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The Interplay Between U.S. Statutory Rights and Public Policy Under the FAA and New York Convention in International Disputes

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The Interplay Between U.S. Statutory Rights and Public Policy Under the FAA/New York Convention in International Disputes

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Abstract: The “prospective waiver” doctrine allows U.S. courts to invalidate or sever arbitration clauses in otherwise valid agreements to arbitrate where arbitrating under foreign law would prevent a U.S. party from seeking relief under a U.S. statute. The loss of this opportunity is said to affront U.S. public policy. This paper acknowledges that courts’ application of this idea has resulted in the need for a more fundamental revisiting of the question of whose law should be “mandatory” in international arbitration. But more specifically, this paper proposes appropriate sets of factors for pre-arbitration courts, arbitrators, and post-arbitration enforcement courts to consider in balancing the competing forces of desiring to protect vulnerable parties, to hold parties to their bargain, to give regard to the general preference for international arbitration as a beneficial means for resolving international commercial disputes, and otherwise to ensure that the interest in effective implementation of public policy is not stifled.

Alleged public policy can readily defeat the international arbitral process, damaging the international community’s trust in its effectiveness, and thus increasing the cost of trade and investment by adding to the legal risk premium. Yet public policy must have its place in order to control abuse and to avoid conflict with the essential values of the legal orders with which international arbitration must achieve symbiosis.¹

I. INTRODUCTION

The above quotation indicates the difficulties that national courts and arbitrators face when dealing with the tension between international arbitrants’ need for predictability and various legal systems’ legitimate desires to oversee the international arbitral process in an effort to ensure compliance with certain fundamental values. The arbitrants’ ability to possess the greatest legal security possible, e.g., assurance that contractual terms will be applied as written

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¹ JAN PAULSSON, THE IDEA OF ARBITRATION (forthcoming).
under the stipulated law by any court and any arbitrator, is almost always lessened by the possibility that rules of law of the place of the arbitration, of the place of performance of the contract, of the home jurisdiction(s) of the parties, and/or of other jurisdictions with a nexus to the dispute might be applied. Such seemingly extra-contractual rules might apply because they are claimed to be “mandatory” or “super-mandatory,” i.e., must be disposed of by the arbitrator because the nature of the dispute is so closely connected to a jurisdiction that is not the jurisdiction of the stipulated law that that jurisdiction’s law must apply. Or, similarly, it may be argued that rules arising under law other than the stipulated law should apply because it is simply recognized that “the arbitration agreement is simply broader than the stipulation of the governing law of the contract.”

This paper seeks to address a particular subset of this “public policy” conundrum, while simultaneously referencing some of these “mandatory law” problems. United States citizens, residents, or even foreigners who may seek the benefits of United States law in specific circumstances (“United States persons”) are often parties to international arbitration agreements that stipulate that a foreign law will be applicable to any disputes that arise under or in connection with the contract. When a dispute arises, the United States person may realize that by arbitrating under the foreign stipulated law, the right to sue under a federal statute (assuming the right would undisputedly exist in the absence of the arbitration and choice-of-law clauses) will be lost. In such a case, the United States person might wish to assert, either by running into

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2 Arguably, the greatest certainty is achieved where parties indicate that they would like the terms to be applied exactly as written, e.g. without reference to any stipulated law. This is largely the goal of having a contract in the first place, but simultaneously, a contract cannot exist in a complete legal vacuum.

3 PAULSSON, supra note 1.

4 The “prospective waiver” problem is not unique to international arbitration. It arises where a contract contains a forum-selection clause whereby disputes will be litigated in a non-U.S. court
court or in the arbitral proceedings themselves, that the loss of the potential remedy under the federal statute violates United States public policy. Two illustrations, providing diametrically opposite results, may be given.

In *Thomas v. Carnival Corporation*, a seaman sought to avoid an agreement to arbitrate under Panamanian law in the Philippines, and so argued that compelling arbitration would cause him to lose his right to sue in the United States under the Seaman’s Wage Act (which right he undisputedly would have had absent the agreement to arbitrate). The Eleventh Circuit Court of Appeals agreed, and invalidated the agreement because the choice clauses operated in tandem as a prospective waiver of the seaman’s right to seek a remedy under the federal statute in violation of public policy. By contrast, in *Roby v. Corporation of Lloyd’s*, a syndicate agreement provided that disputes would be resolved through arbitration in England under English law, and the investors claimed that enforcing the agreement would operate as a prospective waiver of the investor’s potential remedies under United States securities laws. The Second Circuit disagreed, held that English law provided the investors with sufficient protection, and “refused to allow a party’s solemn promise to be defeated by artful pleading.”

Specifically, this paper will seek to analyze various actions that pre-arbitration courts, arbitrators, and post-award enforcement courts may take when faced with an assertion that the forfeiture of a U.S. statutory remedy has violated public policy. This necessarily entails a more general discussion of “mandatory” rules in international arbitration and varied conceptualizations

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5 Thomas v. Carnival Corp., 573 F.3d 1113 (11th Cir. 2009).
6 Roby v. Corp. of Lloyd’s, 996 F.2d 1353 (2d Cir. 1993).
7 *Id.*
of “public policy.” It will then propose a series of appropriate factors that courts and arbitrators should examine in the future as bearing on an adjudicative result. Viewed another way, this paper will seek to demonstrate whether a modified-Thomas approach or a modified-Roby approach will be more beneficial to the stakeholders in the international arbitral system. First, to understand the prospective waiver problem and proposed resolutions, some basic, though not necessarily intuitive, conceptions regarding applicable law in international arbitration must be explained. Second, as stated, it is logical to examine the relative applicability of particular rules and considerations from the separate perspectives of pre-arbitration courts, arbitrators, and post-award enforcement courts.

II. Basic Conceptions of the Law Applicable in International Arbitration

As a general matter, the law applicable in an international arbitral dispute will be the law chosen by the parties (the “lex contractus”). If the parties have not stipulated to an applicable law, the arbitrators will “apply the law determined by the conflicts of laws rules which they consider applicable.” This is uncomplicated and uncontroversial. Also relatively uncontroversial is that the arbitrators may apply a rule of the place where the tribunal sits (“law of the situs”), especially where that rule is procedural in nature (the law of the situs is usually, but not always, synonymous with the procedural law governing the arbitral proceedings, the lex arbitri). Arbitrators’ authority to apply a clearly substantive rule of the situs affecting the merits of the case is less clear.

If a particular rule has achieved the status of international public policy (and such rule may or may not coincide with a principle acknowledged to be jus cogens), a challenge to its applicability in the arbitral proceedings is also unlikely to be successful. For example, arbitrators

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8 UNCITRAL Arbitration Rules, art. 33.
will generally consider themselves bound to apply a rule prohibiting torture, should an arbitrant assert that torture has occurred. But of course, not all rules of international law have achieved such mandatory status (particularly rules which are likely to determine the outcome of commercial disputes) and even if a particular rule has achieved the eminence of international public policy, its application should not always be taken as a given.

*Lex mercatoria*, a nebulous body of law based on customary practice, equity, and good-faith and fair dealing applicable to commercial relationships in general, may also have application in international arbitration where the parties’ agreement to provide or the parties otherwise consent to its application.

More complicated and controversial (and the subject of this paper) is when a party argues that a national law is applicable which is not part of the *lex contractus*, the *lex arbitri*, the law of the situs, or any conflicts of laws determination. In some way, application of the extra-contractual national law will be premised upon the public policy of the state to which the rule belongs to. Complicating matters is the fact that the basis for the rule’s applicability might be that it is grounded in the *international* public policy of the particular state. One example of this is a state’s *national* predilection for *international* comity. But the crucial theoretical questions are 1) What level of significance need the asserted applicable rule have to the particular legal system?, and 2) How powerful does the connection between the “outside” legal system and the particular dispute need to be? Commentators have long-grappled with these questions, and,

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9 “So should [the tribunal] draw only upon the *ordre public* of the particular jurisdiction whose law the tribunal has identified as the governing law, or of the jurisdiction where it sits? Or is there some other way of identifying the rules of *ordre public* to which the tribunal should feel bound to give effect, irrespective of “‘the otherwise applicable law?’” George Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 AM. REV. INT’L ARB. 1, 4 (2007).

outside the context of a particular dispute, meaningful answers are difficult to achieve. The best that can be hoped for is a series of factors for pre-arbitration courts, arbitrators, and post-arbitration enforcement courts to consider. Legal certainty for all stakeholders would be strengthened if such factors were adopted (or recommended) into positive law by the appropriate body.\footnote{Congress, via FAA amendments for pre-and-post-arbitration courts, or the Supreme Court if Congress does not act; the ICC, \textit{inter alia}, for arbitrators.}

\section*{III. Dealing with the Prospective Waiver Problem}

\subsection*{A. Pre-Arbitration Courts}

Notably, the test used by United States courts when deciding whether to grant a motion to compel arbitration where the clause at issue falls under the New York Convention entails no explicit consideration of the prospective waiver problem. Courts are required to compel arbitration if the four factors are present: “there is an agreement in writing to arbitrate the dispute, 2) the agreement provides for arbitration in the territory of a Convention signatory, 3) the agreement arises out of a commercial legal relationship, and 4) a party to the agreement is not an American citizen.”\footnote{Amizola v. Dolphin Shipowner, S.A., 354 F. Supp. 2d 689, 696 (E.D. La. 2004).} Some courts, like the lower court in \textit{Thomas}, have applied this test as outcome-determinative and have thus refused to consider the validity of a “prospective waiver” argument, which is arguably analogous to an affirmative defense where the four requirements are met. Thus, the ability of pre-arbitration courts to consider public policy as a basis for invalidating or modifying an agreement to arbitrate must originate elsewhere. It possibly arises from Article II of the New York Convention, which provides that an agreement to arbitrate is unenforceable if
it is “null and void, inoperative or incapable of being performed.” It is not fully clear if Article V’s “public policy” basis for refusing to enforce an arbitral award is being implicitly applied in lieu of Article II’s “null and void” language, or if the “prospective waiver” question is separate and distinct from any explicit Convention or FAA language. This lack of clarity suggests that it is perhaps only a judicially-created creature of U.S. law.

This section begins by discussing several approaches, both hypothetical and actual, that pre-arbitration courts may use when faced with a “prospective waiver” argument. It must be remembered that the methods of review of the permissibility of “contracting around” statutory rights in a domestic context are different from the methods of review of the validity of a prospective waiver by virtue of a foreign forum selection or arbitration clause—nevertheless, the former may provide some guidance as to the latter, since the goal here is to compile an optimal and pertinent set of considerations.

Johnson v. Moreton, an English case between English parties, provides a backdrop by which to think about public policy in general, and is thus a possible approach but not one that is actually used to deal with the “prospective waiver” problem. In Johnson, parties to an agricultural tenancy sought to exclude the operation of a provision of the Agricultural Holdings Act from their agreement. The British House of Lords suggested that the validity of this action is heavily dependent upon whether and to what extent the statute’s purpose would be frustrated, and stated

Where it appears that the mischief that Parliament is seeking to remedy is that a situation exists in which the relations of parties cannot properly be left to private contractual regulation, and Parliament therefore provides for statutory regulation, a party cannot contract out of such statutory regulation (albeit exclusively in his

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13 New York Convention, art. II.
(own favour) because so to permit would be to reinstate the mischief which the statute was designed to remedy and render the statutory provisions a dead letter.

While it might be recognized that *Johnson* involved neither arbitration nor any international component at all, it is illustrative of a basic idea underlying the notion of public policy: Parties may not “opt out” of certain rules of law, believing that they may do so because they are only affecting themselves; rather, many laws are enacted with an eye toward protecting the public at large, and that public interest requires uniform conduct in those types of transactions or activities addressed by these particular laws. If a government with an apparent interest in the transaction that gives rise to the arbitral proceedings has passed such a law, it may be incumbent upon a pre-arbitration court or the arbitrators to recognize the need for uniform conduct and to ensure the applicability of the law designed to protect the public interest.

To demonstrate this approach’s application in an international context, assume that the agreement between a German landowner and an English tenant farmer provided that any disputes would be resolved through binding arbitration in France under French law, and assume that the tenant farmer sues the landowner in English court for breach of contract. The landowner will move to compel arbitration under the agreement; but the tenant farmer will respond that arbitration under French law operates as an impermissible waiver of his rights under the Agricultural Holdings Act. Assuming the statute is designed to protect vulnerable tenant farmers because the legislature determined that tenant farmers are likely to be susceptible to mistreatment as a result of bargaining power inequalities, an English court should hold that allowing arbitration in France, where it is clear that the French arbitrators will not apply the Agricultural Holdings Act, should invalidate the arbitration clause at least as far as the particular Agricultural
Holdings Act rights are lost (i.e., courts have severed the choice-of-law clause rather than forbidding arbitration, thus still giving effect to the rest of the agreement).\textsuperscript{15}

While the \textit{Thomas} court did not discuss notions of unconscionability or rest its decision on the vulnerability of seamen, it is difficult to believe that arbitration would have been compelled if the court was not concerned with the potential for frustration of the Wage Act. In any event, other approaches are possible, and indeed, necessary; in the absence of specific legislative guidance this approach might undesirably require judges, when evaluating precedent, to effectively decide that rights provided under one federal statute are more important than the rights provided under another, leading eventually to a “ranking” of the normative value of various federal statutes. On the other hand, inasmuch as the \textit{Johnson} approach of looking at the potential for frustration of the statutory purpose is a useful way to distill the essence of what public policy actually is, its guidance will inevitably remain part of prospective waiver analysis.

\textit{S.K.I. Beer Corp. v. Baltika Brewery} can be viewed as an approach at the other end of the spectrum.\textsuperscript{16} \textit{S.K.I. Beer} suggests that an intensive review of a statute’s text is required to determine its vulnerability to prospective waiver, an approach that fails to adequately respond to the realization that public policy is at stake. In other words, it implies that the legislature’s intent to make the statute’s application mandatory is outcome-determinative, which is quite different from figuring out whether a statute was designed to remedy vulnerabilities experienced by a particular group of individuals. The parties agreed to a Russian forum selection clause, but \textit{S.K.I.}

\textsuperscript{15} See, \textit{e.g.}, \textit{Dockeray v. Carnival Corp.}, --- F. Supp. 2d ----, No. 10-20799-CIV, 2010 WL 2813803 (S.D. Fla. May 11, 2010).
\textsuperscript{16} 612 F.3d 705 (2d Cir. 2010).
argued that N.Y. Alco. Bev. Cont. Law. § 55\textsuperscript{17} rendered the clause in violation of public policy and unenforceable. The court rejected the contention and placed heavy emphasis on the word “may” in the statute and held it significant that “the section does not state that a beer wholesaler is prevented from agreeing to maintain a civil action in a different forum.” \textit{S.K.I. Beer} also relied on \textit{Roby}, citing with approval the lower court’s holding that the burden to prove a lack of a comparable remedy under the foreign law falls to the party asserting the public policy violation, and that mere speculation as to what rights that party would have in the arbitral proceedings is not sufficient to defeat the presumption of enforceability.

The permissive versus mandatory language approach is too straightforward for comfort, as it may fail to acknowledge the reasons underlying the enactment of the statute in the first instance, i.e., some “void” in the legal landscape. Legislative deference is generally considered admirable, but it is nevertheless clear that the court discounted New York’s goal of providing specific protections for beer wholesalers. This is not to say that the “may apply” versus “shall apply” distinction has no place in the analysis, because legislators must be assumed to convey their intentions clearly through a statute’s text.

These two cases provide enough background for an introduction of the proposed factors for pre-arbitration courts to consider. \textit{The core of the inquiry must be 1) whether the statutory protection claimed as lost is even applicable to the facts of the case, if not, further analysis may cease and arbitration may be compelled;\textsuperscript{18} 2) if so, a determination as to the likelihood that the}

\textsuperscript{17} Section 55 provides “[i]f a brewer fails to comply with the provisions of this section, a beer wholesaler \textbf{may} maintain a civil action in a court of competent jurisdiction within this state for damages . . .” N.Y. Alco. Bev. Cont. Law. § 55.

\textsuperscript{18} The use of this factor demonstrates some of the difficulty in this area because it conflates whether the statute \textit{should} apply with its actual application to the merits. For this reason, its use by arbitrators would be more problematic than its use by a pre-arbitration court, which already has a mandate to effectuate the public policy of the state where it sits.
U.S. statute will apply notwithstanding a foreign lex contractus, because the parties have stipulated to its application, because it is demanded by conflicts of law rules, or more controversially, because the court believes that the arbitrators will recognize the mandatory nature of the rule combined with a heavy U.S. nexus to the dispute; 3) comparing the protections available under the lex contractus to the statutory right at issue, and refusing to compel arbitration only where the protections available under the lex contractus are so deficient as to entirely and utterly thwart the Congressional purpose in passing the U.S. statute. Taken together, use of these factors falls somewhere between the “pure” public policy inquiry of Johnson and the rigidity of S.K.I. Beer.

The first factor is necessary for efficiency reasons. It is superfluous and unnecessary to delve into the far more complicated second and third factors if the party asserting the existence of an invalid “prospective waiver” has no factual basis for asserting a right to relief under the statute. For example, if a party states that arbitrating under foreign law will cause him to lose his right to sue in the U.S. under the securities laws, the court should first establish that, inter alia, the assets at issue qualify as “securities.”

Second, the court must analyze the likelihood that the U.S. statute itself will apply. If the parties stipulate to its application or it is otherwise obvious that the arbitrators will consider the claim (because of the broad scope of the arbitration clause), arbitration may be compelled because U.S. public policy will be vindicated. The court should also be empowered to make a likeliness determination as to whether the arbitrators will find the U.S. statute to be mandatory, notwithstanding the difficulty of making such a finding.

The Ninth Circuit Court of Appeals, in particular, has taken the most rational approach to the “prospective waiver” problem, though it does not precisely follow the framework laid out
above. That court has consistently held that, similar to *Roby* and other well-known Lloyd’s of London cases, that the standard to be applied is “whether the law of the transferee court [or the law to be applied in an arbitral tribunal] is so deficient that [a party] would be deprived of any reasonable recourse.” This test highlights the significance of the third factor. For instance, in *Simula, Inc. v. Autoliv, Inc.*,[19] a plaintiff argued that if Swiss law were to apply to the exclusion of U.S. antitrust law, a “profound and irrevocable detriment [to] United States automotive safety and the national interest in open and competitive markets” would result. The court first noted that the Swiss Tribunal might apply U.S. law in situations affecting U.S. markets, and second, that even if only Swiss law is applied, the plaintiff had not shown that it would not provide him with sufficient protection. To return to an above-example, this would require the English court in the tenant farmer case to determine the likelihood that the French arbitrators would apply the Agricultural Holdings Act, and if not, to compare the tenant farmer protections under French law to the Agricultural Holdings Act. This analogy demonstrates why this type of comparability analysis is consistent with a “pure” public policy analysis while simultaneously giving teeth to the preferences for arbitration and party autonomy.

The courts of appeals that have made the conscious choice to compare substantive protections provided under foreign law with the content of the statutory right that will supposedly be lost should be commended for this mode of analysis because it adequately reconciles U.S. national policy in favor of international arbitration with the U.S. policy of ensuring access to statutory protections for those who would be entitled to them absent a choice-of-law clause, particularly where latent bargaining power inequalities lurk in the background. This method is thus largely preferable to the method of those courts, like *Thomas*, which simply

[19] 175 F.3d 716 (9th Cir. 1999).
“invoke ‘public policy’ to deny arbitration on the sole basis that a consumer or an employee or the victim of civil rights violations have been deprived of ‘statutory rights’ by having agreed to an applicable law that does not provide for the statutory relief in question.” The Simula/Roby method appears to recognize the principle that the arbitration agreement is broader than the stipulated law whereas the Thomas line refuses to make this acknowledgement.

This might involve more than just looking at the two sets of statutory protections side-by-side; it might require examining customary practice to assess whether and how particular provisions might be applied. For example, in Central National-Gottesman, Inc. v. M/V “Gertrude Oldendorff”, a U.S. court found a “prospective waiver” where an English court would “give force to an exculpatory clause in the bill of lading, [thus] insulating parties other than the shipowner from liability, in violation of COGSA.” The court heard testimony from a foreign law expert in support of its conclusion that English courts would adopt a different, narrower view of the term “carrier” and would give effect to the exculpatory clause.

Notably, the purpose underlying a U.S. statute could be vindicated in the arbitral proceedings in other ways. As such, a pre-arbitration court should look at the potential for the application of, and the substantive rights provided by, the law of the situs, international law, and lex mercatoria before refusing to compel arbitration. Most likely, these types of possibilities will be raised by the parties in connection with the court’s consideration of the second factor.

B. Arbitral Tribunals

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20 Paulsson, supra note 1, § 6.3
Let us assume the following: An investor’s argument in a U.S. court that agreeing to arbitrate in England deprives him of protections otherwise available to him under U.S. securities laws in violation of public policy has been rejected, and the investor, now arbitrating in England, asserts that the arbitrators are not bound by the Second Circuit and are required to apply U.S. securities law because the claim is “in connection with” the parties’ agreement. While the Second Circuit may have assumed that the proceedings would go forward under English law, the arbitrators have broad discretion to consider whether to apply U.S. law. What sort of nexus to the U.S. is required for the arbitrators to decide U.S. securities law is applicable? This question is not amenable to an easy answer; again, sets of factors are probably the best solution.

Put more generally, “[a]rbitrators may be asked to apply a law which purportedly overrides the provision of the contract, its governing law, and indeed the law of the place of arbitration.” Arbitrators are faced with an extraordinarily difficult task when faced with an assertion that a law other than the lex contractus, lex arbitri or law of the situs should apply. First, it must be recognized that this is, in fact, a “task”; arbitrators have a positive obligation to consider whether such a law applies. Therefore, arbitrators should not be persuaded by the other party’s responses that the arbitrator has no warrant to even consider whether the law applies, let alone to apply that law simply because the arbitrator’s jurisdiction arises from party agreement. In other words, if public policy is to have any role, where an agreement provides that disputes arising “under or in connection with” the contract shall be arbitrated, the arbitrators have the ability to consider a country’s law other than the lex contractus and the law of the situs. One key insight here is that, as stated by Rau, “attention to the will of the parties, and attention to the

22 PAULSSON, supra note 1.
contractus, are after all two quite different things.” Further complicating the analysis is the recognition that even if the arbitrator decides that such an “other” law is mandatory, it may not have mandatory application to the particular facts at hand or it may be effectively obsolete. What is at least clear, as recently recognized by the Supreme Court in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.* is that the arbitrator’s identification of and decision whether to apply a particular rule of law must not be the arbitrators “own conception of sound policy.” However, this is fundamentally different from whether an arbitrator has a duty or obligation to enforce a mandatory rule of law.

One oft-criticized unique approach to the mandatory rules quandary was taken in ICC Case No. 6320 (1992). It is illustrative of this complexity. There, disputes between a U.S. contractor and a Brazilian utility were to be adjudicated in arbitration in France under Brazilian law. The utility wished to assert a RICO claim against the contractor, and indeed, the tribunal acknowledged that it had “jurisdiction” of the claim. Despite this, the tribunal found the claim “inadmissible” because “to apply RICO as a ‘mandatory rule’ would be ‘contrary to the choice of law the parties agreed to.’ For such application, ‘the priority of the will of the parties’ to hear a claim not based on the chosen law must be subordinated to the existence of a state’s ‘strong and legitimate interest’ in the application of its law.” Rau notes the tension created by the tribunal’s inference that the choice-of-law clause limited the scope of the arbitration clause and its simultaneous recognition that it had “jurisdiction” of the claim. What is meant by “strong and legitimate interest?” Perhaps it is not so different from an analysis of the following factors that arbitrators should consider:

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24 130 S. Ct. 1758 (2010).
25 Rau, supra note 23, at 52.
26 Rau, supra note 23, at 56.
When faced with the assertion that some “other” law (U.S. law, in the context of this paper) is applicable to the arbitral proceedings, arbitrators are, and should be, guided by several factors. These include, but can never be limited to, 1) the place of performance of the underlying contract; 2) the citizenship and/or domicile of the parties; and 3) where the award will ultimately be enforced.

**Rules of the place of performance of the contract:** Suppose a Japanese manufacturer and a U.S. wholesaler enter into an agreement under which the manufacturer is to deliver 100 widgets to the wholesaler, and for whatever reason, delivery is to take place in Canada. Disputes are to be arbitrated in London under Swiss law. No one doubts that Canada has some interest in applying its rules to the transaction. If the act of selling widgets in Canada is illegal (and therefore contrary to Canada’s public policy), but the same act is legal under any other law, the London arbitrators might hold 1) the rule prohibiting the act of selling widgets is an active and fundamental part of Canada’s legal system, and 2) the fact that the transaction consisted of a single delivery to take place in Canada is enough for the arbitrators to invalidate the contract, since there is an obvious and significant nexus between Canada and the conduct.

This simplified example renders it easy to see why arbitrators should consider rules of the place of performance of the contract. Thus, while complicated facts complicates analysis, in the context of the “prospective waiver” issue, where a given statutory protection is deemed essential to the U.S. legal system as a whole (such as the Sherman Act or various securities laws), and where a contract is to be substantially performed in the U.S., creating a significant U.S. nexus to the transaction such that statutory protection for one who would otherwise have it is necessary to effectuate Congress’s purpose notwithstanding the dispute’s international component, arbitrators should apply the U.S. statute.
Rules of the place of citizenship or domicile of the parties: This is rather intuitive: An arbitrant that claims the right to a statutory protection which is not part of the *lex contractus* should not have the ability to claim the right any existing statutory protection; that party must have some connection to the rule. In general, this connection will exist because that party is a citizen or resident of the jurisdiction that the rule “belongs to.” Legislatures do not legislate for the world; thus, the *Roby* names were American and wanted remedies under American securities laws; were the dispute between Mexican investors and Lloyd’s, it is unlikely in any event that the Mexican investors would have asserted protections under American securities laws. If they did, however, the point is that the U.S. would have no connection to the dispute and the arbitrators should accordingly refuse to consider the applicability of U.S. investor protections to Mexican investors unconnected with the U.S. This factor is part of a more general discussion; in the context of the more specific “prospective waiver” problem, it can usually be assumed that party asserting the loss of the right to the U.S. statutory protection will be a U.S. citizen or resident or otherwise entitled to the benefit of the statute.

Rules of likely enforcement jurisdictions: Professor Rau has intimated that the rules of the jurisdictions where the award will ultimately (or likely be) enforced have a particular importance. Where such a jurisdiction is relatively clear to the arbitrators, it is difficult to dispute the reasons for taking particular account of such jurisdiction’s rules. Simply put, various arbitral rules provide that arbitrators have a duty to render enforceable awards. This is a duty which necessarily entails review of the standards by which an award’s validity will later be assessed.

C. Post-Arbitration Courts
Present United States law is worth quoting. It is as follows: “If there is an agreement to arbitrate, and the issues presented to the arbitrator fell within that agreement, courts may overturn the arbitrator's award only on very narrow grounds . . . (1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrator(s); (3) the arbitrators were guilty of certain kinds of procedural misconduct; and (4) ‘the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award’ was not made.” 27 A post-arbitration challenge claiming that an arbitrator misapplied, should have applied, or should not have applied a law other than the *lex contractus* or the law of the situs may be classified as an assertion that the arbitrators “exceeded their powers.” Alternatively, and more directly for present purposes, 9 U.S.C. § 207 provides that a court “shall confirm the arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.” 28 Recognition and enforcement of an arbitral award may be refused if the recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought. (However, it has been vehemently argued that enforcement courts should consider the public policies of the place of performance of the contract). 29 In addition, an award

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27 *Flexible Mfg. Sys. Pty, Ltd. v. Super Prod. Corp.*, 86 F.3d 96, 99 (7th Cir. 1996). On a philosophical level, it is worth noting that regimes for recognition of foreign judgments vary widely. For example, “[c]ourts of some states (e.g., France) recognize a foreign judgment only if they would have applied the same law to the controversy as that chosen by the rendering court, or if the choice of law did not affect the result.” *REST. (3d) FOREIGN RELATIONS, Introductory Note.*


29 Christopher S. Gibson, *Arbitration, Civilization and Public Policy: Seeking Counterpoise Between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law*, 113 *PENN. ST. L. REV.* 1227 (2009); see *Northrop Corp. v. Triad Int’l Mktg.*, 811 F.2d 1265 (9th Cir. 1987) (refusing to consider the law of the place of performance notwithstanding that contract was clearly illegal under that law). Enforcement courts escape this problem by framing
may generally be vacated if it is arbitrary and capricious, displays manifest disregard of the law, or fails to draw its essence from the underlying contract. Despite the apparent existence of multiple grounds by which an award may be vacated however, a party seeking to vacate the award, even on the basis of a “prospective waiver”-type claim, has, and should have, a high mountain to climb.

As an example of a more general problem, suppose a post-arbitration award enforcement court in the U.S. is faced with the assertion of the loser (in arbitration) that “the arbitrators rejected the applicability of statute X,” where statute X is not the lex contractus, the lex arbitri, or the law of the situs; statute X, however, governs in the place where the contract was to be performed. The post-arbitration enforcement court thus must examine whether the claim of statute X’s applicability was raised before the tribunal, and if so, the basis for the arbitrator’s rejection (however, the fact that the arbitrators did not adequately explain their reasoning or provide more detail as to the legal basis for their decision will probably not be, and should not be, sufficient). If a post-award enforcement court reviews the record and finds that the party did not assert the applicability of statute X in the arbitral proceedings, there is something disingenuous about that party being permitted to raise the issue. Such a finding should weigh against the party, but since the concern is in fact “public policy,” it should not completely bar the claim for nonrecognition of the award. But under present law, U.S. courts called upon to enforce their role as recognizers and enforcers of an arbitral award, not reviewers of the underlying contract. But see Victrix S.S. Co. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987) (refusing to enforce a London award because of related Swedish bankruptcy proceedings—U.S. public policy would be violated if Swedish proceedings were not recognized, thus, enforcement was refused in order to “facilitat[e] the orderly and systematic distribution of the assets.”).

an award are limited to whether the award violated U.S. public policy. This may be a rule ripe for reassessment.

Returning to a “prospective waiver” question, suppose then that statute X is a U.S. statute. The loser in arbitration claims a violation of U.S. public policy because protections otherwise available under it were lost. In general, the inquiry of the enforcement court, assuming there has been no involvement of a pre-arbitration court (see below), should consist of factors (1) and (3) for pre-arbitration courts, above. (2) is not necessary because it can be assumed that the arbitrators refused to consider the applicability of the U.S. statute—again, it must be remembered that rights generally will be protected where applicability is gauged and not only where the U.S. statute is held to apply and applied). Thus, if the statutory protection does not encompass the particular conduct at issue, the award should be enforced, and if it does, the enforcement court should examine the substantive comparability of protections available under the lex contractus (or perhaps any other law the arbitrators found mandatory), and if comparable, should enforce the award. Accordingly, in the final inquiry, the comparability analysis serves to illuminate the answer to whether, if the award is enforced, the non-application of statute X to the U.S. party truly affected his or her rights to such an extent that the entire Congressional purpose for enactment of the statute would be thwarted. Admittedly, this standard is somewhat imprecise and its application by equally competent judicial authorities could lead to inconsistent results. But hearkening back to Johnson v. Moreton, it is an abundantly reasonable interpretation of what it means for courts to base decisions upon “public policy.” Hence, as stated above, meaningful overarching answers are difficult to achieve outside the context of a concrete dispute.

In addition, the post-arbitration enforcement court must ask whether the validity of a prospective waiver of law X was litigated prior to arbitration. To the extent that the litigant has
the ability to assert that the pre-arbitration court was wrong to refuse to invalidate the clause due to a “prospective waiver” of a statutory right, such a prior determination by a fellow U.S. court, if not simply *res judicata*, should carry significant weight in the interest of finality; an “abuse of discretion” standard of review of the prior court’s determination on each individual point is appropriate. Moreover, the post-enforcement court has the opportunity to review whether the applicability of the U.S. statute was raised before the arbitrator, and if so, how the arbitrator dealt with the claim. This may put the U.S. court in an awkward position; its view of whether the U.S. statute was mandatory in the context of the arbitration may differ from the arbitrator’s view, not least because of the U.S. court’s home bias. Thus, refusal to enforce arbitral awards on the basis that the arbitrator did not allow a U.S. statutory claim yet should have should be rare; only where the arbitrator’s refusal to apply the U.S. statute or any comparable legal protection was patently unreasonable and resulted in tangible prejudice to the party should an award not be enforced.

### III. Conclusion

The “prospective waiver” problem highlights significant complications associated with application of mandatory law in international arbitration. At best, logical sets of factors can be developed for pre-arbitration courts, international arbitral panels, and post-arbitration enforcement courts to consider, though “prospective waiver” arguments based in public policy must continue to be adjudicated on a case-by-case basis.

Pre-arbitration courts should consider 1) whether the statutory protection claimed as lost is applicable to the facts of the case; 2) if so, the likelihood that the U.S. statute will apply notwithstanding a foreign *lex contractus*; 3) if not, the protections available under the *lex contractus* compared to the statutory right at issue, and refuse to compel arbitration only where
the protections available under the *lex contractus* are so deficient as to entirely and utterly thwart the Congressional purpose in passing the U.S. statute.

Arbitrators should consider the significance of the statute to the U.S. legal system as a whole and the level of the U.S. nexus to the dispute, and more specifically 1) whether the U.S. is the place of performance of the contract; 2) citizenship or domicile of the parties, if appropriate; and 3) whether the U.S. is a likely enforcement jurisdiction. As indicated in footnote 10, arbitrators generally should not hold the U.S. statute inapplicable on the basis that its protections do not coincide with the facts of the case because this dangerously resembles actually applying the statute.

Post-arbitration enforcement courts should generally accord deference to determinations made by pre-arbitration courts and arbitrators in accordance with existing law. With this in mind, they nevertheless should examine the same factors as considered by the pre-arbitration courts: 1) Whether the statute is applicable to the facts, i.e. whether the aggrieved party has any warrant for complaining in the first place; and 2) most importantly, what extent were the rights provided to the aggrieved party by the arbitrators under the *lex contractus*, the *lex arbitri*, the law of the situs, the *lex mercatoria*, and/or other laws based on conflicts determinations or international law consistent with the rights that would have been provided were the U.S. statute applied itself.

To return to one of the initial questions raised, the use of these factors favors a modified- *Roby* approach over a modified- *Thomas* approach. Courts and arbitrators can vindicate U.S. public policy in multiple, evolving ways; requiring the application of a specific statute as written by one legislature, and invalidating or severing an arbitration clause where the statute’s application will not directly occur poses too great a threat to the benefits of legal certainty accruing from the international arbitral regime.