Summer 2014

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Recommended Citation
Tiffany Ng, Choice of Procedural Law in International Commercial Arbitration: Providing "Proper Notice" to a Foreign Party to Ensure That the Arbitral Award Can Be Enforced, 10 Hastings Bus. L.J. 491 (2014).
Available at: https://repository.uchastings.edu/hastings_business_law_journal/vol10/iss2/6

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Choice of Procedural Law in International Commercial Arbitration: Providing “Proper Notice” to a Foreign Party to Ensure That the Arbitral Award Can Be Enforced

Tiffany Ng*

International parties seeking dispute resolution often opt for arbitration for flexibility and financial reasons. Parties, however, frequently fail to anticipate issues in choice of procedural laws before entering into arbitration agreements. Parties are usually not meticulous enough to specify what procedural laws govern the arbitral process should disputes arise. As a result, international parties often claim due process violations because they received notice of the proceeding based on a foreign standard, which often offers less protection than their home country. As of today, there are still no standard guidelines for courts to determine what constitutes “proper notice.” This note outlines various approaches that international courts have adopted to determine whether a party has been deprived of an opportunity to be heard due to lack of “proper notice.” These approaches include: (1) applying the national law of the recognition forum; (2) applying the national law of the arbitral seat; or (3) applying a uniform international standard derived directly from the New York Convention Article V(1)(b). This note argues for a standardized rule to apply the national law of the arbitral seat when there are disputes regarding the “proper notice” standard. This approach provides international parties with predictability as it follows the New York Convention’s principles most faithfully.

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I. INTRODUCTION

International commercial arbitration has become a frequently used dispute resolution mechanism to resolve contractual disputes between parties from different legal systems, as the economy is increasingly globalized.\(^1\) Parties opt for international arbitration instead of litigation in courts for a number of perceived advantages. Arbitration gives parties from different legal systems a more cost efficient way to resolve disputes.\(^2\) It also offers parties a high degree of flexibility, including the ability to select the venue, the language, the arbitrators, the arbitration process, and maintain confidentiality.\(^3\)

The effectiveness of international commercial arbitration depends on the regime established by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention.\(^4\) The Convention, concluded in 1958, now includes 142 nations—including the United States and most other leading commercial countries.\(^5\) The New York Convention imposes two fundamental obligations on its signatories: (1) Enforce agreements to arbitrate, and (2) recognize awards under such agreements and enforce them through proceedings not substantially more burdensome than those applicable to domestic awards.\(^6\)

Even though the parties may include additional procedural rules to govern the whole arbitration process as they wish, few parties spend the extra time and effort to include such details into the arbitration agreement when they do not anticipate future disputes. Most arbitration agreements include a “catch all” provision: adopting the set of rules published by the parties’ chosen arbitration provider. The New York Convention Article V(1)(b) provides that enforcement of an arbitral award may be denied when the party

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3. *Id.*
5. *Id.*
6. *Id.*
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.\(^7\) This provision only considers whether a party received notice and was unable to present its case, rather than ensuring the entirety of procedural due process law.\(^8\) Courts, however, have reached different conclusions as to which standard to use when determining what constitutes proper notice. Even if courts concluded that the notice of arbitration satisfies the enforcing country's due process requirements, the parties may bring a claim under the New York Convention Article V(2)(b), which provides that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.

This note analyzes how courts in different legal systems have interpreted the "proper notice" standard in the New York Convention Article V(1)(b) when deciding whether to enforce or refuse to enforce arbitral awards, and the factors courts normally look at to determine whether enforcing an arbitral award would violate public policy. The analysis is based on three court decisions from three different legal systems.

II. CASE BACKGROUND

A. THE AMERICAN COURT'S APPROACH—QINGDAO FTZ GENIUS INT'L TRADING v. P & S INT'L

Qingdao Free Trade Zone Genius Int'l Trading Co. ("Qingdao"), a Chinese company, brought a claim in the District Court of Oregon seeking to enforce a Chinese arbitral award against P and S International, Inc. ("P & S"), an American company, in the United States.\(^9\) The parties disputed whether P & S received proper notice of arbitration from Qingdao.\(^10\) Qingdao contracted with P & S

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10. Id.
to broker the sale of wood chips to a purchaser in China.\textsuperscript{11} The sales contract was written in English with the following arbitration clause:

Any dispute arising from the execution of, or in connection with, this Sales Contract should be settled through negotiation. In case no settlement can be reached, the case shall then be submitted to Qingdao Arbitration Commission for arbitration according to the Commission’s Rules of Arbitration. The award rendered by the Commission shall be the final and binding [sic] upon both parties.\textsuperscript{12}

According to Rule 67 of the Qingdao Arbitration Commission (“QDAC”), the “Chinese language is the working language of the Arbitration Commission.”\textsuperscript{13}

Subsequently, the parties had a dispute regarding the sales contract and Qingdao submitted a claim to the QDAC in China for arbitration. The QDAC mailed documents to the P & S headquarters in Oregon, including two English pamphlets titled “Qingdao Arbitration Commission Arbitration Rules” and “List of Arbitrators.”\textsuperscript{14} Qingdao did not include the sales contract in its mailing, and none of the documents contained Qingdao’s name in English.\textsuperscript{15} The Chinese documents contained the name and the address of P & S in English and the number “44911.88,” which was the disputed amount claimed by Qingdao.\textsuperscript{16} The Chinese documents also contained, in English, the phone number, fax number, and address of the QDAC.\textsuperscript{17}

In addition, Qingdao personnel sent P & S two different emails stating:

We suggest you and we should go to Qingdao Arbitration Commission for arbitration. The commission [sic] will give us a fair adjudication. We have to do it. We must do it, if you do not pay us the money which we firstly paid instead of your company.\textsuperscript{18}

P & S asserted that the arbitration award was unenforceable

\textsuperscript{11. Id.}  
\textsuperscript{12. Qingdao, 2009 WL 2997184 at *1.}  
\textsuperscript{13. Id. at *4.}  
\textsuperscript{14. Id. at *2.}  
\textsuperscript{15. Id.}  
\textsuperscript{16. Id. at *4.}  
\textsuperscript{17. Id.}  
\textsuperscript{18. Id. at *2.}
because P & S did not receive the notice of arbitration in English.\textsuperscript{19} Further, one of P & S’s two owners claimed that he thought the papers were related to another dispute of theirs that was supposed to be handled by their attorney in China.\textsuperscript{20} P & S alleged that this lack of proper notice violated the due process clause under the United States Constitution.\textsuperscript{21} In addition, the New York Convention Article V(1)(b) provides that an arbitral award is unenforceable when the 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.\textsuperscript{22}

To support its claim, P & S relied heavily on a California case, \textit{Julen v. Larson}, in which the Court of Appeal refused to enforce a Swiss court judgment on the ground that the service of Swiss process, in German, did not give the defendant sufficient notice of the pending Swiss action and that the Swiss court never acquired personal jurisdiction over the defendant.\textsuperscript{23} In \textit{Julen}, the court concluded that “at minimum a defendant should be informed in the language of the jurisdiction in which he is served that a legal action is pending against him at a particular time and place.”\textsuperscript{24}

Here, the circumstances presented could in fact lead to the inference that P & S knew it had agreed to arbitrate disputes with the QDAC in China, and had reason to suspect that Qingdao was about to bring arbitration proceedings against P & S in China. The magistrate judge in this case, however, ruled that regardless of whether the emails from Qingdao were considered, the emails did not generate an inference that P & S had actual knowledge that Qingdao had commenced an arbitration proceeding on a particular date in a particular place.\textsuperscript{25} Further, the contract P & S signed did not contain a provision under which P & S agreed to service of process by the QDAC in Chinese.\textsuperscript{26} The District Court of Oregon adopted the United States notice requirement in determining whether Qingdao had satisfied the due process requirement in the United States. The court concluded that the documents and circumstances of the case did not demonstrate that P & S received reasonably calculated notice,

\begin{flushleft}
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} New York Convention, \textit{supra} note 7.
\textsuperscript{24} Qingdao, 2009 WL 2997184 at *3.
\textsuperscript{25} Id. at *4.
\textsuperscript{26} Id.
\end{flushleft}
under all the circumstances, to apprise them of the pendency of the arbitration and afford them an opportunity to be heard.\textsuperscript{27} Ultimately, \textit{Qingdao FTZ Genius International Trading v. P&S International} illustrates that some courts will substitute their own proper notice standard instead of the proper notice standard of either the place of arbitration or the place of the chosen arbitration provider.

\textbf{B. THE CHINESE COURT'S APPROACH—\textit{HAIMALU V. POPEYES}}

The Chinese court adopted a different approach when it faced an identical problem as the District Court of Oregon.\textsuperscript{28} The parties in this case, Haimalu and Popeyes, signed a contract with an arbitration clause stating that all disputes should be submitted to the Korean Commercial Arbitration Board ("KCAB") for arbitration and all parties were to follow the KCAB’s International Rules. After the KCAB issued an arbitral award against Popeyes, Haimalu brought a claim seeking to enforce the arbitral award against Popeyes in China.\textsuperscript{29} In defending this claim, Popeyes claimed the notice of arbitration did not satisfy China’s notice requirement.\textsuperscript{30} The notice of arbitration was in Korean and Popeyes did not act upon receiving this notice because Popeyes’ representatives did not understand Korean.\textsuperscript{31}

The New York Convention Article V(1)(b) provides that enforcement of an arbitral award may be denied when the party against whom the award is invoked has not been given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case.\textsuperscript{32} Relying on Article V(1)(b) of the New York Convention, the lower court in China refused to enforce the arbitral award.\textsuperscript{33} The Heilongjiang Province Supreme People’s Court, however, reversed the lower court’s decision and enforced the arbitral award.\textsuperscript{34} The Heilongjiang Province Supreme People’s Court referred to the KCAB Rule 24 and the Korean Arbitration Act Article 23 in coming to its conclusion.

\begin{itemize}
\item \textsuperscript{27} Id. at *5.
\item \textsuperscript{28} TS Haimalu, Daxing Paipaisi Shipin Youxiangongsi (TS海碼路, 大慶派派思食品有限公司), [2005] 民四他字第46号, People’s Court of Heilongjiang (黑龙江省高级人民法院), [hereinafter TS Haimalu].
\item \textsuperscript{29} TS Haimalu, supra note 28.
\item \textsuperscript{30} Id.
\item \textsuperscript{31} Id.
\item \textsuperscript{32} New York Convention, supra note 7.
\item \textsuperscript{33} TS Haimalu, supra note 28.
\item \textsuperscript{34} Id.
\end{itemize}
The KCAB Rule 24 states that: “In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.”

The Korean Arbitration Act Article 23 states that:

(1) The parties shall be free to agree on the language or languages to be used in the arbitral proceedings, failing such agreement, the arbitral tribunal shall determine such language or languages, and otherwise the Korean language shall be used.

(2) The agreement or determination referred to in paragraph (1) shall, unless otherwise specified therein, apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(3) The arbitral tribunal may, if considered necessary, order a party to submit any documentary evidence accompanied by a translation into the language or languages referred to in paragraph (1).

The Heilongjiang Province Supreme People’s Court held that even though the notice of arbitration had not been translated to English or Chinese, it did not violate any KCAB rules or the Korean Arbitration Act regarding proper notice. The parties signed a contract stating the KCAB rules will be applied. The language of the arbitration, however, was not specified in the contract so the arbitral tribunal had the authority to determine what language would govern the arbitration proceedings. By choosing to do business with a foreign party, it was expected that all parties had the resources to communicate with each other effectively. Further, there was evidence indicating that Popeyes did receive the notice of arbitration by signing for the document’s receipt when delivered by DHL. The DHL receipt clearly stated in English that the document was sent by KCAB. Ultimately, the Heilongjiang Province Supreme People’s

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37. TS Haimalu, supra note 28.
38. Id.
39. Id.
40. Id.
Court respected the parties’ choice of arbitration rules and enforced the arbitral award because China and Korea were both signatories of the New York Convention.41

C. THE ITALIAN COURT’S APPROACH – ABATI LEGNAMI V. FRITZ HAUPL

The American and Chinese courts are not the only ones that have tackled the “proper notice” standard in international arbitration. An arbitral award in favor of Fritz Haupl was rendered by the Arbitration Court at the Vienna Commodity Exchange.42 Fritz Haupl sought enforcement of the award against Abati Legnami in Italy before the Court of Appeal of Milan. The Court of Appeal granted enforcement and Abati Legnami appealed to the Supreme Court.

Abati Legnami argued that the Court of Appeal violated the New York Convention Article V(1)(b). According to Abati Legnami, he was given less than thirty days notice before he had to appear before the tribunal.43 The Supreme Court noted that the Italian legal notice period is typically ninety days and that all time limits for proceedings before Italian courts are suspended between August 1st and September 15th.44 The Supreme Court held that this provision led to a “thinning out” of all juridical activities, so Abati Legnami’s opportunity to defend himself might have been affected.45 Accordingly, the Supreme Court remanded the case to the Court of Appeal of Milan, requesting that it determine whether Abati Legnami’s opportunity to defend himself had been affected.46

II. STANDARDS FOR REVIEW

The standard of review of an arbitration award by an American court is extremely narrow.47 The reason for such limited judicial review is to avoid undermining the goals of arbitration: settling disputes efficiently and avoiding costly and time-consuming

41. Id.
44. Id.
45. Id.
46. Id.
litigation. The New York Convention specified the grounds for challenges in recognition and enforcement proceedings. Parties to the Convention are obligated to accept recognition and enforcement on grounds other than those stated in Article V of the New York Convention. In the United States, Chapter 2 of the Federal Arbitration Act requires courts to confirm the award “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the ... Convention.” As a mode of settling disputes, arbitration should receive ample encouragement from courts of equity. If the award is within the submission and contains the honest decision of the arbitrators, a court of equity should not set it aside for error after a full and fair hearing of the parties. A contrary course would be a “substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an arbitral award the commencement, not the end, of litigation.” Acting under the narrow judicial review of arbitral awards granted to American courts, a court should not substitute its judgment for that of the arbitrators.

A. CHOICE OF PROCEDURAL LAW TO DETERMINE WHAT CONSTITUTES “PROPER NOTICE”

The choice of law applicable to the interpretation of the arbitration agreement is normally the same as the proper law of the contract. However, under exceptional cases, the choice of law applicable to the interpretation of the arbitration agreement may be different from the proper law of the contract even when the proper law of the contract is expressly chosen by the parties. When there is no express choice of law governing a contract or an arbitration agreement, it is presumed that the law of the country where the

50. Id.
53. Id. at 345.
54. Id.
57. See id. at 407.
arbitration is agreed to be held is the proper law of the arbitration agreement.58 That is, however, a rebuttable presumption.59

B. DIFFERENT COURTS' APPROACHES

The American, Chinese, and Italian courts faced a very similar problem: one party claimed it did not receive proper notice and therefore lost the opportunity to present its case. In general, three circumstances can prevent a party from presenting its case: (1) if the party opposing enforcement was not present at the arbitration proceeding either by choice or from lack of notice; (2) if the arbitration panel did not allow the party opposing enforcement the opportunity to present evidence; and (3) if the arbitration panel did not allow the party opposing enforcement an opportunity to object to the arbitration panel's procedural rulings.60

The New York Convention does not define "proper notice" nor did the arbitration providers in each respective case. The question is whether proper notice in one country can be regarded as proper notice in a foreign country. Technically, if a party is not able to comprehend the information presented to him or her on a notice of arbitration, this notice should not be considered "proper" because the notice did not serve its purpose. As outlined supra Section II, above, neither P & S, Popeyes, or Abati Legnami were present at their arbitration proceeding due to lack of notice. According to the New York Convention Article V(1)(b), inability to present a case due to lack of notice is an explicitly enumerated ground for courts to refuse to enforce the arbitral award. This exception, however, is intended to be interpreted narrowly and to protect only against serious procedural defects that have a material effect on arbitral proceedings, rendering the proceedings fundamentally unfair.61 As demonstrated by the three cases, courts in different countries, without a uniform "proper notice" standard, can reach very different conclusions regarding what constitutes "a lack of notice" or a "proper notice."

When the arbitration providers' rules do not provide enough guidance about what constitutes "proper notice," or when the parties do not specify what procedural rules govern the arbitration

58. Id.
59. Id.
60. Lu, supra note 8, at 763.
proceedings, courts will be left with three choices: (1) apply the national law of the recognition forum; (2) apply the national law of the arbitral seat; or (3) apply a uniform international standard derived directly from Article V(1)(b).

1. The American Court’s Approach – Applying the National Law of the Recognition Forum

National courts generally have an interest in protecting their own citizens’ due process rights. To achieve this goal, the District Court of Oregon held that Qingdao was subject to examination under the due process standards of the U.S Constitution and adopted the notice requirements derived from Mullane v. Central Hanover Bank & Trust Co.62 The Court in Mullane ruled that proper notice requires the best method practicable under the circumstances to apprise interested parties of the action and give them an opportunity to object.63 There are, however, no specific guidelines or federal statutes defining the proper method for giving notice to parties. In Mullane, the Court suggests it should adopt a balancing test.64 In other words, whether or not a party has been given proper notice should be analyzed on a case-by-case basis.65 As a consequence, foreign parties may have difficulty understanding their responsibilities when attempting to comply with the United States’ due process requirements.

2. The Chinese Court’s Approach – Applying the National Law of the Seat of Arbitration

On the other hand, the choice of a particular seat of arbitration is a strong factor in determining what set of procedural rules should be applied to an arbitration. In Union of India v. McDonnell Douglas Corporation,66 the court stated that if the parties did not agree upon an express choice of procedural law to govern their arbitration, the court would then consider whether they made an implicit choice. If the parties agreed to a particular seat of arbitration, it would be a very strong indication that they must have implicitly chosen the laws of that place to govern the procedures of the arbitration. By choosing

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63. Id.
64. Id.
65. Id.
a country for the parties’ seat of arbitration, the parties created a
close connection between the arbitration and that country. The court
held that it is reasonable to assume from the parties’ choice that they
attached importance to the relevant laws of that country, i.e., laws
that would be relevant to an arbitration conducted in that country.

Following the principle in *Union of India*, the QDAC arbitration
rules and Chinese procedural laws should be applied in *Qingdao*. The
parties signed an agreement specifying that should disputes arise, the
QDAC would be the arbitration provider and the QDAC’s Rules of
Arbitration would be followed. The notice of the arbitration is part
of the arbitration process and using the Chinese language to serve a
foreign party doing business in China should be proper. Even if one
argues that this provision should only cover the arbitration hearing
itself, but not notice of the arbitration to a foreign party, Chinese
procedural rules should still apply. P & S received emails from
Qingdao and P & S was aware that Qingdao would submit the dispute
to arbitration. It is difficult to imagine that P & S would simply
ignore documents from the QDAC, especially when P & S knew they
had a dispute pending resolution by the QDAC. Additionally, no
evidence suggested there was unequal bargaining power between
Qingdao and P & S (e.g., one company is significantly larger than the
other company, or one company has strong ties to the local
government while the other does not). Both parties had the
opportunity to negotiate the place of arbitration and the rules
governing the arbitration. Compared to other Chinese arbitration
providers, like the China International Economic and Trade
Arbitration Commission (“CIETAC”), the QDAC is not particularly
well known or preferred for handling international commercial
disputes. In fact, the QDAC website does not contain any
information in English. P & S, however, knowingly and willingly
entered into the arbitration agreement and P & S should have been
prepared to arbitrate in China subject to the laws in China.

68. Id. at *4*.
69. The China International Economic and Trade Arbitration Commission (“CIETAC”) and
China Maritime Arbitration Commission (“CMAC”) are the two principal arbitration
bodies that handle foreign-related arbitrations in China. *See Commercial Arbitration: China,
GLOBAL ARB. REV.*, http://globalarbitrationreview.com/know-how/topics/61/jurisdictions/
27/china/ (last visited Feb. 8, 2014).
13, 2012).
The Civil Procedure Law of the People’s Republic of China Article 11 states:

Citizens of all nationalities shall have the right to use their native spoken and written languages in civil proceedings. Where minority nationalities live in aggregation in a community or where several nationalities live together in one area, the people’s courts shall conduct hearings and issue legal documents in the spoken and written languages commonly used by the local nationalities. The people’s courts shall provide translations for any participant in the proceedings who is not familiar with the spoken or written languages commonly used by the local nationalities.\(^7^1\)

The Civil Procedure Law of the People’s Republic of China Article 240 states: “The people’s court shall conduct trials of civil cases involving foreign element in the spoken and written language commonly used in the People’s Republic of China. Translation may be provided at the request of the parties concerned, and the expenses shall be borne by them.”\(^7^2\)

Nothing in the civil procedure statutes speaks directly to the issue of not translating the notice sent to a foreign party. By looking at the statutory language, however, courts are only required to use the “spoken and written language commonly used” in the neighborhood. In China, prominent use of a foreign language is uncommon in most neighborhoods. Therefore, the method that the QDAC used to notify P & S of the upcoming arbitration proceeding was consistent with the QDAC rules and Chinese civil procedure statutes.

Even though national courts generally have an interest in protecting its citizens’ due process rights, the Chinese court adopted the law of the arbitral seat when deciding whether the notice from the KCAB constituted proper notice to the Chinese party and ultimately ruled against its own national. Because the arbitration clause stated that the KCAB rules should be applied and the KCAB rules did not

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72. Id.
require the KCAB to provide a translation of the notice of arbitration, the court concluded that KCAB had fulfilled its responsibility to provide proper notice to the Chinese party. Here, the Chinese court had an interest in respecting the parties’ autonomy to decide what procedural rules should be applied other than protecting its citizens’ due process rights. Both Haimalu and Popeyes are business entities that possess at least a degree of sophistication when negotiating or entering into an agreement. Both parties knew the arbitration agreement specified the KCAB rules would apply; it should not have come as a surprise to any of the parties when the KCAB rules were adopted. The parties could have specified what language and which set of procedural rules would govern their arbitration agreement, but they failed to do so. As a result, this case demonstrates the importance of carefully drafting and negotiating arbitration agreements such that if disputes arise, the agreed upon choice of law will be applied. As the court in Union of India pointed out, the seat of arbitration is a strong determining factor in determining what procedural rules should govern.73

3. The Italian Court’s Approach—Case-By-Case Analysis

In Abati Legnami v. Fritz Haupl, the Italian Court did not rule that the Italian legal notice period should be applied.74 Instead, the court remanded the case to the Court of Appeal of Milan to determine whether Abati Legnami’s opportunity to defend himself had been affected.75 Abati Legnami and Fritz Haupl were both sophisticated parties. The parties negotiated an agreement that did not specify the legal notice period. International commercial activities do not stop just because Italians concentrate their vacations in a particular month. Abati Legnami could have made arrangements to designate another party to manage his mail when he unequivocally knew that commercial activities would be suspended during a particular time of the year.

In order to determine whether Abati Legnami’s opportunity to defend itself had been affected by the legal notice period, it is likely that courts will have to adopt some kind of a balancing test, which may not depend entirely on Italian law or Austrian law. If Abati Legnami had received constructive notice of the arbitration, the

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75. Id.
Court of Appeal may find that Abati Legnami had sufficient time and opportunity to present his case, even though the legal notice period was shorter than required by Italian law. If it turns out that it was impossible for Abati Legnami to find an Italian lawyer willing to work during the “summer vacation” period, the court may conclude that Abati Legnami’s opportunity to defend himself had been affected. This balancing test approach can make it difficult for foreign parties to understand what they must do to ensure that they have given the other party sufficient and proper notice. Additionally, this case-by-case approach will not instill foreign parties with confidence when they are conducting business with partners located in certain countries because the enforceability of an arbitral award can be unpredictable.

While party autonomy is the spirit of arbitration, as in most contractual contexts, it is virtually impossible to specify every conceivable procedure that could arise in any dispute. The New York Convention Article V(1)(b) currently does not provide details regarding what constitutes “proper notice.” It is easier said than done to derive a set of standardized rules regarding notice requirements when dealing with foreign parties because every country has its own unique due process requirements. Coming up with definitive rules about what constitutes “proper notice” while taking into consideration every New York Convention signatories’ legal environments, cultures, and interests appears a Sisyphean task. However, it would be helpful to have a set of rules to govern which nation’s procedural laws will be applied when procedural requirements are not specified in a chosen set of arbitration rules or in the parties’ arbitration agreement.

4. The American Legal Institute Third Restatement Approach

The American Law Institute ("ALI") issued a tentative draft of the Third Restatement of the U.S. law of international commercial arbitration in April of 2012. Section 4-13 of the Third Restatement discusses the ALI’s view on denial of notice or opportunity to present one’s case. Once this draft is approved by the Council and ALI membership, it may represent the most current iteration of the ALI’s position until the official text is published.76

The Third Restatement’s approach states that whether or not notice is adequate and whether or not there is a meaningful opportunity to be heard depends on the facts and circumstances of the particular case.77 These standards generally require each party to be provided with a reasonable amount of time to prepare and present evidence and arguments to the arbitral tribunal. An absence of notice is not a basis for vacating or denying recognition or enforcement to an award unless it resulted in serious procedural disadvantages that materially affected the arbitral proceedings and rendered them fundamentally unfair to the party who was denied notice.78 The Third Restatement’s approach recognized that there could be differences in due process standards, particularly in an arbitration involving parties from different legal cultures and procedural traditions.79 Therefore, the American due process standards should not be applied directly to arbitration.80 Similar to the District Court of Oregon and the Supreme Court of Italy, the Third Restatement proposes a balancing test that is highly fact specific.

The notice requirement can be satisfied when (1) effective notice has been provided to a party; (2) the party otherwise had actual knowledge of the proceedings or the relevant event; or (3) in appropriate circumstances and if consistent with the interests of justice, when the party has received constructive notice.81 It is unclear whether receiving notice in a foreign language would constitute “constructive notice.” The Third Restatement stated that a notice lacking information, such as the constitution of the tribunal, the scheduling of hearings, and the setting of deadlines for submissions, may be deemed a serious procedural defect.82 Therefore, if a party receives a notice in a foreign language that contains all the necessary information about the upcoming arbitral proceedings, the fact-specific nature of the Third Restatement’s approach may require courts to determine if the party has the capacity or resources to translate or to understand the document in a particular foreign language. However, a party cannot intentionally disregard a notice in a foreign language when he or she

79. Id. at 171.
80. Id. at 174.
81. Id. at 171.
82. Id. at 174.
knew exactly what the document signifies because the party would have received constructive notice when he or she had actual knowledge about the upcoming proceedings. This is, however, highly fact-specific and difficult to prove.

Using Qingdao as an example, P & S was at least aware that Qingdao would be taking the dispute to the QDAC for arbitration even though the specific date and time for the arbitral proceeding was unknown at the time. There were not enough facts to determine whether P & S actually knew what the QDAC documents were for and intentionally disregarded the notice or whether P & S really had no idea what the documents represented. The result of this case may incentivize parties in the United States to intentionally disregard notices in foreign languages when they could have easily figured out what the notice was regarding. Similar to the previous cases, it will be difficult to establish a party’s true intentions and determine whether or not a party received constructive notice.

In addition, the burden of proof is on the party opposing recognition and enforcement to prove either the absence of notice or the existence of a material procedural defect.\textsuperscript{83} A mere denial of knowledge is not sufficient for the party opposing an application for post-award relief, particularly when there is evidence that the relevant information was duly sent.\textsuperscript{84} Similarly, failure to comply with formal procedures for providing notice is not sufficient to establish an absence of notice.\textsuperscript{85} Courts often require that a party opposing confirmation, recognition, or enforcement to make an affirmative showing that essential facts under-lying the challenge were not and could not have been discovered by the exercise of due diligence prior to or during the arbitral proceedings.\textsuperscript{86}

Following this approach, P & S, Popeyes, and Abati Legnami would bear the burden of proof to demonstrate the absence of notice. A mere denial of knowledge as to the pending proceeding would not be sufficient. P & S and Popeyes must show that they could not have understood the notices in a foreign language were related to a pending arbitral proceeding. However, the Third Restatement does not offer any guidance in terms of what level of due diligence is required. Perhaps P & S could have submitted evidence that they

\footnotesize{\begin{itemize}
\item \textsuperscript{83} \textit{Restatement (Third) of the U.S. Law of Int’l Commercial Arbitration}, \textit{supra} note 61, at 181.
\item \textsuperscript{84} \textit{Id.} at 182.
\item \textsuperscript{85} \textit{Id.}
\item \textsuperscript{86} \textit{Id.}
\end{itemize}}
consulted their lawyer in China whether the notice from the QDAC was related to the dispute between P & S and Qingdao. Perhaps Abati Legnami could have submitted evidence to show that he arranged to have his mail forwarded to him, but nevertheless was unable to receive the notice on time. Based on the facts of the respective cases, P & S and Abati Legnami both failed to provide proof that there had been an exercise of due diligence on their parts. They merely denied knowledge of receiving the notice of arbitration. The result in Qingdao is contrary to the United States’ Third Restatement approach.

C. THE LITIGATION STANDARD VS. THE ARBITRATION STANDARD

P & S relied heavily on Julen v. Larson to support its argument that a notice of arbitral proceeding in a foreign language to an American party in the United States was improper. In Julen, Julen was doing business in Switzerland when he filed a complaint against Larson in a Swiss court. Larson received two letters prior to the entry of judgment, but neither of the letters provided notice of the nature of the documents enclosed. The California court refused to enforce the foreign judgment because the court believed that, at minimum, a defendant should be informed in the language of the jurisdiction in which he or she is served that a legal action of a specific nature is pending against him or her at a particular time and place. At the same time, the court emphasized that no great amount of formality is required for effective notice.

It is important to note that Julen was not an arbitration case. When parties file a complaint to national courts to resolve disputes, it is reasonable for the courts to apply that nation’s due process standard. However, by agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights in favor of arbitration with all of its notable advantages and drawbacks. Many grounds that are available for challenging judicial proceedings as procedurally defective are not available for arbitral proceedings. Here, P & S

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89. Id.
90. Id.
relinquished its courtroom rights and due process protection in favor of arbitration in exchange for a more efficient and less costly dispute resolution method. The District Court of Oregon penalized Qingdao for following what the parties had contracted to by imposing an external foreign standard upon Qingdao. The District Court of Oregon set standards for what constituted proper notice in an international arbitration context by mirroring the standards in United States litigation.

The holding of *M/S Bremen v. Zapata Off-Shore Company* provides some insight as to how important it is to respect sophisticated business entities' freedom to contract. Zapata, a Houston-based American corporation, contracted with Unterweser, a German corporation, to tow Zapata's drilling rig from Louisiana to Italy. The contract contained the following provision: "Any dispute arising must be treated before the London Court of Justice."

The Supreme Court of the United States held that this provision should be enforced even though the London Court of Justice had no relationship with or interest in resolving this contractual dispute. In particular, the Court held that "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances." In *Bremen*, parties chose their forum in an arms-length negotiation by experienced and sophisticated business entities. Absent some compelling and countervailing reason, the provision should be honored by the parties and enforced by the courts. Although this opinion is binding only on federal admiralty cases, this decision has been incredibly influential and most states now follow the holdings of *M/S Bremen v. Zapata Off-Shore Company*. The *Bremen* standard may seem harsh because it forced the parties to arbitrate at a location that not only lacked ties to the dispute, but also was far away. Nevertheless, this result was necessary to facilitate inter-national commerce. The parties understood what they agreed to. Applying the *Bremen* standard to *Qingdao*, the District Court of Oregon should have respected the parties' choice to arbitrate in China and should have enforced the arbitral award against P & S.

95. *Id.* at 12.
96. *Id.*
D. Reciprocity

The goal of the New York Convention is to "promote the enforcement of arbitral agreements and thereby facilitate international business transactions on the whole." Signatories of the New York Convention agree to recognize and enforce foreign arbitral awards rendered by other signatories of the New York Convention. One of the legal factors parties consider when selecting an international business partner is the recognition and enforcement of foreign arbitral awards or foreign judgments in that country. The fact that the United States is a signatory of the New York Convention is a strong indicator that the United States understands the importance of enforcing arbitral awards rendered by foreign tribunals and expects other countries to recognize and enforce arbitral awards rendered in the United States.

By imposing the American due process standard onto foreign arbitral tribunals, foreign countries might justifiably reciprocate and impose their own due process standards onto United States arbitral tribunals. Some of these foreign due process standards may be stricter than the American due process standards. This may create technical difficulties for the arbitral tribunals because they cannot apply the local procedural rules they are familiar with. Instead, they will have to learn foreign procedural laws to ensure that their awards will be enforceable in a foreign country.

E. Public Policy

The New York Convention Article V(2)(b) provides that recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country. Although there are no guidelines detailing what would constitute a violation of public policy, the provision is expected to be construed

98. Lu, supra note 8, at 749.
99. Id.
An expansive construction of this defense would vitiate the New York Convention's efforts to remove preexisting obstacles to enforcement. Additionally, courts need to be cautious when invoking the public policy defense as it may lead to retaliation from foreign courts refusing to enforce arbitral awards rendered in the United States on grounds of public policy. Therefore, enforcement of foreign arbitral awards should be denied on this basis only where enforcement would violate the forum state's most fundamental notions of morality and justice.

In *Parsons and Wittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier*, the court distinguished public policy from national policy:

To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of public policy. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.

If the court construed the public policy defense broadly, the court is essentially converting a defense intended to be interpreted narrowly into a major loophole within the New York Convention's mechanism for enforcement.

**IV. CONCLUSION**

When faced with a situation where parties do not specify the set of procedural rules that will apply to an arbitration, or when the chosen set of rules does not provide guidelines about a specific procedure, the better approach is to apply the procedural law of the seat of the arbitration and the rules of the chosen arbitral institution. A case-by-case analysis approach, as adopted by the Italian court to determine whether the party's opportunity to defend itself had been
affected, will not provide international parties with predictability. Predictability is an important factor in international dispute resolution when parties are deciding where they want to bring their disputes. The District Court of Oregon applied the American procedural standards. This holding may force arbitral tribunals to take into consideration unfamiliar foreign procedural laws throughout the arbitral process to ensure that the arbitral award can be enforced in a particular foreign country. This will certainly decrease the efficiency of arbitration, and yet efficiency is one of the main hallmarks of arbitration. Applying the procedural law of the seat of the arbitration and the rules of the chosen arbitral institution will lead to predictability because the parties know in advance what procedural laws will be adopted and they can prepare for any differences in legal standards should disputes arise. Under this system, the parties are also given sufficient time prior to disputes to research and negotiate which laws should govern the arbitration. The efficiency of arbitration will not be sacrificed because the arbitral tribunal is familiar with the set of procedural laws that will be applied to the arbitration proceedings.

As a practical matter, parties can remove uncertainty by expressly stating the language of all notices in the arbitration agreement and by conducting careful research about available arbitration providers. This will significantly decrease the level of unpredictability throughout the arbitral process as well as the uncertainty related to the enforceability of the arbitral award. Lawyers can help their clients avoid having their awards thrown out by translating the notice of proceedings to the respondent’s native language, especially if enforcement is expected in the respondent’s home country. As the District Court of Oregon stated, at minimum, the respondent should receive a translated summary of the nature of the legal action, location, date and time for respondent’s appearance, and the potential consequences of failing to appear in order to give the respondent proper notice of the proceedings. Lawyers must research the many arbitration providers before agreeing to submit disputes to a particular arbitration provider. This is necessary to ensure the selected arbitration provider has adequate resources and international capacity to not only translate legal documents into another language, but also to effectively handle disputes between foreign parties.