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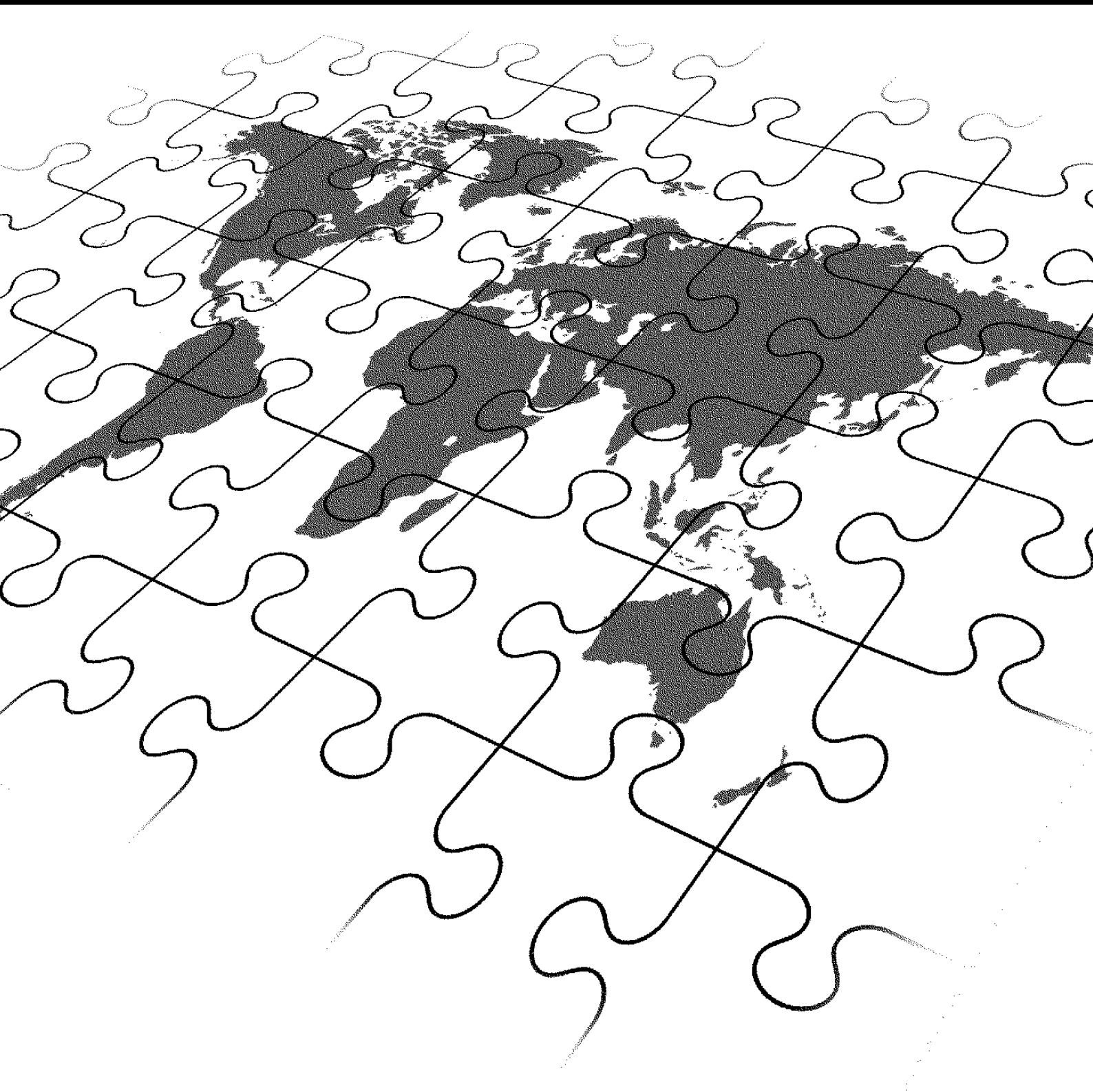

Protocols aim to meet the diverse settings in which cases arise, recognising that the prescribed behaviour ultimately cannot be imposed but can only be encouraged, in a context where the constituencies' efforts permit formulation of the best plan for the particular case.

Conclusion

It is the fervent hope of the College of Commercial Arbitrators that publication of these Protocols will sound a clarion call to action by all constituencies involved in business arbitration, whether in US domestic or international cases, encouraging prompt adoption of effective measures to dramatically reduce process costs and delay, and restoring arbitration to its rightful place as a valuable and efficient alternative to litigation in the resolution of business disputes.

Notes

1 For a current listing of the College members, see CCA Website: **http://thecca.net/bio.aspx?id=browse**.

2 The Protocols were chiefly drafted and edited by Thomas J Stipanowich, CCA Fellow; William H Webster, Chair in Dispute Resolution and Professor of Law at Pepperdine University School of Law and Academic Director of the Straus Institute of Dispute Resolution; The Hon Curtis E von Kann, CCA Fellow and former District of Columbia Superior Court Judge; and Deborah Rothman, CCA Fellow and full-time arbitrator and mediator. The complete Protocols may be found and downloaded from the College of Commercial Arbitrators website: www.thecca.net/CCA_Protocols.pdf.

Enforcement of international arbitration agreements in the United States after *Granite Rock* and *Rent-A-Center*

UNITED STATES

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In June 2010, the United States Supreme Court handed down two decisions clarifying when challenges to an arbitration agreement must be heard by a court, even when the arbitration agreement itself reserves the question of validity and arbitrability to the arbitrators. In *Granite Rock Co v International Brotherhood of Teamsters*,[1] the Court determined that a dispute over arbitrability that hinged on whether the parties' agreement was in effect at the time the claim arose was for a court to determine. In *Rent-A-Center, West, Inc v Jackson*,[2] the Court found that a claim of unconscionability of an arbitration agreement was for the arbitrator to determine, where the claim did not go to the delegation of authority to the arbitrator, but questioned ancillary terms governing the arbitration.

These decisions brought a greater measure of order under the Federal Arbitration Act (FAA)[3] to the determination of the gateway question of who decides whether a dispute is to be arbitrated – the arbitrator(s) or the court. They will have implications for parties seeking to compel international arbitrations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'),[4] and for parties seeking to avoid arbitration.

Enforcement of the New York Convention in US federal courts

The United States is a contracting state of the New York Convention. Chapter 2 of the FAA implements the treaty, providing a procedural mechanism in the United States federal courts for compelling arbitration where the arbitration is international in nature, and for domesticating an international award as a judgment. Section 206 of the FAA

gives federal courts the power to compel arbitration. It does not, however, provide a rule of decision, stating only that a court having jurisdiction may compel the parties to arbitrate in accordance with their agreement, within or outside the United States, and that the court may appoint arbitrators as provided in the parties' agreement. Courts refer to Article II of the New York Convention to determine whether or not to compel arbitration.

Boiled down, under Article II of the New York Convention, the party seeking to compel arbitration must show (i) a written agreement, (ii) signed by the parties, (iii) undertaking to submit a matter to arbitration, (iii) arising out of a defined legal relationship, (iv) on a subject capable of settlement by arbitration, and (v) that is not null and void, inoperative or incapable of being performed.

Article II, section 1 of the New York Convention provides that member states will recognise '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.'

Article II, section 2 explains that an 'agreement in writing' includes 'an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.'

Article II, section 3 requires that courts in a state party to the New York Convention, '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.'

In determining whether or not to compel arbitration, courts first determine whether the party seeking to compel arbitration has established the existence of an agreement satisfying section 1 of Article II, a dispute covered by that agreement susceptible to being arbitrated, and then determine whether the 'affirmative defenses' in section 3 (as well as the public policy exception to the enforcement of an award under Article V § 2(b) of the New York Convention) apply.[5]

The decision of whether the parties agreed to arbitrate the dispute at issue is a matter of the federal common law of arbitrability. '[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'[6] United States courts will give greater deference to international arbitration agreements than domestic ones.[7]

Who decides whether an agreement to arbitrate is to be enforced?

What happens when the arbitration agreement purports to give the arbitrators the power to determine disputes over the existence or validity of the arbitration agreement? Under the FAA, courts determine arbitrability unless the parties have clearly and unmistakably committed that power to the arbitrators.[8] The specific grant, however, need not be in the agreement to arbitrate itself, but will be found if the parties agreed to arbitrate under the rules of a dispute resolution organisation that gives that authority to the arbitrators.[9] Even then, however, courts are empowered to hear certain disputes. The contours of which disputes are for the courts and which are for the arbitrators have been unclear and the subject of conflicting and confusing opinions.[10]

There are three types of challenges to the validity or existence of an agreement to arbitrate: that no agreement was in fact concluded, that the contract in its entirety is invalid, or that the agreement to arbitrate is invalid.[11] The United States Supreme Court's decision in *Granite Rock* clarifies the courts' role in the first case, while *Rent-a-Center* gives greater clarity to the role of the courts versus the arbitrators in the other two cases.

Granite Rock: courts hear challenges to the formation of the agreement to arbitrate

The Supreme Court's decision in *Granite Rock* addressed the question of whether the issue of contract formation was for the courts or the arbitrators, holding squarely for the former. *Granite Rock* involved the arbitration provision of a collective bargaining agreement ('CBA'). In the course of a strike, the parties reached agreement on the terms of the CBA, which the union allegedly ratified on 2 July 2004.

However, because the parties had not agreed to a 'back-to-work' or hold harmless agreement that would protect the union and its members from liability for damages related to the strike,

the union continued striking for another month. The company sought an injunction against the strike because, it said, the dispute between the parties about a back-to-work agreement was an arbitrable grievance. The union, however, contended that the CBA had not been validly ratified on 2 July and, because the CBA was not in effect, its no-strike clause had not become effective and thus the strike was not an arbitrable grievance.

While the company's motion for an injunction was pending, the union held another vote on the CBA and ratified (or re-ratified) it, and ended the strike. The company continued to seek damages in its federal lawsuit; the union contended that the issue of when the contract was ratified should be referred to the arbitrator in that case. The lower court held that the question of the time of ratification of the CBA was for the court, not the arbitrator, and sent the issue to the jury. The jury found against the union, determining that the CBA was ratified on 2 July, not the later date claimed by the union. Because the jury found that the CBA was effective, the lower court decided that the company's claim for damages was subject to arbitration and referred the parties to arbitration.

The Ninth Circuit reversed that part of the lower court's decision, holding that United States public policy in favour of arbitration mandated that the threshold issue of the ratification date of the CBA – that is, whether or not there was a contract – be referred to the arbitrators.

The Supreme Court reversed the appellate court. Justice Thomas explained the 'proper framework for deciding when disputes are arbitrable'. That is:

> '[A] court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*. To satisfy itself that such agreement exists, the court must resolve any issue that calls into question the formation or applicability of the specific arbitration clause that a party seeks to have the court enforce. Where there is no provision validly committing them to an arbitrator, these issues typically concern the scope of the arbitration clause and its enforceability. In addition, *these issues always include whether the clause was agreed to*, and may include when that agreement was formed.'[12]

The import of the Supreme Court's analysis is that, notwithstanding a provision referring issues of arbitrability to the arbitrators, the question of whether the arbitration agreement was formed will always be for the court, and not for the arbitrators, as is the question of when agreement was reached. The Supreme Court reiterated, however, that issues of the enforceability of the arbitration agreement or its applicability to a particular dispute can be referred to the arbitrators.[13]

Rent-A-Center: where the arbitrators are delegated the power to determine arbitrability, challenges to arbitration provisions other than that delegation are for the arbitrators

While *Granite Rock* clarified that threshold issues of contract formation were for the courts, the Supreme Court, three days earlier in *Rent-A-Center*, emphasised that a court's review of challenges to the enforceability of an agreement to arbitrate, where the parties have agreed to arbitrate arbitrability, is very narrow. In *Rent-A-Center*, the employer required the employee to sign a standalone Mutual Agreement to Arbitrate ('MAA') as a condition of employment. That agreement provided for the arbitration of all disputes arising out of the employee's employment, and gave the arbitrator 'exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable'.[14]

The employee filed an employment discrimination suit in federal court, and the employer moved to stay or dismiss the suit and to compel arbitration. The employee opposed on the grounds that the MAA was unconscionable under applicable state law. The district court granted the employer's motion, finding that the arbitrator had authority to decide whether the MAA was enforceable. The Ninth Circuit Court of Appeals reversed on the issue of the arbitrator's authority, holding that because a party cannot meaningfully assent to an unconscionable agreement, unconscionability was a threshold issue to be determined by the court.

The Supreme Court reversed. The Court treated the MAA (which might be thought of as a meta-arbitration agreement) as itself an agreement containing an agreement to arbitrate. The Supreme Court then applied the rule that, where parties have delegated the determination of arbitrability to the arbitrator, challenges to the validity or enforceability of the contract as a whole (including the arbitration provision) are for the arbitrator, while

challenges specific to the parties' agreement to arbitrate are for the court. In the circumstance here, where the parties specifically delegated questions of arbitrability of the MAA itself to the arbitrator, the challenge would have had to be to the narrow delegation of that authority to the arbitrator itself, and not to the parties' general agreement to arbitrate disputes not related to the MAA. Because the employee's challenge was to the MAA itself, as a whole, rather than to the specific delegation of authority to the arbitrator to arbitrate disputes concerning the enforceability of the MAA, the Supreme Court held that the determination of unconscionability of the MAA was for the arbitrator.

Implications of *Rent-A-Center* and *Granite Rock* for international arbitration

Rent-A-Center and *Granite Rock* should bring greater predictability to what has been a confusing and uncertain area of arbitration law in the United States. Lower court decisions applying the new Supreme Court decisions are beginning to appear, and it is likely that courts applying these cases to proceedings to compel under section 206 will apply *Granite Rock* to threshold issues of contract formation (Article II §§ 1-2 of the New York Convention), but will likely apply *Rent-A-Center* to limit the scope of review of arbitration agreements that delegate arbitratibility to the arbitrators. Even after *Rent-A-Center*, however, courts will give effect to public policy considerations, for example by severing choice of law provisions that violate established United States public policy.[15]

Parties to international arbitration agreements seeking to limit court review of arbitrability issues would be well-advised to ensure that their arbitration agreements 'clearly and unmistakably' provide for arbitration of threshold issues of arbitrability. For example, the IBA Guidelines for Drafting International Arbitration Clauses § 18 provides a clause that grants the arbitrators authority to resolve issues of the 'existence, validity or termination' of the agreement. That provision likely suffices under current United States law to delegate the issue to the arbitrators.[16]

Notes

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1 130 S Ct 2847 (24 June 2010).

2 130 S Ct 2772 (21 June 2010).

3 9 USC §§ 1-307 (2006).

4 10 June 1958, 21 UST 2517, 330 UNTS 38.

5 *Orozco v Princess Cruise Line, Ltd*, No 10-23276-CIV-KIN, 2010 US Dist Lexis 111631, at *6-8 (SD Fla, 7 October 2010) (citing *Thomas v Carnival Corp*, 573 F.3d 1113, 1120 (11th Cir, 2009) and *Bautista v Star Cruises*, 396 F.3d 1289, 1294 n 7 (11th Cir, 2009)).

6 *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, 473 US 614, 626 (1985) (quoting *Moses H Cone Mem'l Hosp v Mercury Constr Corp*, 460 US 1, 24-25 (1983)); see also *Vedachalam v Tata Am Int'l Corp*, 477 F Supp 2d 1080, 1086 (ND Cal, 2007) (Application of the federal common law of contracts is 'guided by general principles of contract law and by the Restatement [(Second) of Contracts]' (quoting *First Interstate Bank v Small Bus Admin*, 868 F.2d 340, 343 (9th Cir, 1989)).

7 *Mitsubishi Motors*, 473 US at 638-39; see also *Vimar Seguros y Reaseguros, SA v M/V Sky Reefer*, 515 US 528, 538 (1995); *Sourcing Unlimited, Inc v Asimco Int'l, Inc*, 526 F.3d 38, 45-46 (1st Cir, 2008); *Dependable Highway Express, Inc v Navigators Ins Co*, 498 F.3d 1059, 1069 (9th Cir, 2007).

8 *First Options of Chicago, Inc v Kaplan*, 514 US 938, 944 (1995).

9 See Am Arb Ass'n, Inc, *Int'l Disp Resol Proc*, Article 15(1) (2009); Inter-American Com Arb Comm'n, *Rules of Proc*, Article 18 (2002); Int'l Chamber of Com, *Rules of Arb*, Article 6.4 (1998).

10 Compare, for example, *Cap Gemini Ernst & Young, US, LLC v Nackel*, 346 F.3d 360, 365 (2d Cir, 2003) (court determines validity and scope of arbitration agreement) and *Nichols v Washington Mut Bank*, No 07-CV-3216 (JG), 2007 US Dist Lexis 85936, at *24,26 n 7 (EDNY, 21 November 2007) (unconscionability claim for court to determine) with *Contec Corp v Remote Solution Co Ltd*, 398 F.3d 205, 211 (2d Cir 2005) (arbitrability is for the arbitrators under AAA rules) and *Republic of Uruguay v Chem Overseas Holdings, Inc*, Nos 05 Civ 6151 (WHP), 05 Civ 6154 (WHP), 2006 US Dist Lexis 2261, at *17-21 (SDNY, 24 January 2006) (arbitrability for arbitrator under ICC Rules).

11 *Janiga v Questar Capital Corp*, 2010 US App Lexis 15983, at *13 (7th Cir, 2 August 2010), *cert denied*, No 10-579, 2010 US Lexis 9636 (13 December 2010).

12 *Granite Rock*, 130 S Ct at 2856 (internal citations and reference omitted) (second emphasis added).

13 *Ibid*, at 2857.

14 *Rent-A-Center*, 130 S Ct at 2775.

15 *Orozco*, 2010 US Dist Lexis 111631, at *9-10 (severing choice of law provision that would have deprived seaman of her statutory rights under the Jones Act).

16 *Mercury Telco Group, Inc v Empresa de Telecommunicaciones de Bogota SA ESP*, 670 F Supp 2d 1350, 1352, 1355 (SD Fla, 2009).