contrary to U.S. commitments under the Convention. For the same reasons, these results are also implausible. Both the *Charming Betsy* presumption and the federal political branches' stated intention to faithfully implement the Convention underscore that conclusion.

364. See *supra* notes 233–35.

365. The *Restatement* asserts: “Section 207 applies to ‘any court having jurisdiction under’ FAA Chapter 2, which includes but is not limited to federal courts . . . FAA § 207 thus applies to both federal courts and state courts, and makes the grounds in Article V of the New York Convention applicable in both federal court and state court.” RESTATEMENT OF U.S. LAW OF INT’L COMMERCIAL & INV. ARBITRATION § 1-5 cmt. B (AM. LAW INST., Tentative Draft No. 6, 2018). The *Restatement's* assertion that “any court having jurisdiction under this chapter” includes state courts is wrong. Sections 202 and 203 provide grants of federal subject matter jurisdiction to “the district courts of the United States,” not to state courts. 9 U.S.C. § 203 (2012). Nothing in Chapter 2 grants state courts jurisdiction over actions arising under the Convention. Likewise, the *Restatement's* interpretation of § 207 would also mean that § 206 (regarding appointment of arbitrators and orders compelling arbitration) applies in state courts (which plainly was not intended). There is also no indication in Chapter 2's legislative history that any such results were intended, with the Executive Branch instead repeatedly testifying that Chapter 2 would not “have any effect whatever on state laws” and that the chapter “concerns in effect *solely* the jurisdiction of the Federal district courts.” 1970 *Kearney Statement*, *supra* note 175, at 10 (emphasis added).

366. See *supra* note 245.

In sum, the *Restatement's* current architecture of U.S. arbitration law rests on flawed foundations and produces unsatisfactory results. Instead of leaving the Convention's status unresolved, the *Restatement* should have taken the opportunity to resolve that fundamental question and then to provide a restatement of the international rules that apply to international arbitration agreements and awards. In doing so, the *Restatement* could have contributed to the ongoing process—in which U.S. courts historically have played a central role—of interpreting the Convention and providing a robust international legal framework for international arbitration.

CONCLUSION

The New York Convention is the world's most successful private international law treaty. The Convention provides the framework for resolution of a substantial proportion of all international commercial disputes over the past half century and the foundation for greatly-expanded international trade and investment. Central to the Convention's success is the prescription of uniform international rules governing the recognition of international arbitration agreements and awards.³⁶⁷

Only limited attention has been devoted to the question whether the Convention is self-executing in the United States. Nonetheless, this issue is of considerable importance to the continued success of the Convention, both in the United States and elsewhere. In the United States, it is critical that the Convention be regarded as self-executing, as most U.S. courts have held or assumed. As discussed above, unless the Convention is self-executing, nothing in the FAA (or otherwise) makes its terms applicable in state courts—an unsatisfactory result that would place the United States in material breach of its international obligations—while important provisions of the Convention would arguably not apply in U.S. federal courts.

Moreover, the Convention's status as a self-executing treaty plays a highly important role in ensuring that the Convention's objective of prescribing uniform and harmonized international rules governing the recognition of international arbitration agreements and awards is achieved. If the Convention itself is not applicable in national courts, and instead is only mediated through individual and divergent national or state laws, then the essential objectives of uniformity and harmonization are inevitably frustrated. That is graphically illustrated by the treatment of the Convention's terms in the *Restatement of the U.S. Law of International Commercial and Investment Arbitration*, which provides that the Convention is implemented in U.S. state courts through a *sui generis* combination of Section 2 of the domestic FAA and Section 207 of Chapter 2 of the FAA, and which would result in the application of substantive rules differing materially from those applicable under the Convention.

367. See *supra* Parts I.A–B.

The uniform interpretation of the Convention is particularly important because the Convention does not contain any mechanism for resolving disputes over its interpretation and instead depends on the interpretations of national courts. In order for the Convention to be interpreted and developed in a uniform manner, it is important that the Convention's terms, and not the provisions of divergent municipal arbitration statutes, be applied. Treating the Convention as non-self-executing would threaten to balkanize its terms, with courts and legislatures in different Contracting States adopting inconsistent applications of the language of individual implementing statutes and, inevitably, divergent understandings of the meaning of the Convention itself. It is important to the Convention's continued role in providing an effective legal framework for international arbitration that the Convention be treated as self-executing, with U.S. and other national courts interpreting the same text and not divergent national statutory enactments.

Despite the uncertainty of some authorities, the text, purposes, and history of the Convention all argue decisively for treating both Article II of the Convention—dealing with international arbitration agreements—and Articles III, IV, V, and VI—addressing awards—as self-executing. That conclusion is confirmed by the interpretations of the Convention that national courts and other authorities have adopted, as well as by the terms of national arbitration legislation in Contracting States other than the United States. The Convention's self-executing status ensures that the Convention will be fully applicable in American courts, both state and federal, and that the Convention's objective of uniformity can be fulfilled, providing the basis for national courts to work together in applying the Convention and developing the international rules that it prescribes. This collaborative role of national courts, implementing the Convention's international terms, has been an important element of the Convention's success over the past sixty years and is equally important to its success in coming decades.

APPENDIX A

	Federal Courts		State Courts	
	Arbitration Agreements	Arbitral Awards	Arbitration Agreements	Arbitral Awards
Convention Self-Executing				
	NYC Art. II	NYC Arts. III, IV, V and VI	NYC Art. II	NYC Arts. III, IV, V and VI
Convention Non-Self-Executing				
<ul style="list-style-type: none"> • §201 Incorporates Convention for Federal Courts • §2 Preempts in State Courts for Agreements Involving “Foreign Commerce”; § 207 Incorporated for Awards in State Courts 	NYC Art. II	NYC Arts. III, IV, V and VI	§2 (not §§3,4)	§207; NYC Arts. III, IV, and V
			State law*	
<ul style="list-style-type: none"> • §201 Incorporates Convention for Federal Courts • §§2, 9, and 10 Preempt in State Courts for Agreements and Awards Involving “Foreign Commerce” 	NYC Art. II	NYC Arts. III, IV, V and VI	§2 (not §§3,4)	§§9 and 10
			State law*	State law*
<ul style="list-style-type: none"> • § 201 Incorporates Convention for Federal Courts • §2 Preempts in State Courts for Agreements in “Foreign Commerce”; No Incorporation or Preemption for Awards in State Courts 	NYC Art. II	NYC Arts. III, IV, V and VI	§2 (not §§3,4)	State Law
			State law*	
<ul style="list-style-type: none"> • §§2, 3, and 4 Apply to Agreements in Federal Courts for “Foreign Commerce” • §207 Incorporates Convention, Arts. III, IV, and V in Federal Courts • §2 Preempts in State Courts for Agreements in “Foreign Commerce”; No Incorporation or Preemption for Awards in State Courts 	§§2, 3, 4	§207; NYC Arts. III, IV and V	§2 (not §§3,4)	State Law
	State law*		State law*	
<ul style="list-style-type: none"> • §§2, 3, and 4 Apply to Agreements in Federal Courts for “Foreign Commerce” 	§§2, 3, 4	§207; NYC Arts. III,	State Law	State Law

<ul style="list-style-type: none"> • §207 Incorporates Convention, Arts. III, IV, and V in Federal Courts • No Incorporation or Preemption for Agreements or Awards in State Courts 	<p>State law*</p>	<p>IV and V</p>		
<ul style="list-style-type: none"> • §§2, 3, and 4 Apply to Agreements in Federal Courts for “Foreign Commerce” • §§9 and 10 Apply to Awards in Federal Courts for “Foreign Commerce” • No Incorporation or Preemption for Agreements or Awards in State Courts 	<p>§§2, 3, 4</p>	<p>§§9 and 10</p>	<p>State Law</p>	<p>State Law</p>
<p>State law*</p>	<p>State law*</p>			

* State law for agreements/awards not involving the “foreign commerce” of the United States