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ARBITRATION AND THE U.S. CONSTITUTION: THE IMPACT OF FEDERALISM AND DUE PROCESS ON THE ENFORCEMENT OF ARBITRATION AGREEMENTS AND AWARDS IN THE UNITED STATES

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Introduction

When thinking of issues relating to arbitration, questions of constitutional law are not the first that come to mind. However, a more careful review of arbitration practice spanning the last century in the United States reveals that the topics have always been intermingled. Beginning with the enactment with the Federal Arbitration Act in 1925, which “declared a national policy favoring arbitration”³ and was intended by Congress to affirm courts’ ability to honor parties’ decision to resolve disputes through arbitration,⁴ U.S. courts and practitioners alike have clearly been grappling with how arbitration, as a separate dispute resolution process that operates outside of a national court proceeding,

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3. *Southland Corp. v. Keating*, 465 U.S. 1, 2 (1984).

4. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (noting that the enactment of the FAA “revers[e]d” centuries of judicial hostility to arbitration agreements, [and] was designed to allow parties to avoid ‘the costliness and delays of litigation,’ and to place arbitration agreements ‘upon the same footing as other contracts’”) (citation omitted).

is compatible with some of the most fundamental tents of the U.S. Constitution, including – for example – Article III’s Supremacy Clause, which vests judicial power in the courts.⁵

While the enactment of the FAA may have ended the practice, prior to the 20th Century, of U.S. courts refusing to enforce arbitration agreements (as arbitration was considered to be an inappropriate overstep of the jurisdiction of Constitutionally-granted jurisdiction of Article III courts), it has not ended the conversation about arbitration’s compatibility with various U.S. Constitutional norms and concepts, and the impact that such U.S. Constitutional norms and concepts have on arbitration practice and U.S. courts’ interpretation of arbitration agreements and awards.⁶

This article does not focus on this first issue, but the latter. For more insights into the first issue of how arbitration is compatible with various provisions of the U.S. Constitution, Professor Peter Rutledge provides a comprehensive overview of the topic in *Arbitration and the Constitution*.⁷ While Professor Rutledge analyzes the constitutional principles that underlie and inform arbitration, this article seeks to focus on how these constitutional principles are applied in practice, as demonstrated by a review of recent cases interpreting arbitration provisions and enforcing arbitration awards. Therefore, while by no means an exhaustive overview as to how the U.S. Constitution has informed arbitration practice for arbitrations seated, or subject to enforcement, in the United States (and not intended as such), this article provides a snapshot of how two topics – federalism and due process – impact arbitration proceedings more generally, and the enforcement of arbitration agreements and awards in the United States.

Section I discusses the Supremacy Clause of the U.S. Constitution, and how the system of federalism can lead to questions of conflict and preemption between the FAA, as federal arbitration law, and state arbitration law. Section I explores a potential growing rift between New York state courts and New York federal courts considering when and how parties may elect for their arbitrations to be governed by New York’s arbitration law to the exclusion of the FAA, and cautions that forum-shopping among counsel may increase as a result of recent decisions.

Section II explains how the Due Process Clause contained in the Fifth Amendment and Fourteenth Amendment to the U.S. Constitution has had a growing impact on arbitration procedures and the enforcement of arbitration awards in U.S. courts. Section II catalogues the minimum due process standards that are incorporated into arbitration procedure, and describes the phenomenon of parties seeking to organize their proceedings to account for potential due process challenges, and the chilling effect this can have on arbitrator conduct. This section also explores how due process may serve as a grounds for vacatur or the refusal of the recognition or enforcement of arbitration awards under the FAA or the New York

5. Article III of the U.S. Constitution states in relevant part: “The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. Art. III, § 1.

6. “Over the past half century, constitutional norms increasingly have worked their way into arbitration law and, to a lesser extent, arbitration law has influenced the development of constitutional norms.” Peter B. Rutledge, *Arbitration and the Constitution* (2013) at 5.

7. See generally Peter B. Rutledge, *Arbitration and the Constitution* (2013).

Convention (defined below), respectively. Finally, Section II also discusses how different due process standards as applied to foreign states and foreign state-owned entities can lead to difficulties with enforcing arbitration awards.

I. Federalism and Arbitration

Arbitration has been impacted by issues arising out of the United States's system of federalism, memorialized, *inter alia*, in Article VI, Section 2 of the U.S. Constitution, otherwise known as the Supremacy Clause, which states that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁸

As an integral part of federalism, the Supremacy Clause makes clear that the Constitution, federal laws and regulations, and international treaties supersede conflicting or inconsistent state law. Because “arbitration law” stems from many sources in the United States—including federal statute (the FAA), international treaties (the New York Convention and Panama Convention),⁹ and various state arbitration laws – Constitutional concerns regarding the preeminence of federal law can arise.

According to the U.S. Supreme Court, “[a] fundamental principle of the Constitution is that Congress has the power to preempt state law,” which is typically demonstrated where there is (1) an express provision for preemption manifested in the law; or (2) an implied intention for federal law to “occupy the field” to the exclusion of state law or where state law conflicts with prevailing federal law.¹⁰ The U.S. Supreme Court confronted the preemption question in the context of arbitration in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford, Jr.*¹¹ There, the California Court of Appeals had determined that a contract

8. U.S. CONST. Art. VI, § 2.

9. The “New York Convention” refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was opened for signature in 1958 and adopted by the United States and incorporated into law through Chapter 2 of the FAA. *See* 21 U.S.T. 2517; 9 U.S.C. §§ 201-208. The “Panama Convention” refers to the Inter-American Convention on International Commercial Arbitration of 1975, which has been adopted by the United States and incorporated into law through Chapter 3 of the FAA. *See* 101 Stat. 448, 1438 U.N.T.S. 245; 9 U.S.C. §§ 301-307.

The focus of this article pertains to commercial arbitration, and therefore does not discuss arbitrations administered pursuant to the International Centre for Settlement of Investment Disputes (“ICSID”) or ICSID awards, which are enforceable in the United States under the 1966 ICSID Convention, adopted and implemented into law in the United States through the Convention on the Settlement of Investment Disputes Act of 1966.

10. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2009).

11. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468 (1989).

with an arbitration provision and a governing law clause providing for the application of California law adopted California law not only as the substantive law under which to construe the parties' contract, but also adopted the state's arbitration law.¹² The application of California's arbitration law to the dispute would have led to the parties' arbitration to be stayed pending resolution of certain litigation; under the FAA, no stay would be available and the parties would have to proceed to arbitration.¹³ Because the application of either California arbitration law or federal arbitration law (in the form of the FAA) would result in a different outcome, the question in *Volt* was whether state arbitral rules may coexist with the FAA or are preempted by the federal statute.

The Supreme Court in *Volt* found that there was no preemption, explaining instead that the "FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."¹⁴ Rather, Congress' intent in adopting the FAA was to have courts "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."¹⁵ Because the FAA requires that "arbitration proceed in the manner provided for in [the parties'] agreement,"¹⁶ parties to an arbitration may "specify by contract the rules under which that arbitration will be conducted," including "state rules of arbitration."¹⁷ The Supreme Court accordingly found that while the FAA preempted state laws limiting agreed-upon arbitrability,¹⁸ the FAA did not "prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the [FAA] itself,"¹⁹ and, therefore, parties remained free to contract for the application of state arbitral rules that differ from the parameters set forth in the FAA.²⁰

The *Volt* decision "promote[s] federalism values" by allowing state courts to "liberally constru[e] general choice-of-law clauses to encompass an implied choice to subject the arbitration clause to state law," therefore strengthening "state power to regulate arbitration."²¹ While paving the way for the incorporation of state law into both domestic and international arbitration, the Supreme Court's decision in *Volt* did not answer the fundamental questions that have since preoccupied state and federal courts regarding

12. *Id.* at 470.

13. *Id.* at 479.

14. *Id.* at 470.

15. *Id.* at 478.

16. *Id.* at 475 (quoting 9 U.S.C. § 4).

17. *Id.* at 472, 479.

18. See *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984) (holding the FAA preempted a California state law that barred arbitration of certain claims); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-89 (1996) (Montana law that mandated arbitration agreements to comply with requirements that were "not applicable to contracts generally" was preempted by FAA).

19. *Id.* at 479.

20. See *Hall St. Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 590-92 (2008) (noting that while the FAA provides the exclusive grounds for vacatur or enforcement of an arbitral award that parties cannot change by contractual agreement, parties may "contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable").

21. Peter B. Rutledge, *Arbitration and the Constitution* (2013) at 109.

what language in choice-of-law clauses is sufficient to demonstrate the “implied choice to subject the arbitration clause to state law,” and what role – if any – remains for federal law in such scenarios.

Following *Volt*, in which the Supreme Court found that language that the agreement “shall be governed by [California law]” was sufficient to adopt California’s arbitration law and displace the FAA,²² New York state and federal courts have grappled with what role, if any, New York state arbitration law – embodied in C.P.L.R. 75 (“Article 75”) – may also play, either to the exclusion of federal law by explicit or implicit agreement (as was the case in *Volt*), or in a more gap-filling role on the more discrete topics where the FAA may otherwise be silent.²³ The New York Court of Appeals in *In re Smith Barney, Harris Upham & Co. v. Luckie*, relying on *Volt*, held that a governing law clause that stated that “[t]his agreement and its enforcement shall be governed by the laws of the State of New York,” indicated that New York law was intended not only to provide the substantive law under which the contract would be interpreted, but also “that the parties intended that New York law” – that is, Article 75 – “govern the arbitration.”²⁴ The Court further found that Article 75’s rule delegating statute of limitations questions to a court in the first instance (rather than requiring resolution by the arbitrator, as provided in the FAA) was not preempted by the FAA because the application of “this State’s body of arbitration law . . . is not inimical to the policies of the FAA.”²⁵

Shortly after *Luckie* was decided by the New York Court of Appeals, the U.S. Supreme Court clarified its position with respect to preemption and the application of state arbitration law in light of the FAA. In *Mastrobuono v. Shearson Lehman Hutton, Inc.*, the Supreme Court considered whether to apply the FAA – which presents no restrictions on arbitrators’ ability to award punitive damages – or New York arbitration law, which (as interpreted through the *Garrity* rule) generally found that arbitrators may not award punitive damages.²⁶ The Supreme Court determined that the choice-of-law provision, without more, did not “constitute evidence of an intent to exclude punitive damages claims” and apply Article 75 to the exclusion of the otherwise-applicable FAA.²⁷

Thus, while some have interpreted *Mastrobuono* “as part of an effort to trim back the state power granted by *Volt*,”²⁸ it is not in conflict with *Luckie*, since the language of

22. *Volt*, 489 U.S. at 470.

23. For a more detailed overview on the interplay between the FAA and Article 75, see B. Morag and K. Gonzalez, *CPLR Article 75 or the Federal Arbitration Act: Which One Applies to Arbitrations in New York and Why It Matters*, *The International Lawyer* (Vol. 52, No. 2).

24. *In re Smith Barney, Harris Upham & Co. v. Luckie*, 85 N.Y.2d 1293, 197-98, 202-03 (N.Y. 1995), *cert. denied sub nom.*, 516 U.S. 811 (1995).

25. *Id.* at 205.

26. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995).

27. *Id.* at 59. See also *id.* at 64 (noting that “the best way to harmonize the choice-of-law provision with the arbitration provision is to read ‘the laws of the State of New York’ to encompass substantive principles that New York courts would apply, but not to include special rules limiting the authority of arbitrators”).

28. Peter B. Rutledge, *Arbitration and the Constitution* (2013) at 110.

the choice-of-law provisions at issue in both cases are, importantly, different: While the *Luckie* language averred that “[t]his agreement *and its enforcement* shall be governed by the laws of the State of New York,”²⁹ the provision in *Mastrobuono* simply specified that the contract “shall be governed by the laws of the State of New York.”³⁰ New York state courts have largely adopted this distinction between the two cases, and found that a party’s inclusion of the “enforcement” or “enforced under” language in a choice-of-law agreement containing New York law provides sufficient evidence of a party’s intent to apply Article 75, to the exclusion of the FAA. After *Mastrobuono*, for example, the New York Court of Appeals found in *Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.* that a choice-of-law clause stating that the agreement “shall be governed by the law of [New York]” did not indicate an attempt to be bound by Article 75, “because the contract’s choice-of-law provision does not provide that New York law shall govern the enforcement of the parties’ agreement.”³¹ Not all New York state courts, however, are in accord – in a 3-2 decision by the First Department (one of four intermediate appellate courts in New York) in *Matter of Flintlock Constr. Servs. LLC v. Weiss*, the court ruled that a choice-of-law provision stating that the agreement was to be “construed and enforced” in accordance with New York law “did not unequivocally demonstrate an intent” to be bound by Article 75.³²

Regardless, New York federal courts contemplating the application of the FAA or Article 75 have recently declined to follow the New York Court of Appeals’ guidance, and have instead relied on the U.S. Supreme Court precedent to hold that New York state arbitration law cannot supplant the FAA without more evidence. Although earlier New York district court decisions agreed that “[i]n the absence of ‘critical language concerning enforcement,’ . . . the FAA’s vacatur’s rules apply,”³³ shortly after *Mastrobuono*, the Second Circuit held that *Luckie* was no longer good law and rejected the argument that the parties

29. *Luckie*, 85 N.Y.2d at 198 (emphasis added). The words “enforced under” when included in a New York choice-of-law provision to a contract with an arbitration clause demonstrates parties’ implicit intent to adopt Article 75 where the FAA may otherwise. See, e.g., B. Morag and K. Gonzalez, *CPLR Article 75 or the Federal Arbitration Act: Which One Applies to Arbitrations in New York and Why It Matters*, *The International Lawyer* (Vol. 52, No. 2) at 285-86.

30. *Mastrobuono*, 514 U.S. at 53.

31. *Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 250 (N.Y. 2005). See *N.J.R. Assocs. v. Tausend (N.J.R. Assocs.)*, 19 N.Y.3d 597, 602 (N.Y. 2012) (finding that where clause “does not include the critical ‘enforcement’ language,” “the agreement fails to unequivocally invoke the New York standard” for incorporating Article 75).

32. *In re Flintlock Constr. Servs., LLC v. Weiss*, 122 A.D.3d 51, 54 (N.Y. App. Div. 2014). For reasons why the *Flintlock* majority decision may have been wrongly decided, see B. Morag and K. Gonzalez, *CPLR Article 75 or the Federal Arbitration Act: Which One Applies to Arbitrations in New York and Why It Matters*, *The International Lawyer* (Vol. 52, No. 2) at 287-89.

33. *CRC Inc. v. Comput. Scis. Corp.*, No. 10 Civ. 4981(HB), 2010 WL 4058152, at *2 (S.D.N.Y. Oct. 14, 2010). See *Penrod Mgmt. Grp. v. Stewart’s Mobile Concepts, Ltd.*, No. 07 Civ. 10649(JGK), 2008 WL 463720, at *2 (S.D.N.Y. Feb. 19, 2008) (“In this case, the choice of law provision states only that the Agreement ‘shall be construed in accordance with New York law.’ . . . This language is insufficient to find that the parties intended Section 7503(b) [rather than the FAA] to govern the issue of waiver” of jurisdictional objections to arbitration).

had implicitly selected Article 75.³⁴ There, the Second Circuit found that a choice-of-law provision which simply stated that “the Agreement . . . and its enforcement ‘shall be governed by the laws of the State of New York’” did not “clearly identif[y]” a desire to replace the FAA, and therefore could not “be construed to impose substantive restrictions on the parties’ rights under the [FAA].”³⁵ The Second Circuit’s general unwillingness to find that a choice-of-law provision electing New York law – even where it includes the “enforcement” language that the New York Court of Appeals has repeatedly found to incorporate Article 75 – has been twice affirmed. In *Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda.*, the Second Circuit contemplated whether Article 75 applied to allow a court to resolve a dispute regarding the statute of limitations, or if such an issue was for the arbitrator to decide, pursuant to the FAA.³⁶ While acknowledging that “the question is a close one,”³⁷ the Second Circuit nevertheless determined that the “holding in *Bybyk* compels us to conclude that the contracts in this case are at least ambiguous” with respect to whether the parties intended for Article 75 to govern,³⁸ and finding no clear and unmistakable intent to apply Article 75, the FAA’s election for arbitrators to resolve timeliness disputes took precedence.³⁹ Most recently in a 2022 summary order, the Second Circuit further confirmed its reliance on precedent in *Bybyk* and *Bechtel*, and rejected the New York Court of Appeals’ position.⁴⁰ In *Empire Asset Management Company v. Best*, the Second Circuit acknowledged that the choice-of-law provision stating that “the interpretation and enforcement of the rights and duties of the parties will be governed by the laws of the State of New York,” would result in New York state courts applying New York arbitration law, but declined to do so, finding that this position “is conclusively foreclosed by our holdings in *Bybyk* and *Bechtel*, under *Mastrobuono Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995).”⁴¹

The developing and sometimes differing case law among New York state and federal courts on the interplay between state arbitration law and federal arbitration law highlight

34. See *Painewebber Inc. v. Bybyk*, 81 F.3d 1193, 1200 (2d Cir. 1996).

35. *Id.*

36. See *Bechtel do Brasil Construções Ltda. v. UEG Araucária Ltda.*, 638 F.3d 150, 154-55 (2d Cir. 2011). The choice-of-law provision in *Bechtel* stated that “this agreement to arbitrate shall be governed by the laws of the state of New York,” and also contained another provision that “[t]he law governing the procedure and administration of any arbitration . . . is the law of the State of New York.” See *Bechtel*, 638 F.3d at 152. See also *id.* at 158 (noting that “the contracts at issue here do not, in fact, state that their ‘enforcement’ shall be governed by New York law. While *Bechtel* may be correct that a New York court might find the ‘effect’ language synonymous with this ‘enforcement’ language, the fact that the parties did not use the particular ‘enforcement’ language referenced in *Diamond Waterproofing* weakens *Bechtel*’s argument that this language indicates the parties’ clear intent to permit a court to decide timeliness issues pursuant to C.P.L.R. 7502(b)).

37. *Bechtel*, 638 F.3d at 154.

38. *Id.* at 156.

39. *Id.* at 158.

40. See generally *Empire Asset Management Co. v. Best*, No. 21-1798-cv, 2022 WL 893402 (2d Cir. Mar. 28, 2022).

41. *Id.* at *1.

the uncertainties and unintended consequences that can arise in determining the impact of choice-of-law provisions on an arbitration, even in light of U.S. Supreme Court jurisprudence on the subject. The tension between New York state courts' and New York federal courts' interpretation of choice-of-law provisions and the arbitration law that will be applied creates a "perplexing state of affairs for the relationship between private choice and federalism."⁴² While reminiscent of the seemingly contrasting holdings of *Volt* and *Mastrobuono*, where "the exact same clause could have very different consequences depending solely on the court through which it percolated,"⁴³ this divide between state and federal is likely to have practical consequences for arbitrations, since the different application of the FAA or Article 75 can directly impact a party's ability to compel arbitration or enforce an award,⁴⁴ and may also encourage forum shopping by counsel (who may be more inclined to bring matters before a state court versus federal court, depending on the language of the agreement and which arbitration law counsel wishes to see applied).

II. Due Process and Arbitration

The Constitutional right to due process has similarly had an important impact on the enforcement of arbitration awards in the United States, which oftentimes informs how parties choose to structure and conduct their arbitration proceedings (whether seated in the United States or in a foreign, non-U.S. jurisdiction). In the United States, due process of law is guaranteed by the Due Process Clause in the Fifth and Fourteenth Amendments, each of which states as follows:

No person shall be . . . deprived of life, liberty, or property, without due process of law.⁴⁵

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.⁴⁶

The earliest impacts of the U.S. due process guarantees are often experienced in the arbitration proceeding itself. Whether the arbitration is seated in the United States or

42. Peter B. Rutledge, *Arbitration and the Constitution* (2013) at 111.

43. *Id.* (emphasis in original).

44. See Boaz Morag and Katie Gonzalez, *NY Ruling Underscores Federal, State Arbitration Law Conflict*, Law360 (Nov. 6, 2020), available at <https://www.law360.com/articles/1326628/ny-ruling-underscores-federal-state-arbitration-law-conflict> (describing how a New York state court's decision to apply Article 75 to the exclusion of the FAA was determinative because Article 75 foreclosed a post-award challenge to the arbitrators' jurisdiction that would have been permissible under the FAA).

45. U.S. CONST. Fifth Amend.

46. U.S. CONST. Fifth Amend.

elsewhere, international arbitration practice generally requires arbitration to comport with basic requirements of equality and fairness, which are considered to be congruent with the general due process of law requirements.⁴⁷ As explained in a leading international arbitration treatise, while “most national arbitration regimes do not impose significant mandatory limitations” on the manner in which parties can agree to conduct their arbitration, “legislation and/or judicial decisions in most developed jurisdictions require that arbitral proceedings seated on local territory satisfy minimal standards of procedural fairness and equality. These standards are variously referred to as requiring ‘equality of treatment,’ ‘due process,’ ‘natural justice,’ ‘procedural regularity,’ or ‘fair and equitable treatment.’”⁴⁸ As a result, while the FAA does not expressly mandate certain due process requirements, U.S. courts have interpreted the FAA as compelling the tribunal to meet “‘the minimal requirements of fairness’ – adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.”⁴⁹ U.S. courts have been careful to note, in this regard, that arbitration need not incorporate the same, “complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure,”⁵⁰ as parties who have agreed to resolve their disputes through arbitration have expressly opted out of specific national litigation, and any attendant procedures.⁵¹

The popularity of the United States as a forum for enforcement proceedings, coupled with the potential impact that arguments of due process violations during an arbitration itself can have on a party’s ability to seek to confirm or vacate an award,⁵² oftentimes lead parties and tribunals to make certain arguments or preserve their objections to an outcome in the arbitration proceeding, so as to lay the foundation for a potential basis for the set aside of an arbitration award, should such award not be in the party’s favor.⁵³ While purported

47. See, e.g., UNCITRAL *Notes of Organizing Arbitral Proceedings* (2016) ¶ 8 (“[d]iscretion and flexibility are useful as they enable the arbitral tribunal to make decisions on the organization of arbitral proceedings that take into account the circumstances of the case and the expectations of the parties, *while complying with due process requirements*”) (emphasis added); Gary Born, *International Commercial Arbitration* (3d ed. 2022) § 15.03[B] (explaining the “most national legal systems provide the arbitral tribunal with substantial discretion to establish the arbitral procedures in the absence of agreement between the parties, *subject only to general due process requirements*”) (emphasis added).

48. Gary Born, *International Commercial Arbitration* (3d ed. 2022) § 15.04[B]

49. *Abu Dhabi Inv. Auth. v. Citigroup, Inc.*, No. 12 Civ. 283(GBD), 2013 WL 789642, at *7 n.4 (S.D.N.Y. March 4, 2013), *aff’d* 557 F. App’x 66 (2014), *cert. denied*, 135 S.Ct. 137 (2014).

50. *Id.* See also *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 299 (5th Cir. 2004).

51. See *Parsons & Whittlemore Overseas Co., Inc. v. Generale de l’Industrie du Papier (RAKTA)*, 508 F.2d 969, 976 (2d Cir. 1974) (“By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights . . . in favor of arbitration ‘with all of its well known advantages and drawbacks.’”) (citation omitted).

52. See *infra* at 11-12.

53. See Gary Born, *International Commercial Arbitration* (3d ed. 2022) § 15.01[B] (noting that arbitrators can “suffer from ‘due process paranoia,’” “characterized by acceding to parties’ unreasonable applications and requests in order to minimize the risk that an award will be challenged or annulled”); *id.* (finding that “[p]articular attention is devoted to issues of

due process violations remain one of the animating purposes behind U.S. courts' refusal to enforce both domestic and international arbitration awards, a party's ability to avoid compliance with an arbitration award based on due process arguments is quite remote.

Indeed, both Chapter 1 of the FAA and the New York Convention (which was adopted by the United States and incorporated into law through Chapter 2 of the FAA)⁵⁴ provide grounds for vacatur or set aside of an arbitration award based on the constitutional norm of due process, although due process is not expressly mentioned in either instrument. As relevant here, Chapter 1 of the FAA provides that an arbitration award may be vacated "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any misbehavior by which the rights of any party have been prejudiced."⁵⁵ The New York Convention similarly states that a court may refuse the recognition and enforcement of an award where "[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."⁵⁶ Therefore, while neither the FAA nor the New York Convention explicitly refer to principles of due process, the references to the parties' right to have an award issued on the basis of "evidence pertinent and material to the controversy" and the ability to "present his case," demonstrates that "both laws provide that an award can be denied enforcement (or vacated under the FAA) in cases where a party lacked proper notice of the arbitral proceedings. To evaluate these claims, courts applying these standards generally have imported due process norms."⁵⁷

As a result, in cases where the FAA standards for vacatur or the New York Convention grounds for refusing enforcement apply, U.S. courts have recognized the important role of due process. As interpreted, U.S. courts have found that the FAA requires vacatur where the tribunal's conduct amounts to "fundamental unfairness" that violates a party's due process rights.⁵⁸ Fundamental fairness requires that each party has an opportunity to present its evidence and argument, and as such an arbitral award may be overturned where

procedural fairness in international arbitration because international arbitration conventions, national arbitration legislation and institutional arbitration rules guarantee the parties' right to due process").

54. Where both the New York Convention and the Panama Convention would apply to an arbitration that is seated outside of the United States, the Panama Convention takes precedence when "a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States." 9 U.S.C. § 305. That said, the Panama Convention and New York Convention enforcement provisions are "substantively identical." *PDV Sweeny, Inc. v. ConocoPhillips Co.*, No. 14-CV-5183(AJN), 2015 WL 5144023, at *4 (S.D.N.Y. Sept. 1, 2015), *aff'd* 670 F. App'x 23 (2d Cir. 2016).

55. 9 U.S.C. § 10(a)(3).

56. N.Y. CONV., Art. V(1)(b).

57. Peter B. Rutledge, *Arbitration and the Constitution* (2013) at 47.

58. *Tempo Shain Corp. v. Bertek, Inc.*, 120 F3d 16, 18 (2d Cir. 1997).

an arbitrator excludes evidence without any “reasonable basis.”⁵⁹ In determining whether a party has been denied “fundamental fairness,” the key issue is whether the arbitral tribunal “allow[ed] each party an adequate opportunity to present its evidence and argument.”⁶⁰ Vacatur is warranted on this ground where a party identifies pertinent and material evidence that the tribunal refused to hear and demonstrates that there was no “reasonable basis” for the arbitrator not to consider such evidence.⁶¹ Vacatur is also warranted under the FAA where an arbitral tribunal “bar[s] a party from defending itself by precluding discovery of files central and dispositive to the dispute before it.”⁶² U.S. courts applying the New York Convention have considered similar rationales in assessing whether to refuse enforcement or recognition of an award on the basis that a party was given improper notice or otherwise unable to present its case, which is “essentially sanctions the application of the forum state’s standards of due process.”⁶³

Regardless of the *availability* of these due process grounds to vacate or deny enforcement to arbitration awards, this defense is usually construed narrowly, as arbitrators have broad latitude in managing arbitration proceedings. Indeed, while courts have acknowledged that while due process rights are protected and generally must be adhered to in arbitration proceedings, as noted above, they also recognize that “the full panoply of rights associated with judicial proceedings are not available during arbitration,”⁶⁴ and the tribunal’s unwillingness to consider certain documents or refusal to hear cross-examination of a witness or expert will only amount to a due process violation sufficient to justify the vacatur or refusal to enforce an arbitration award where such conduct “prejudices [the parties’] rights” to a fair hearing.⁶⁵

59. *Id.* at 20 (citing *Hotelese Condado Beach v. Union De Tronquistas Local 901*, 763 D.2d 34, 39 (1st Cir. 1985)).

60. *Companion Prop. & Cas Ins. Co. v. Allied Provident Ins., Inc.*, No. 13 Civ. 7865, 2014 WL 4804466, at *10 (S.D.N.Y. Sept. 26, 2014).

61. *See Kellner v. Amazon*, 1:20-CV-06322 (AMD)(PK), 2022 WL 1085418, at *5 (E.D.N.Y. Mar. 1, 2022).

62. *Home Indem. Co. v. Affiliated Food Distributors, Inc.*, No. 96 Civ. 9707(RO), 1997 WL 773712, at *5 (S.D.N.Y. Dec. 12, 1997).

63. *Tianjin Port Free Trade Zone Int’l Trade Serv. Co. v. Tiancheng Chempharm, Inc. USA*, 771 F. App’x 36, 37 (2d Cir. 2019) (“We have recognized that the defense provided for in that subsection of the Convention ‘essentially sanctions the application of the forum state’s standards of due process’”) (quoting *Generica Ltd v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129-30 (7th Cir. 1997)).

64. *LaPine v. Kyosera Corp.*, No. C 07-06132 MHP, at *8 n.5 (N.D. Calif. May 23, 2008) (citing cases). *See Howard Univ. v. Metro. Campus Police Officer’s Union*, 512 F.3d 716, 721 (D.C. Cir. 2008) (due process protections in arbitration proceedings does not require arbitration tribunal to follow U.S. evidentiary procedures; a “fundamentally fair hearing” will suffice); *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 (10th Cir. 2001) (“a fundamentally fair [arbitration] hearing requires only notice, opportunity to be heard and to present *relevant and material evidence* and argument before the decision makers”).

65. *OJSC Ukrnafta v. Carpathy Petroleum Corp.*, 957 F.3d 487, 499 (5th Cir. 2020) (failure to admit certain evidence did not rise to due process violation); *Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1130-31 (7th Cir. 1997) (tribunal narrowing the scope or refusing

The U.S. Constitutional due process requirements have also led to the potential for a disparity among a party's ability to enforce an arbitration award against a state-owned entity that was a signatory to the arbitration agreement and a party to the arbitration, versus as against a foreign state, who was neither a signatory nor a party. In the United States more generally, a party's ability to bring a lawsuit against a party in a particular forum is limited by personal jurisdiction, which the U.S. Supreme Court has held requires "minimum contacts" with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"⁶⁶ As it relates to the enforcement of arbitration award, in an action against a foreign state to enforce an arbitration award, U.S. courts have found that there is no need to undertake a "minimum contacts" analysis as required by the due process clause in the Fifth Amendment to demonstrate personal jurisdiction over the sovereign, because a sovereign is not considered a "person" entitled to Constitutional protections.⁶⁷ This conclusion is based, among other things, on a strict textualist interpretation of the Fifth Amendment, which states that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁶⁸ Courts have reasoned that because a sovereign is not a "person," they are not afforded Fifth Amendment rights, but instead are protected by "principles of comity and international law," which "recognizes the reality that foreign nations are external to the constitutional compact" and "preserves the flexibility and discretion of the political branches in conducting this country's relations with other nations."⁶⁹ This conclusion, courts have found, is reinforced by the practical realities underpinning the personal jurisdiction requirement, which "recognizes and protects an individual liberty interest" enshrined in the Due Process Clause.⁷⁰

While this means that a U.S. court can exercise jurisdiction and the action can proceed against a foreign state even if the sovereign has no presence in the jurisdiction, courts have found that the same principles do not apply with respect to state-owned entities, which are legal persons afforded due process protections. In *TMR Energy Ltd. v. State Property*

cross-examination of a witness because it does not pertain to what the tribunal views as the main issue in the case does not deny due process, even if a party considers such testimony to be key); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 304 (5th Cir. 2004) (no due process violation where tribunal refused additional discovery in response to additional arguments because the parties already had sufficient opportunity to present their cases).

66. *International Shoe Co. v. State of Wash., Office of Unemployment Compensation and Placement*, 326 U.S. 310, 316 (1945) (citation omitted). See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985) (noting that the Due Process Clause shields the defendant from litigating in a forum with which it does not have minimum contacts).

67. See, e.g., *Price v. Socialist People's Libyan Arab Jamajiriya*, 294 F.3d 82, 95-96, 99 (D.C. Cir. 2002) (holding "that foreign states are not 'persons' protected by the Fifth Amendment," and, therefore, "[t]he constitutional limits that have been placed on the exercise of personal jurisdiction do not limit the prerogative of our nation to authorize legal action against another sovereign").

68. U.S. CONST., Fifth Amend.

69. *Price*, 294 F.3d at 97.

70. *Id.* at 98 (citing *Ins. Corp. of Ire. v. Compagnie de Bauxties de Guinee*, 456 U.S. 694, 702 (1982)).

Fund of Ukraine, for example, the D.C. Circuit Court considered “whether an agency or instrumentality of a foreign state is entitled to the protection of the due process clause,”⁷¹ and concluded that such state-owned entities were entitled to such protections, to the extent they had a separate “constitutional status different from that of the” foreign state.⁷²

As a result, parties attempting to initiate an action against a state-owned entity in the United States—including an action to enforce an arbitration award—will need to demonstrate personal jurisdiction through “minimum contacts.” Since many state-owned entities may not have sufficient “minimum contacts” in the United States to support a finding of personal jurisdiction over them, parties that seek to enforce an award against a state-owned entity in a U.S. court have sought to avoid this Constitutional requirement through an application of the state common law theory of “alter ego” liability, arguing that the state-owned entity is an “alter ego” of the foreign state. As a consequence, foreign states that were not a party to an arbitration award may find themselves named as a defendant in a U.S. court proceeding to enforce against them an award issued against one of their state-owned entities.

As a practical matter, proving alter ego liability is a very high bar, and of the cases surveyed in which a party argued personal jurisdiction was proper because a state-owned entity was the alter ego of the sovereign (as a non-party to the arbitration agreement, proceedings and award), this argument has been met with reluctance by courts and very little—if any—success. For example, in *Gater Assets Limited v. AO Moldovagaz*, the United State Court of Appeals for the Second Circuit considered whether it could enforce an arbitration award against the Republic of Moldova, even though it “was not a party to the arbitration agreement,” because the party against whom the arbitration award was rendered—Moldovan gas company AO Moldovagaz (“Moldovagaz”)—was alleged to be an alter ego of a foreign sovereign.⁷³ Recognizing that Moldovagaz “has no contacts with the United States” that would ordinarily result in the district court “lack[ing] personal jurisdiction over Moldovagaz,” the Second Circuit acknowledged that “we have recognized an exception to the minimum contacts requirement when a sovereign state is the defendant,” and set out to determine whether Moldovagaz was an “alter ego[] of [a] foreign sovereign[],” and therefore could not “claim the protection of the Fifth Amendment’s Due Process Clause.”⁷⁴ To make this assessment, the Second Circuit “use[d] the framework set out in the Supreme Court’s decision” in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) (“*Bancec*”),⁷⁵ in which the Supreme Court found that while “governmental instrumentalities established as juridical entities distinct and independent from their sovereign” enjoy a presumption of separateness from the sovereign, such presumption could be overcome in one of two ways: (i) where viewing the instrumentality as a separate entity “would work fraud or injustice,” or (ii) “where a corporate entity is so extensively

71. *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 302 (D.C. Cir. 2005).

72. *Id.* at 301.

73. *Gater Assets Limited v. AO Moldovogaz*, 2 F.4th 42, 53-54 (2d Cir. 2021).

74. *Id.* at 55.

75. See generally *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629-31 (1983). This case was superseded by statute on other grounds, as stated in *Rubin v. Islamic Republic of Iran*, 138 S.Ct. 816 (2018).

controlled by its owner that a relationship of a principal and agent is created.”⁷⁶ Noting that “[a]n alter ego relationship is not easily established,” the Second Circuit ultimately found that Moldovagaz was not an alter ego of Moldova because the plaintiff failed to “show that [Moldova] ‘exercises significant and repeated control over [Moldovagaz’s] day-to-day operations,’” nor had plaintiff demonstrated that fraud or injustice would result from maintaining the presumption of separateness.⁷⁷ Consequently, “[b]ecause we do not equate Moldovagaz with a foreign sovereign” and therefore “due process requires that it have minimum contacts with the United States before an American court may exercise jurisdiction over it,” the Second Circuit found personal jurisdiction lacking and concluded that the district court correctly dismissed the action.⁷⁸

The *Gater* case aligns with others, including in the D.C. Circuit, which have found that arbitration awards cannot be enforced against state-owned entities in courts where personal jurisdiction was lacking, where the plaintiff could not demonstrate that the state-owned entity met the *Bancec* test required to defeat the presumption of separateness between the state-owned entity and the sovereign.⁷⁹

III. Conclusion

While issues of the U.S. Constitution may seem, on first glance, of distant relevance to arbitration practitioners, Constitutional principles like federalism and due process play a very important role in the conduct of the arbitration and the rules and standards that may govern the enforcement of arbitration agreements and arbitration awards. Far from an exercise in academia, understanding the role of Constitutional principles and norms in arbitration is essential to the practice of arbitration, particularly in the United States, and counsel should be prepared to understand these issues and consider the potential impacts on their cases.

76. *Id.* at 629. While most alter ego cases under *Bancec* have historically been brought under the “fraud or injustice” prong, the five factors to consider in conducting the “extensive control” analysis under *Bancec* include: “(1) the level of economic control by the government; (2) whether the entity’s profits go to the government; (3) the degree to which government officials manage the entity or otherwise have a hand in its daily affairs; (4) whether the government is the real beneficiary of the entity’s conduct; and (5) whether adherence to separate identities would entitle the foreign state to benefits in United States courts while avoiding its obligations.” *Rubin*, 138 S.Ct. at 823.

77. *Id.* at 61.

78. *Id.* at 65-66.

79. *See, e.g., GSS Group Ltd v. National Port Authority*, 680 F3d 805, 817 (D.C. Cir. 2012) (affirming district court’s dismissal of a petition to confirm an arbitration award against the National Port Authority of Liberia after concluding that the Port Authority did not have sufficient contacts with the United States); *UAB Skyroad Leasing Inc. v. OJSC Tajik Air*, 20-cv-0763, 2022 WL 2189300, at *2 (D.D.C. Jan. 26, 2021) (“[G]iven that Skyroad concedes that Tajik Air lacks minimum contacts with the United States, the district court did not err in finding that it could not exercise personal jurisdiction over Tajik Air consistent with the Due Process Clause.”).