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Enforcement of Foreign Arbitral Awards Under the United Nations Convention of 1958: a Survey of Recent Federal Case Law

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NOTES & COMMENTS

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER THE UNITED NATIONS CONVENTION OF 1958: A SURVEY OF RECENT FEDERAL CASE LAW

I. INTRODUCTION

As the commercial world becomes a smaller community comprised of networks of businesses conducting international transactions daily, the benefits and even the necessities of international commercial arbitration become evident. Although not among the first nations to recognize the necessity of international commercial arbitration, the United States has nevertheless quickly developed one of the strongest pro-en-

forcement policies of both arbitration agreements and arbitral awards.[1] This pro-enforcement policy, mandating in most cases that parties proceed first to arbitration to settle disputes and subsequently respect awards granted by arbitral bodies, is primarily governed by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards[2] which the United States ratified in 1970.[3]

This paper will examine the philosophy of enforcement of foreign arbitral awards under the 1958 United Nations Convention still developing within the United States federal court system. It will summarize the minimal requirements needed to ensure enforcement of arbitral awards, and it will examine the various defenses to enforcement of these awards possible under the 1958 United Nations Convention as interpreted by the federal court system.

II. UNITED STATES JUDICIAL ENFORCEMENT OF ARBITRAL AWARDS UNDER THE 1958 UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

A. *Introduction*

Prior to the United States' ratification of the 1958 United Nations Convention, parties entering into international contracts containing arbitration clauses were faced with much uncertainty concerning their mutual agreement to first enter into arbitration proceedings before seeking recourse in the courts. Domestic arbitration laws provided the only guidance concerning these agreements and their subsequent enforcement.[4] However, these laws were outdated, unfavorable to arbitration, and lacking in uniformity.[5] In response to this lack of uniformity and to the increase in international trade and arbitration in the years following World War I, the League of Nations and the International Chamber of Commerce sponsored an international effort which resulted in two multilateral treaties: the Geneva Protocol on Arbitration Clauses

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1. *See generally* McLaughlin & Genevro, *Enforcement of Arbitral Awards Under the New York Convention - Practice in U.S. Courts*, 3 INT'L TAX & BUS. LAW. 249, 250 (1986).

2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, No. 4739 (1959) [hereinafter cited as *Convention.*]

3. The United States Arbitration Act, 9 U.S.C. § 201 (1982) *as amended by* Pub. L. No. 91-383, 84 Stat. 692 (1976).

4. *See generally* A. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 6 (1981).

5. *Id.*

of 1923; and, the Geneva Convention on the Execution of Foreign Awards of 1927.[6] Although an improvement, the inadequacies of these treaties prompted a gathering of representatives of nations in New York City in 1958.[7] These representatives met with the aim of adopting a much more satisfactory international agreement that would promote, rather than retard, international commercial arbitration. The result was the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[8]

The United States, not having ratified any of the previous treaties concerning international arbitration, remained cautious concerning arbitration and arbitral award enforcement. This cautiousness was the result of a deeply embedded judicial jealousy of arbitration and its potential encroachment upon what many considered to be uniquely judicial territory.[9] However, after a gradual but determined erosion of this jealousy based on the judicial recognition of the true value of arbitration, the United States finally ratified the Convention in 1970 and adopted Chapter Two of the United States Arbitration Act which implemented the Convention.[10]

Since its ratification, the federal courts have adopted a pro-enforcement philosophy that has rigorously promoted the Convention's goal of making "arbitration a more certain and efficient means of resolving international disputes."[11] By liberally construing the requirements for enforcement of arbitral awards and narrowly interpreting enumerated defenses to confirmation of awards listed within the Convention itself, the federal courts have made the United States one of the most advantageous forums in the world in which to seek enforcement of foreign arbitral awards.[12]

Invocation of the Convention in order to enforce an arbitral award is generally unnecessary.[13] Typically, parties that have voluntarily en-

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6. *Id.* at 6-7.

7. *Id.* at 7-8.

8. *Id.* at 397-401.

9. Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., 767 F.2d 1140, 1145 n.12 (1985).

10. 9 U.S.C. §§ 201-208 (1982).

11. McLaughlin & Genevro, *supra* note 1, at 251.

12. Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 n.10 (1974). The Supreme Court leaves no doubt that "[t]he goal of the convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements and international contracts and to unify the standard by which the agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. *Id.*

13. McLaughlin & Genevro, *supra* note 1, at 272.

tered into an arbitration agreement will also voluntarily abide by the results of such an agreement. However, in situations where one party refuses to follow the award of an arbitral panel, a judicial body must convert the arbitration award into an enforceable judicial order due to the arbitral panels lack of power to enforce their awards. Because of the United States federal courts' pro-enforcement philosophies, American businessmen can enter into international agreements containing arbitration clauses and be assured of judicial enforcement of resulting awards by the United States court system.[14]

B. *Minimum Requirements for Invocation of the Convention*

When a party must resort to the 1958 Convention for judicial enforcement of an award, he must comply with only a minimum of requirements. Article IV of the Convention stipulates that "the party applying for recognition and enforcement shall, . . . supply . . . the duly authenticated original award [and] . . . the original [arbitration] agreement . . ."[15] Most significantly, the complaining party is not required to prove the arbitral award is binding in the country where the award was granted.[16]

The technical sufficiency of these minimal requirements for enforcement of an arbitral award as set forth by the Convention has been upheld by the United States Court of Appeals for the Second Circuit. In *Bergesen v. Joseph Muller Corp.*,[17] the court was faced with an assertion that a petition for enforcement was "technically insufficient."[18] A Norwegian owner of cargo vessels, Bergesen, petitioned the court to confirm and enter judgment upon an arbitral award made in New York City against the charterer of his vessels, Mueller.[19] Among other defenses, Mueller argued that the documents presented did not meet the requirements of the Convention because the original agreement from which the copy was made and subsequently certified had not also been

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14. *See e.g.*, Bergesen v. Joseph Muller Corp., 548 F. Supp. 650, 654 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2d Cir. 1983).

15. *Convention, supra* note 2, at 4, art. IV. Although requiring the arbitration agreement to be in writing, the Convention recognizes the peculiar circumstances inherent in international trade and, therefore, does not require both parties to sign the same document. In fact, the Convention recognizes the exchange of written letters as a valid arbitration agreement. AMERICAN ARBITRATION ASS'N, NEW STRATEGIES FOR PEACEFUL RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES, 19 (1971).

16. AMERICAN ARBITRATION ASS'N, *supra* note 15, at 16.

17. *Bergesen*, 710 F.2d 928.

18. *Id.* at 934.

19. *Id.* at 930.

authenticated.[20] The court believed that this interpretation would be too restrictive[21] and held that "copies of the award and the agreement which have been certified by a member of the arbitration panel provide a sufficient basis upon which to enforce the award.[22]

In addition to enjoying only minimal requirements needed to support a prima facie case for enforcement, the complaining arbitration party also enjoys the lack of any burden to prove the validity of the arbitral award. Instead, "[t]he burden of proving the invalidity of the award rests upon the defendant . . . ."[23]

In order to prove the invalidity of the arbitral award, the party opposing enforcement must prove one of the seven defenses enumerated in the Convention[24] or he must prove applicability of one of the reservations with which the United States ratified the Convention.[25] Absent these avenues of defense, parties have sometimes sought to prove that either the Convention does not apply to the particular arbitral award at issue and, therefore, the particular court in which enforcement is sought lacks subject matter jurisdiction,[26] or that the court lacks *in personam* jurisdiction.[27]

C. *Determination of Federal Jurisdiction*

1. *Subject Matter Jurisdiction*

The determination of jurisdiction, both subject matter and *in personam*, has been one of the most confusing issues surrounding the Convention. This confusion, coupled with the lack of any clearly defined jurisdictional limits, has provided the federal courts with an opportunity to promote their pro-enforcement philosophy through recent devel-

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20. *Id.* at 934.

21. *Id.*

22. *Id.*

23. von Mehren, *The Enforcement of Arbitral Awards Under Conventions and United States Law*, 9 YALE J. WORLD PUB.. ORD. Vol. 9, no. 2, 343, 346 (1983). As one commentator states, "this burden discourages contesting enforcement of an award." McLaughlin & Genevro, *supra* note 1, at 258 n.56 (noting *The Validity of the Foreign Sovereign Immunity Defense in Suits Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 7 FORDHAM INT'L L. J. 321, 332 (1983-1984)).

24. *Convention, supra* note 2, at 40, 42, art. V. For a discussion of these defenses, *see infra* notes 76-222 and accompanying text.

25. *Id.* at 38, art. I. For a discussion of these reservations, *see infra* notes 223-235 and accompanying text.

26. *See infra* notes 28-59 and accompanying text.

27. *See infra* notes 60-64 and accompanying text.

opments in the interpretation and expansion of federal jurisdiction.

Generally, 9 U.S.C. §203 grants subject matter jurisdiction to federal district courts to hear cases to recognize and enforce foreign arbitral awards falling under the Convention.[28] Although the language of 9 U.S.C. §203 seems unambiguous, a difficulty often arises in determining which arbitral awards can be enforced under the Convention. Article I of the Convention defines the scope of the Convention as "apply[ing] to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement . . . are sought, . . . [and] arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."[29]

Applying the first part of this jurisdictional description is relatively simple: so long as the award was not made in the country where enforcement is being sought, and was made in another contracting state (so as to meet the requirements of reciprocity), the arbitral award may be enforced under the Convention.[30] However, it is the definition and application of the phrase "domestic" in the second part of the description that has proved to be the most troublesome, yet attractive, vehicle to federal courts enforcing arbitral awards.

Originally, only the first part, dealing with arbitral awards made in the territory of another state, was to have been included within Article I of the Convention.[31] However, "[t]hat provision was criticized as placing undue emphasis on the place in which an award was made, since the place of an award was often fortuitous or artificial."[32] Several participating countries objected "believ[ing] that the nationality of the parties, the subject of the dispute and the rules of arbitral procedure were factors to be taken into account in determining whether an award was foreign."[33] In addition, some of the countries which opposed a jurisdictional scope limited only to the description in the first part of Article I believed that the State law under which the arbitration agree-

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28. "The district courts of the United States . . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." 9 U.S.C. §203 (1982). *See also* Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 971 (2d Cir. 1974) for judicial interpretation of this section.

29. *Convention, supra* note 2, at 38, art. I.

30. This statement assumes the court has *in personam* jurisdiction, an issue that will be examined in later text. *See infra* notes 60-64 and accompanying text.

31. *Bergesen*, 710 F.2d at 931.

32. AMERICAN ARBITRATION ASS'N, *supra* note 15, at 17-18.

33. *Bergesen*, 710 F.2d at 931, citing G. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1 at 2 (1958) (Haight).

ment was formed should also govern the "nationality of an award."[34] Therefore, the second part of the jurisdictional description was added to the Convention with the intention of leaving the resolution of "nondomestic" situations to each contracting State.

Through the addition of this second part, the drafters of the Convention simultaneously enlarged the jurisdiction of both the Convention itself and the courts seeking to enforce awards under it. "Article I(1) makes it clear that the 'awards not considered as domestic awards' form a category of awards which is additional to that of the awards made in another State."[35] This additional category of awards falling under the Convention was only to be limited by the definition of "nondomestic" arrived at by each contracting state.

Within the United States, the term "nondomestic" has primarily been judicially defined, with the exception of one statutorily determined situation that the Congress has delineated as "domestic". In this specific situation, the agreement or award will not fall under the Convention if it "aris[es] out of such a relationship which is entirely between citizens of the United States . . . unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[36] One author has noted that this particular definition of "domestic" does not comply with the Convention, for it was agreed and understood that the nationalities of the parties to the arbitration were not to be a "pertinent consideration" in determining whether the award would be governed by the Convention[37]. However, it has been observed that it is unlikely that this will ever give rise to any reaction from other contracting states.[38]

Other than this one statutory guideline, the federal courts have been free to develop the term "nondomestic" with limited legislative interference.[39]

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34. *Id.*

35. G. GAJA, INTERNATIONAL COMMERCIAL ARBITRATION, NEW YORK CONVENTION, I.A.3 (G. GAJA ed. 1978).

36. 9 U.S.C. § 202 (1982).

37. McMahon, *Implementation of the United Nations Convention on Foreign Arbitral Awards in the United States*, 2 J. MAR. L. & COM. 735, 738-39 (1970-71).

38. *See generally* GAJA, *supra* note 35.

39. This judicial development of the term "nondomestic" and the parallel expansion of federal jurisdiction have occurred only in the lower federal courts. The Supreme Court has not yet addressed the issue.

2. *Expansion of Subject Matter Jurisdiction*

The expansion of the definition of "nondomestic" in the lower federal courts began in 1977 when a New York District Court was faced with potential jurisdiction under the Convention over two foreign parties seeking a judicial order to compel arbitration. Without explanation, the court in *Ferrara S.P.A. v. United Grain Growers*[40] declared that Chapter 2 of the United States Arbitration Act[41] conferred subject matter jurisdiction over the controversy. The court ordered a Canadian corporation and two Italian corporations to proceed to arbitration, as specified in their contract.[42]

In 1979, the same court once again ordered arbitration in a dispute arising between two Japanese corporations and a company incorporated in Panama. In *Sumitomo Corp. v. Parakopi Compania Maritima*,[43] the parties had agreed to arbitrate any difference arising under their contract in New York City in accordance with the rules of the United States Arbitration Act.[44] Unlike the court in *Ferrara*, the *Sumitomo* court discussed at length its finding of subject matter jurisdiction.

The Panamanian corporation, Parakopi, seeking to avoid the arbitration sought by the two Japanese corporations, argued that only Chapter One of the United States Arbitration Act, enacted in 1925 prior to the 1958 Convention, applied to the present case.[45] Chapter One of the 1925 act was adopted to regulate arbitration in maritime transactions and any contract involving "commerce."[46] Parakopi argued that "commerce" as defined in Chapter One did not include contracts involving only foreign corporations.[47]

The court disagreed with this argument, holding that Chapter One of the 1925 Act did not control the scope of the implementing legislation for the 1958 Convention.[48] The court further stated that "[i]n delineating the coverage of the Convention, Congress explicitly excluded purely domestic transactions. Had Congress also intended to exclude

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40. In re Ferrara S.P.A., 441 F. Supp. 778, 780 (S.D.N.Y. 1977), *aff'd mem., sub nom.* Ferrara S.P.A. v. United Grain Growers, Ltd., 580 F.2d 1044 (2d Cir. 1978).

41. *See supra* note 3.

42. *In re Ferrara*, 441 F. Supp. at 779.

43. Sumitomo Corp. v. Parakopi Compania Maritima, 477 F. Supp. 737 (S.D.N.Y. 1979), *aff'd mem.*, 620 F.2d 286 (2d Cir. 1980).

44. *Id.* at 740.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 741.

purely foreign transactions, it undoubtedly would have done so explicitly as well."[49]

On several occasions, the issue of jurisdictional scope of the Convention has presented itself to appellate courts. In 1978, the United States Court of Appeals for the Second Circuit refused to address the issue of jurisdiction over totally foreign parties in an action to confirm an arbitral award issued in New York City.[50] However, the court went on to confirm the award under Chapter One of the United States Arbitration Act noting that Chapter Two of the same act was certainly no more liberal on the matter of vacating awards than Chapter One and therefore, "resort to the Convention would not alter the result."[51] Not until 1983, in the case *Bergesen v. Joseph Muller Corp.*, did the Second Circuit address the issue of possible jurisdiction over two foreign parties.[52]

The Second Circuit in *Bergesen* affirmed the district court's finding of jurisdiction under the Convention over an arbitral agreement and subsequent award between all foreign parties. The district court, noting the earlier finding of jurisdiction under the Convention to compel arbitration between foreign parties in *Sumitomo*, concluded that it also had jurisdiction to confirm an award rendered in New York City between two foreign entities.[53] The United States Court of Appeals for the Second Circuit agreed, rejecting appellant's contentions that the court lacked subject matter jurisdiction.[54] Appellant argued that the award did not fall under the Convention because it was "neither territorially a 'foreign' award nor an award 'not considered as domestic' within the meaning of the Convention."[55] The court summarized the history of Article I of the Convention and concluded that the definition of "nondomestic" was omitted "deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of 'nondomestic' in conformity

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49. *Id.* The court further noted that "[t]o hold that subject matter jurisdiction is lacking where the parties involved are all foreign entities would certainly undermine the goal of encouraging the recognition and enforcement of arbitration agreements in international contracts." *Id.*

50. "We find this controversy intriguing, but we need not resolve it here." In re Andros Compani Maritima v. Marc Rich & Co., 579 F.2d 691, 699 n.11 (2d Cir. 1978).

51. *Id.*

52. *Bergesen*, 710 F.2d at 928.

53. *Bergesen*, 548 F. Supp. at 651-653.

54. *Bergesen*, 710 F.2d at 928.

55. *Id.* at 930.

with its own national law."[56] The court then seized upon this opportunity to define "nondomestic."

> We adopt the view that awards "not considered as domestic" denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.[57]

Applying this standard to the facts, the court found proper subject matter jurisdiction conveyed by the 1958 Convention.

Because of the federal court's continuing expansion of jurisdiction under the Convention, it is very difficult for a party opposing enforcement of an arbitral award to successfully defend against such enforcement on the grounds of lack of subject matter jurisdiction. Courts have now held that the Convention applies to awards between totally foreign parties as in *Bergensen* and *Sumitomo*, between one foreign and one domestic party,[58] and between two domestic parties where the contract involved a reasonable relationship with a foreign state.[59]

3. *In Personam Jurisdiction*

In addition to requiring subject matter jurisdiction over the parties, the court must also have in personam jurisdiction. Recently, the United States District Court for the Southern District of New York refused to confirm an arbitral award rendered in London because the court lacked in personam jurisdiction over the Panamanian corporation against whom the award was made. In *Transatlantic Bulk Shipping v. Saudi Chartering*,[60] Transatlantic, a Liberian ocean carrier, sought confirmation of an arbitral award. The court stated that in order for a plaintiff to invoke the power of the court in such a case, the defendant

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56. *Id.* at 932.

57. *Id.* The court further noted that "[they] prefer this broader construction because it is more in line with the intended purpose of the treaty, which was entered into to encourage the recognition and enforcement of international arbitration awards." *Id.*

58. Fertilizer Corp. of India v. IDI Management, 517 F. Supp. 948 (S.D. Ohio 1981), *aff'd on rehearing*, 530 F. Supp. 542 (S.D. Ohio 1982); *see also* Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982).

59. Fuller Co. v. Compagnie des Bauxites de Guinee, 421 F. Supp. 938 (W.D. Pa. 1976).

60. Transatlantic Bulk Shipping v. Saudi Chartering, S.A., 622 F. Supp. 25 (S.D.N.Y. 1985).

must be subject to the court's jurisdiction by "either resid[ing] within the court's power or hav[ing] acted in such fashion as to bring himself within the court's power."[61] Simply because the Convention granted subject matter jurisdiction to the courts in an area previously not within their jurisdiction, the federal district courts are not viewed as having "power over all persons throughout the world who have entered into an arbitration agreement covered by the Convention."[62] The court stated that jurisdiction could be conferred by a defendant's residence, his conduct, his consent, or the location of property.[63] The court noted that its decision was not inconsistent with *Bergesen* or *Sumitomo* because in those cases the parties had consented to the court's *in personam* jurisdiction by agreeing to arbitrate their disputes in New York City.[64]

In light of *Transatlantic*, parties wishing to afford themselves of the opportunity to utilize American courts for enforcement of arbitral awards must be careful to set the site of arbitration within the United States to avoid potential in personam jurisdictional problems. The courts' recent willingness to extend their subject matter jurisdiction is not reflected in issues involving in personam jurisdiction.

4. *Problems of Sovereign Immunity*

Another jurisdictional issue which has confronted the courts recently is that of their power to enforce an arbitral award against a sovereign state notwithstanding the defense of sovereign immunity. In their continuing desire to promote the goals of the Convention, the courts in most cases have found that the sovereign states have implicitly waived their immunity to the jurisdiction of the United States federal courts.

The Federal Republic of Nigeria was found to have explicitly waived its sovereign immunity by agreeing that the "construction, validity and performance of [a] contract would be governed by the laws of Switzerland and that any disputes arising under the contract would be submitted to arbitration by the International Chamber of Commerce in Paris, France."[65] This finding has been characterized as con-

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61. *Id.* at 27 *citing* International Shoe Co. v. State of Washington, 326 U.S. 310 (1945).

62. *Id.*

63. *Id.*

64. *Id.*

65. Ipitrade International v. Federal Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978).

sistent with the exception explicitly stated in §1605(a)(1) of the Foreign Sovereign Immunities Act of 1976,[66] where immunity is denied to any sovereign state that has "waived its immunity either explicitly or by implication . . . ."[67] This required waiver has been inferred from an agreement to arbitrate.[68]

A similar finding was made by the same court two years later in *Libyan American Oil Co. v. Socialist People's Libyan Aran Jamahirya.*[69] Although refusing to confirm and enforce an arbitral award due to the act of state doctrine, the court found that Libya had implicitly waived its defense of sovereign immunity by agreeing to arbitrate "where the parties agreed or where the arbitrators might agree."[70] The court noted that although the United States was not named, consent to arbitrate wherever the arbitrators determined was implicitly an agreement to arbitrate in the United States, thereby meeting both the implicit waiver requirement and providing a nexus between the lawsuit and the United States.[71] This connection provided the court with original in personam jurisdiction over the parties.[72]

Although the law is somewhat unsettled surrounding sovereign immunity and the Convention, it appears from cases such as *Ipitrade International* and *Libyan American Oil* that courts will enforce arbitral awards even when faced with the defense of sovereign immunity. In fact, it is more probable that a waiver of sovereign immunity will be

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66. Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (1982).

67. von Mehren, *supra* note 23, at 353.

68. *Id.* at n.66 *citing* Ohntrup v. Firearms Center, Inc., 516 F. Supp. 1281, 1284 (E.D. Pa. 1981).

69. Libyan American Oil Co. v. Socialist People's Libyan Aran Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980).

70. *Id.* at 1178.

71. *Id.* at 1177-78.

72. *Id.* One author has noted that the findings reached in cases such as *Ipitrade International* are in accordance with the Convention. In his article, *Waiver of Foreign Sovereign Immunity by Agreement to Arbitrate: Legislation Proposed by the American Bar Association*, Feldman calls attention to the fact that the Convention was intended by its drafters to apply to awards rendered against foreign states. 40 THE ARB. J. 24, 29 (Mar. 1985). "The 'expression in Article I (1) "differences between persons, whether physical or legal" was inserted in the Convention on the understanding that an arbitration agreement and an arbitral award to which a State is a party are not excluded from the gambit of the Convention.'" *Id. quoting* A. VAN DEN BERG, *supra* note 4, at 279, *quoting* Article I(1) of the Convention. Feldman notes that sovereign immunity is not one of the enumerated defenses expressly provided in the Convention, and therefore, recognition of the defense of sovereign immunity could be viewed as a violation of the forum state's obligation to the contracting party in whose state the award was made. *Id.* at 30.

found when the arbitration agreement either explicitly or implicitly designates the United States as the site of the arbitration proceedings.[73] In *Verlinden B.V. v. Central Bank of Nigeria*,[74] the court found an implicit waiver of immunity grounded upon an agreement to arbitrate in a country other than the United States to be too tenuous.[75] Based upon the *Verlinden* decision, parties should designate the United States as the place of arbitration in order to maximize the probability of enforcement of arbitral awards against a foreign state.

D. *Avoiding Confirmation and Enforcement of an Arbitral Award: Defenses Under the Convention*

In addition to citing a lack of subject matter or *in personam* jurisdiction or the presentation of improper documents to present a *prima facie* case for enforcement, a party seeking to avoid the confirmation and enforcement of an arbitral award under the Convention can raise one of seven enumerated defenses listed in Article V.[76] However, a party raising one of these seven defenses will have no easier task than a party raising jurisdictional or evidential grounds to block enforcement because not only does the party raising these defenses bear the burden of proving their applicability,[77] but he is also faced with a very limited standard of review of an arbitrator's decision by the federal court.[78]

This limited review by courts of arbitrators' decisions under the Convention has long been upheld by the federal courts in all areas of arbitration. In *Trans-Asiatic Oil Ltd. S.A. v. UCO Marine International Ltd.*,[79] the District Court for the Southern District of New York

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73. *See, e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 488 F. Supp. 1284 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd on other grounds*, 461 U.S. 480 (1983).

74. *Id.* at 1302.

75. *Id.*

76. Convention, *supra* note 2, at 40, 42, art. V. A court within three years after an arbitral award is made may confirm the award upon petition to the court and the court must confirm the award unless "it finds one of the grounds for refusal or deferral of [the] recognition or enforcement of the award specified in the said Convention." 9 U.S.C. § 207.

77. The first five defenses discussed *infra* can be raised solely by the party seeking to avoid enforcement of an arbitral award.

78. In addition to the limited review accorded by federal district courts, there is a deeply entrenched philosophy that the seven defenses enumerated in the Convention must be very narrowly construed. *See* Comment, *The Federal Courts and The Enforcement of Foreign Arbitral Awards*, 5 PACE L. REV. 151, 151-152 (1984). This effectively makes the party's task seeking to block enforcement almost impossible.

79. Trans-Asiatic Oil Ltd. S.A. v. UCO Marine International Ltd., 618 F. Supp.

summarized the standard of review and the applicable case law:

> The Court's power to vacate an arbitration award is limited to the grounds set forth in 9 U.S.C. §10. *Wilco v. Swan*, 346 U.S. 427, 74 S.Ct. 182, 98 L.Ed. 168 (1953). Arbitrators are not required to explain their conclusions in the awards they issue. *Id.* at 436, 74 S.Ct. 187; *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2d Cir. 1972). "When arbitrators explain their conclusions . . . in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue . . . for a different result." *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978). It is not the function of the district court to review the record of the arbitration proceedings for errors of law or fact. *Saxis S/S Co. v. Multifacs International Traders*, 375 F.2d 577, 581-82 (2d Cir. 1967).[80]

This limited standard of review of an arbitrator's decision has been consistently upheld under the Convention.[81]

1. *Absence of Valid Arbitration Agreement*

The first defense listed in the Convention is the absence of a valid arbitration agreement.[82] This defense is seldom raised because the real-

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132 (S.D.N.Y. 1985).

80. *Id.* at 135.

81. *See, e.g.*, Amoco Overseas Oil Co. v. Astir Navigation Co., 490 F. Supp. 32 (S.D.N.Y. 1979); La Societe Nationale v. Shaheen Natural Resources, 585 F. Supp. 57 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 260 (2d Cir. 1984), *cert. denied*, 469 U.S. 883 (1984). Agreeing with the limited review by judicial bodies of arbitration decisions, the United States Court of Appeals for the Second Circuit stated that it would not review the record of arbitration to discover errors of fact or law. *Parsons*, 508 F.2d at 977. The court stated this was a role that it had "emphatically declined" in the past and rejects once again. *Id.* "'[E]xtensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings.'" *Id.* This limited review thwarted the appellant's efforts to have the Second Circuit vacate an order confirming an foreign arbitral award on the basis of the award's manifest disregard of the law. *Id.*

82. "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes . . . proof that: (a) the parties to the agreement . . . were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. . . ." *Convention, supra* note 2, at 40, art. V(1)(a).

ity of a written arbitration agreement is difficult to refute.[83] However, the agreement's validity is to be judged against the law governing the contract or, absent this indication, the law of the country where enforcement is sought.[84] In *Rhone Mediterranee Compagnie v. Lauro*,[85] the plaintiff insurer brought suit as subrogee to recover payments made to the owner of a time charter vessel that burned en route to its destination.[86] The owner filed a motion to dismiss the suit due to the existence of a valid arbitration agreement contained in the contract between the owner and the time charterer of the vessel.[87] Rhone, the plaintiff insurer, contended however that the arbitration agreement should be disregarded because it was null and void under Italian law.[88] Under Italian law, arbitration is valid only if conducted by an odd number of arbitrators. However, this was not specified in the subject contract. Rhone "contended that when an arbitration clause refers to a place of arbitration [in this case Italy], the law of that place is determinative of 'null and void'."[89] Both the district and circuit court disagreed. The district court noted that the drafters of the Convention intended that awards be enforced unless such awards offended the federal law or public policy of the forum and that such enforcement would not be denied simply because the award would not be capable of enforcement under a foreign forum's law.[90] The Court of Appeals affirmed, holding that "the validity of the arbitration clause should be measured against the fundamental policy of the Convention, which is to encourage the enforceability of arbitration agreements. Accordingly, since the Italian rule as to the number of arbitrators did not implicate the fundamental concerns of the Convention, the arbitration agreement was valid."[91]

In *Oriental Commercial & Shipping Co. v. Rosseel*,[92] the United

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83. von Mehren, *supra* note 23, at 358.

84. *See supra* note 79.

85. Rhone Mediterranee Compagnie v. Lauro, 555 F. Supp. 481 (D.V.I. 1982), 712 F.2d 50 (3d Cir. 1983).

86. *Id.* at 481-82.

87. *Id.* at 482.

88. *Id.* at 483.

89. Leigh, *Commentary on Judicial Decisions:* Rhone Mediterrannee Compagnie v. Lauro *and* Bergesen v. Joseph Muller Corp., 78 AM. J. INT'L L. 217, 217 (Jan. 1984).

90. *Rhone*, 555 F. Supp. at 485.

91. Leigh, *supra* note 89, at 217. This Commentary contains a good discussion of the *Rhone* case.

92. Oriental Commercial & Shipping Co. v. Rosseel, 609 F. Supp. 75 (S.D.N.Y. 1985).

States District Court for the Southern District of New York followed the Third Circuit's ruling in *Rhone* and moved to compel arbitration despite one party's contention that the agreement to arbitrate was null and void. The district court held that under the Convention an arbitration agreement was null and void "only when it is subject to internationally recognized defenses such as duress, mistake, fraud or waiver, or when it contravenes fundamental policies of the forum nation."[93] Utilizing this standard and pursuing a goal of implementing the intentions of the parties, the district court held a telex, sent by the seller which included an arbitration clause, to be a valid agreement.[94]

Due to the heavy burden that defendants must bear to prove an agreement is null or void, this defense has not proven very successful even when attacking the agreement on the grounds of duress, mistake, fraud, waiver, or fundamental policy. In *Island Territory of Curacao v. Solitron Devices*,[95] the United States District Court for the Southern District of New York, extending this judicial skepticism, confirmed an arbitral award and the United States Court of Appeals for the Second Circuit affirmed the confirmation despite the assertion that the contract containing the agreement had been terminated due to impossibility. Solitron, defending against both the enforcement of the foreign judicial decision confirming the award and the confirmation by the American court of the arbitral award, asserted that it had been fraudulently induced to sign a contract to locate manufacturing plants in Curacao.[96] The district court held that fraud in the inducement of a total contract is an issue to be ruled upon by an arbitral panel only when a valid agreement is contained within the contract.[97] The court reasoned that if fraud is to be in the exclusive jurisdiction of the arbitral panel, then frustration and impossibility should also be decided by arbitrators.[98]

By delegating the resolution of the issues of fraud and impossibil-

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93. *Id.* at 78.

94. *Id.*

95. Island Territory of Curacao v. Solitron Devices, 356 F. Supp. 1 (S.D.N.Y. 1973), *aff'd on different grounds*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

96. Solitron, an American company, argued that such a location was attractive due to the low minimum wage structure of Curacao and that the government of Curacoa had led Solitron to believe that "the wage structure would remain stable." *Id.* at 11. In reality, the wages were increased rather drastically after major governmental policy changes were made in Curacao. After the increase in wages, Solitron lost interest in the venture, giving rise to the dispute. *Id.* at 6.

97. *Id.* at 11 *citing* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967).

98. *Id.*

ity to an arbitral panel, the federal courts have undermined the viability of these defenses because, by their act of granting an award, the arbitration panel has implicitly ruled that the contract was not fraudulently induced, nor terminated by impossibility or frustration. It should be noted, however, that the courts have maintained their right to examine an assertion that the arbitration agreement itself was fraudulently induced.[99]

Parties seeking to avoid enforcement of arbitral awards have also sought to prove the absence of a valid agreement due to waiver of the right to arbitrate. Just as a party may voluntarily enter into an arbitration agreement, the same party may waive this contractual right.[100] However, this argument has not proven successful in the majority of cases. Both the United States Courts of Appeals for the Fourth and Fifth Circuit, when faced with the defense of a null and void agreement due to waiver, failed to find circumstances supporting the defense and have held that the mere passage of time without ensuing prejudice to the party alleging waiver cannot constitute an implicit waiver of arbitration.[101]

In addition to the defense that the agreement to arbitrate is null and void, Article V of the Convention states that a court may refuse to enforce an arbitral award if the parties to the contract lacked capacity.[102] A defense on this basis has not been reported in any United States court.[103]

2. *Procedural Defects of Arbitration*

The second major defense of Article V of the Convention states that if "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," the court may refuse to recognize and enforce the award.[104] This defense incorporates the requirement of due process as interpreted by the enforcing state.[105] Within the United States, the courts have limited the use of this defense to two circumstances: (1) where the party did not receive

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99. *See, e.g., Prima Paint Corp.*, 388 U.S. at 403-04.

100. *Sedco*, 767 F.2d at 1150.

101. I.T.A.D. Associates v. Podar Bros., 636 F.2d 75, 77 (4th Cir. 1981) and *Sedco*, 767 F.2d at 1150-51.

102. *Convention*, *supra* note 2, at 40, art. V(1)(a).

103. McLaughlin & Genevro, *supra* note 1, at 265 no. 101, *citing* A. VAN DEN BERG, *supra* note 4, at 288.

104. Convention, *supra* note 2, at 42, art. V(1)(b).

105. AMERICAN ARBITRATION ASSOCIATION, *supra* note 15, at 20.

proper notice of the proceeding; or, (2) where the party lacked an opportunity to be heard.[106]

This defense has been asserted often by parties opposing enforcement of an arbitral award. Parties raising this argument have utilized many alleged deficiencies in support of their procedural defense. In *Parsons & Whittemore Overseas Co.*,[107] the defendant alleged *inter alia* that he was not given proper notice and was unable to present his case before the arbitration panel.[108] This allegation was based upon the arbitration panel's refusal to delay the proceedings to allow one of the party's key witnesses to testify.[109] The court dismissed this argument finding that the "[i]nability to produce one's witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration."[110]

Other parties relying on different procedural defects have met with a similar lack of success. In *Imperial Ethiopian Government v. Baruch-Foster Corp.*,[111] the Fifth Circuit affirmed the district court's confirmation of an arbitral award despite the assertion by defendant Baruch-Foster that it was denied discovery on the question of arbitrator bias.[112] The expiration of time limitations has also proven to be an unsuccessful procedural defense. In *La Societe Nationale*, the district court of New York also denied the defendant's motion to dismiss a case for the confirmation of an award despite the assertion that the defendant's procedural rights had been abridged.[113] The defendant moved to dismiss the case because the award was not rendered by the arbitral body in accordance with the time limits set by the International Chamber of Commerce which governed the agreement.[114] The court, however, found no validity to this argument, holding that even if this were a proper basis for a procedural defense, the International Chamber of Commerce time

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106. *See* Comment, *supra* note 78, at 164.

107. *Parsons*, 508 F.2d at 971.

108. *Id.*

109. *Id.* The arbitration panel did however consider an affidavit of the witness.

110. *Id.* at 975. "Overseas' due process rights under American Law, rights entitled to full force under the Convention as a defense to enforcement, were in no way infringed by the tribunal's decision." *Id.* at 976.

111. Imperial Ethiopian Government v. Baruch Foster Corp., 535 F.2d 334, 337 (5th Cir. 1976).

112. As one author has noted, the Fifth Circuit characterized this request for discovery as an attempt made in bad faith to thwart recognition of the award. *See* Comment, *supra* note 78, at 177-78.

113. *La Societe Nationale*, 585 F. Supp. at 64.

114. *Id.* at 65.

limits had been met.[115]

3. *Inadequacy of the Scope of the Arbitration Agreement*

Finding the previously discussed defenses inappropriate or unattractive, parties seeking to defend against enforcement have also relied upon Article V (1)(c). This section states that the court may refuse to enforce the award if "[t]he award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . . ."[116]

Courts have consistently held that this defense must be narrowly construed and that arbitration agreements must be interpreted broadly to allow for arbitration of a maximum number of disputes.[117] The Fifth Circuit, when faced with the assertion that an arbitration agreement did not cover the subject dispute and therefore, arbitration should not be compelled, agreed with the broad reading of such agreements. In *Sedco v. Retreoles Mexicanos Mexican*,[118] the district court held that arbitration should not be denied unless a court is certain that an agreement cannot be interpreted so as to cover the subject dispute. The court further stated that as a general rule, when the interpretation of an agreement and the coverage of a dispute by such agreement is uncertain, the question should be resolved in favor of arbitration.[119]

4. *Arbitrator Bias*

The next defense enumerated in the Convention is contained in Article V (1)(d). This section states that if the composition of the arbitral authority or procedure was not in accordance with the parties' agreement or the law of the country of award, the court may refuse to

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115. *Id.*

116. *Convention, supra* note 2, at 42, art. V(1)(c).

117. *See generally* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S. Ct. 3346, 3352 n.9; Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063, 1069 (N.D. Ga. 1980); Oriental Commercial and Shipping Co. v. Rosseel N.V., 609 F. Supp. 75, 77-78 (S.D.N.Y. 1985); *Parsons*, 508 F.2d at 976-77.

118. *Sedco*, 767 F.2d at 1145.

119. *Id.* (*citing* United Steel Workers v. Warrion & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347 (1960) and City of Meridian, Miss. v. Algernon Blair, Inc., 721 F.2d 525 (5th Cir. 1983)). Although *Sedco* dealt with a case in which an order compelling arbitration was sought, this same reasoning was utilized where enforcement of an award was sought. *See e.g.*, *Parsons*, 508 F.2d at 969. Laminoirs-Trefileries-Calderies de Lens v. Southwire Co., 484 F. Supp. 1063 (N.D. Ga. 1980).

enforce the award upon the provision of adequate proof.[120] This defense has frequently been utilized to argue that the arbitrators were biased in violation of the parties' agreement. However, for various reasons, parties asserting this defense have met with little success.

First, one of the benefits of arbitration is the ability of the parties to choose panel members who are experts in the field of the dispute. Because of the tremendous demand for a small number of renowned experts, many of these experts may jointly serve on many arbitration panels, possibly in other disputes surrounding one or both of the parties now in disagreement.[121] Secondly, in an effort to advance the goals of the Convention, courts will often be very skeptical of broad brushed assertions of bias, not raised before the arbitral panel itself, and subsequently raised to block enforcement of the award.[122] Courts may even characterize these attempts as made in bad faith.[123]

In *Andros Compania Maritima v. Marc Rich & Co.*,[124] the Court of Appeals for the Second Circuit was faced with an assertion that an arbitration award should not be confirmed due to the appellant's lack of opportunity in the lower court to prove arbitrator bias. Finding that the principles of *Commonwealth Coatings Corp. v. Continental Casualty Co.*,[125] should be applied,[126] the court held that arbitrators are required to disclose any relationship that might give an impression of bias, but an arbitrator will *not* automatically be disqualified due to a business relationship with the parties before him, so long as this relationship is disclosed.[127]

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120. *Convention, supra* note 2, at 42, art. V(1)(d).

121. von Mehren, *supra* note 23, at 360.

122. *See, e.g., LaSociets Nationale*, 585 F. Supp. at 65.

123. *See, e.g., Imperial Ethiopian Government*, 535 F.2d at 334.

124. Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691 (2d Cir. 1975).

125. Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).

126. The court summarized these principles as applying equally in both international and domestic arbitration. *Andros*, 579 F.2d at 691.

127. *Id.* at 697-98 (*citing Commonwealth Coating*, 393 U.S. at 148-149). The Second Circuit in *Andros* also noted that it could only find one instance after *Commonwealth Coatings* where an appellant had successfully pleaded undisclosed arbitrator bias. *Id.* at 700 (*citing Sank S. S. Co. v. Cook Industries, 495 F.2d 1260* (2d Cir. 1973)). One author has stated that the results in these cases are proper because "to require that there be no prior contacts between an arbitrator and a party would . . . often pose an insurmountable obstacle to finding a knowledgeable arbitrator." von Mehren, *supra* note 23 at 360.

5. *Ineffective Arbitral Award*

The last of the defenses to recognition and enforcement of an arbitral award that can be raised solely by the party seeking to avoid such enforcement is stated in Article V (1)(e) of the Convention. This article states that a court may refuse to recognize and enforce an award if the award has not yet become binding, or has been set aside or suspended in the country of award.[128] United States courts have not required that all appeals in the country of the award be exhausted prior to enforcement.[129] One commentator has noted that the only requirement to have a "binding" award in the eyes of American courts is to have "no further recourse . . . to another arbitral tribunal."[130] However, the district court's opinion in *Island Territory of Curacao* demonstrates that this point is valid only for arbitration concerning specific issues covered by the award.[131] The possibility of future arbitration concerning related issues revolving around the same dispute will not prevent an American court from finding the arbitral award binding.[132]

In *Island Territory of Curacao*, Solitron, the party seeking to avoid confirmation of the arbitral award, objected that the award was "not final, definitive and conclusive" because the arbitrators left open the possibility of further arbitration to set damages for a time period not covered by the subject award.[133] The district court disagreed and dismissed Solitron's objection stating, "[t]hat at some time in the future another arbitration and another award are possibilities does not mean that the present award at the present time is not 'final' and 'definite'."[134] To be not "final," the court felt that at a minimum, the amount of the award must be left unresolved.[135]

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128. Convention, *supra* note 2, at 42, art. V(1(e).

129. von Mehren, *supra* note 23, at 360.

130. Aksen, *American Arbitration Accession Arrives in the Age of Aquarius*, 3 S. W. UNIV. L. REV. 1, 11 (1971).

131. *Island Territory of Curacao*, 356 F. Supp. at 9.

132. *Id.*

133. *Id.* at 11. Although Solitron raised this defense under Chapter One of the United States Arbitration Act and not under Article V(1)(e) of the Convention, as implemented by Chapter Two of the same act, the plaintiff sought enforcement of the award under Chapter Two of the Arbitration Act and the Convention. Because the award was ultimately confirmed under the Convention, the court's interpretation of this defense is as applicable under Chapter One as it is under Chapter Two of the United States Arbitration Act.

134. *Id.* at 2.

135. *Id.*

6. *Nonarbitrability*

In addition to the five defenses previously discussed, Section 2 of Article V of the Convention lists two additional defenses that may be raised either by a party wishing to avoid enforcement of an arbitral award, or by the court *sua sponte*.[136]

The first of these defenses enumerated in the Article V of the Convention states that "[t]he subject matter of the defense is not capable of settlement by arbitration under the law of [the enforcing] country . . ."[137] To be successful under this section, a party must prove that the country of enforcement attaches a special interest to the dispute which renders the dispute nonarbitrable.[138] Consideration of this defense is most susceptible to the countervailing pressures applied by the strong desire of the courts to promote arbitration, and of the realization that important national interests cannot be arbitrated.[139]

This defense of "nonarbitrability" was raised by the defendant in *Parsons & Whittemore Overseas v. Societe Generale De L'Industrie Du Papier*.[140] Parsons, seeking reversal of confirmation of an arbitral award, contended that "U.S. foreign policy issues can hardly be placed at the mercy of foreign arbitrators 'who are charged with the execution of no public trust' and whose loyalties are to foreign interests."[141]

The Second Circuit refused to reverse the confirmation of the arbitral award despite the precarious predicament of Parsons.[142] The court held that "[s]imply because acts of the United States are somehow implicated in a case one cannot conclude that the United States is vitally interested in its outcome. . . . There is no special national interest in judicial, rather than arbitral, resolution of the breach of contract claim underlying the award in this case."[143]

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136. *See* Comment, *supra* note 78, at 170, for a discussion.

137. *Convention, supra* note 2, at 42, art. V(2)(a).

138. Comment, *supra* note 78, at 170.

139. *Id.* at 171 (*citing Scherk*, 417 U.S. at 508 and *Parsons*, 508 F.2d at 974-75).

140. *Parsons*, 508 F.2d at 969.

141. *Id.* at 975. Parsons' invocation of U.S. foreign policy was based upon the facts giving rise to the dispute. Parsons, an American corporation, contracted with the respondent to construct and manage a paperboard mill in Egypt. Work proceeded until May of 1967 when the Egyptian government broke diplomatic relations with the United States and ordered all Americans, with the exception of those who qualified for a special visa, out of Egypt. Employees of Parsons stopped work and left Egypt and Parsons sent notification to the respondent that the stoppage of work should be excused under the force majeure clause of the contract. The respondent disagreed and a subsequent arbitral panel agreed with the respondent. *Id.* at 972.

142. *Id.* For a brief discussion on Parsons' situation, see *supra* note 141.

143. *Id.* at 975.

In *Northrup Corp. v. Triad Financial Establishment*,[144] Northrup, another American corporation, found itself in a similar situation. Plaintiff Northrup had entered into a marketing agreement with Triad, by which Triad was to operate as Northrup's sole representative for the sale of products to Saudi Arabia.[145] For their efforts, Triad was to receive a commission for all products sold to Saudi Arabia, both directly, because of Triad's efforts, and indirectly, upon the request of the United States Department of Defense. During the effective period of the marketing agreement, the Saudi Arabian government advised the Department of Defense that "the use of intermediaries with respect to arms sales to the Saudi government [indirect sales in the terms of the marketing agreement] would not be permitted."[146] The Department of Defense advised Northrup of this development and Northrup terminated its agreement with Triad. Triad refused to agree to the termination and requested arbitration in accordance with the contract. The arbitral tribunal found Northrup liable for its breach of the contract and the subsequent action was filed in the United States District Court for California to confirm the award against Northrup. Northrup, seeking vacation of the award, contended that the tribunal had exceeded its authority by deciding issues that were nonarbitrable.[147] Northrup characterized these issues as those "affecting fundamental public interests."[148] Although the court ultimately vacated a portion of the arbitral award due to the agreement's illegality, the court noted the strong preference for enforcement of arbitral awards, particularly in international agreements.[149] Based upon this strong preference, the court concluded that the dispute, despite its national "overtones," had been properly submitted to arbitration.[150]

Despite the defendant's general lack of success in asserting the "nonarbitrability" defense, other parties have raised it in the context of a defense to confirmation of an arbitral award. In *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*,[151] the Libyan Amer-

144. Northrup Corp. v. Triad Financial Establishment, 593 F. Supp. 928 (D. Cal. 1984).

145. *Id.* at 930-932.

146. *Id.* at 932.

147. *Id.* at 934. "Specifically, Northrop challenge[d] the tribunal's authority to construe United States policy as announced by DOD in statements and publications, and as codified by Congress in the FCPA and Saudi Decree." *Id.*

148. *Id.*

149. *Id.* at 935-36.

150. *Id.* at 936.

151. Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya, 482 F. Supp. 1175 (D.D.C. 1980).

ican Oil Company (LIAMCO) brought an action in district court to confirm and enforce an arbitration award against Libya.[152] As one of its defenses to the confirmation of the award, Libya raised the act of state doctrine asserting that the award was not capable of settlement in the United States.[153] The District Court agreed with Libya and refused to enforce the arbitral award.[154]

The facts leading to the dispute involved the nationalization of certain of LIAMCO's rights and oil drilling equipment by the government of Libya.[155] Following unsuccessful negotiations between Libya and LIAMCO, LIAMCO initiated arbitration under the contract between LIAMCO and Libya.[156] A subsequent arbitral panel found in favor of LIAMCO and LIAMCO brought action in the United States District Court for the District of Columbia to enforce the award when Libya refused to abide by its terms.[157]

Supporting its decision not to enforce the award, the District Court stated that the subject matter of the difference was the nationalization of LIAMCO's assets and the rate at which LIAMCO should be compensated for these assets by Libya.[158] The court concluded that it could not have compelled the parties to arbitrate the dispute initially because "in so doing [the court] would have been compelled to rule on the validity of the Libyan nationalization law" which determined the procedures for setting the rate of compensation.[159]

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152. *Id.* at 1176.

153. *Id.* at 1177. The act of state doctrine as invoked by the District Court in the Libyan American Oil case requires courts to refrain from judging the validity of public acts of foreign sovereign states. One author has stated that this doctrine should not be given deference either in the arbitration proceeding itself, nor in an action to enforce the award. von Mehren, *supra* note 23, at 357.

> Arbitration is a private, consensual procedure; it does not involve any examination by the "judicial branch," or any other organ of the state, into the validity of the actions of any other foreign state. Moreover, neither the New York Convention nor the Federal Arbitration Act permits a reexamination by the courts during an enforcement action of the merits of the dispute which was before the arbitrations. Therefore, the act of state doctrine should be given no application in or with respect to arbitration.

Id. In view of this criticism of the applicability of the act of state doctrine in arbitration, it is doubtful that *Libyan American Oil Co.* will impact greatly on the choice of defenses to confirmation of arbitration awards.

154. *Libyan*, 482 F. Supp. at 1179.

155. *Id.* at 1176.

156. *Id.*

157. *Id.*

158. *Id.* at 1178.

159. *Id.* Despite the court's decision, the parties in this action reached a settle-

The "nonarbitrability" defense has been considerably narrowed in recent years by federal courts in both domestic and international cases. This narrowing has been primarily accomplished by expanding the issues appropriate for arbitration that previously were held to be strictly within the jurisdiction of the courts. Disputes surrounding the federal securities laws are one such type of issue previously held inappropriate for arbitration.

Since the Supreme Court case of *Wilko v. Swan*,[160] disputes surrounding possible violations of the 1933 Securities Exchange Act have been found to be addressable only within the judicial system. The holding of *Wilko* was based upon the Court's finding that the 1933 Securities Exchange Act conferred upon aggrieved parties an unwaivable right to address violations of the Act in a federal court.[161] Despite their recognition of the advantages of arbitration in commercial transactions, the Court found that the intentions of Congress would best be served in a court which was required to make a complete record of their findings and conclusions, which had the requisite knowledge to handle legal concepts such as the burden of proof, reasonable care and material fact and whose decision would not be subjected to only a limited review.[162]

Although the 1934 Securities Exchange Act did not contain the same language as the 1933 Act upon which the Supreme Court had based its finding in *Wilko* of an "irrevocable right", many courts interpreted the *Wilko* decision to mean that no securities disputes could be submitted to arbitration.[163]

However, in *Scherk v. Alberto-Culver*,[164] the Supreme Court refused to apply their holding in *Wilko*, distinguishing the cases on the basis of the international context in *Scherk*.[165] The action in this 1974 case was brought by an American company, Alberto-Culver, against a German citizen to recover damages under the 1934 United States Federal Securities Exchange Act.[166] Alberto-Culver alleged that Scherk had made fraudulent representations concerning certain trademarks

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ment and the decision was vacated. *See generally*, von Mehren, *supra* note 23, at 358.

160. Wilko v. Swan, 346 U.S. 427 (1953).

161. *Id.* at 435. The court viewed an agreement to arbitrate a dispute as a potential "waiver" of litigation right. *Id.*

162. *Id.* at 436. The Court "decide[d] that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues under the Act." *Id.* at 438.

163. In fact, some courts still hold this opinion. *See, e.g.*, Avent v. Shearson, 633 F. Supp. 770 (D. Mass. 1985).

164. *Sherk*, 417 U.S. at 506.

165. *Id.*

166. *Id.*

which Alberto-Culver purchased in reliance on Scherk's statements.[167] Scherk sought to stay the proceedings while the dispute was arbitrated in accordance with the arbitration agreement in the contract of sale. The United States District Court for the Northern District of Illinois refused to stay the proceedings and the United States Court of Appeals for the Seventh Circuit affirmed.[168]

The Supreme Court reversed the lower courts refusal to stay the proceedings characterizing the agreement to arbitrate as a type of forum selection.[169] The Court stated that to refuse to stay the proceedings and invalidate the arbitration agreement would permit the American company to repudiate its contractual promise.[170] Further, the court distinguished *Wilko* on the grounds that *Wilko* had involved a purely domestic arbitration where there was no uncertainty as to the particular laws that would govern the dispute.[171] However, in an international dispute such as that involved in *Scherk*, much controversy surrounded the proper forum and conflict of laws.[172] The Court characterized arbitration agreements as an advanced effort to resolve these questions.[173]

The *Scherk* decision is certainly a major narrowing of the nonarbitrability defense, not principally because of the number of international disputes involving the securities area, but because of the demise of such a deeply entrenched philosophy of nonarbitrability of federal securities disputes. This important decision has prompted some federal courts, even in domestic arbitration cases, to hold that disputes surrounding the 1934 Securities Exchange Act may also be arbitrated.[174]

The federal courts' narrowing of the scope of nonarbitrable issues has also caused the consequent demise of another jurisdictional principle, the intertwining doctrine. This doctrine held that when arbitrable and nonarbitrable issues or complaints arose out of the same transaction and were "sufficiently intertwined factually and legally," the

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167. *Id.*

168. Sherk v. Alberto-Culver Co., 484 F.2d 611, 615 (7th Cir. 1973).

169. *Sherk*, 417 U.S. at 519.

170. *Id.* The Court further held that such a finding would demonstrate an outdated and improper concept that all disputes in international contracts must be settled according to United States laws and in United States courts - a concept first cautioned against in The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1971). The Supreme Court voiced once again, as they did in *Bremen*, that "[w]e cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.* (*citing Bremen*, 407 U.S. at 9).

171. *Sherk*, 417 U.S. at 515-16.

172. *Id.*

173. *Id.*

174. *See, e.g.*, Brenen v. Becker Paribas, Inc., 628 F. Supp. 442 (S.D.N.Y. 1985).

courts could, in their discretion, refuse to compel arbitration of any claims and try all the claims in federal court.[175] Such a doctrine was believed to be necessary to preserve the federal courts' exclusive jurisdiction over federal securities disputes and to avoid bifurcated and redundant proceedings.[176] However, in *Dean Witter Reynolds v. Byrd*,[177] the Supreme Court held that the United States Arbitration Act divested the district courts of any discretion to refuse to compel arbitration of claims that were viewed as arbitrable.[178] In reaching this conclusion, the Supreme Court reversed the lower court's refusal to compel arbitration of claims of breach of state securities laws that were appended to the claims of federal security law violations.[179] Judicial resolution of the federal claims was therefore stayed until the arbitration could be completed.

Although *Byrd* involved only domestic parties and domestic interests, the demise of the intertwining doctrine has had an important effect on international arbitrations as well. This impact has been demonstrated in *Sedco v Petroleos Mexicanos Mexican National Oil Co.*[180] In *Sedco*, the American owner of a drilling vessel destroyed by an oil spill in the Gulf of Mexico brought suit against the charterer of the vessel for failing to indemnify the owner against all claims arising from the spill.[181] The owner argued that this indemnification was in accordance with a clause contained in the charter party.[182] As a defense, the charterer raised the arbitration clause. The lower court refused to stay the proceeding nor compel arbitration.[183] On appeal by the charterer seeking to reverse the lower court's decision, the owner of the vessel argued that an appellate court lacks jurisdiction to hear an appeal from a lower court's refusal to order arbitration in an admiralty case.[184] This argument was based upon the doctrine first announced in *Schoenamsgruber v. Hamburg American Line*,[185] which states that a court of appeals lacks jurisdiction to hear appeals based upon a lower court's order staying admiralty proceedings pending arbitration.[186] Appellate courts

175. Dean Witter Reynolds v. Byrd, 105 S. Ct. 1238, 1240 (1985).
176. *Id.*
177. *Byrd*, 105 S. Ct. at 1238.
178. *Id.* at 1241.
179. *Id.* at 1240-1241.
180. *Sedco*, 767 F.2d 1140.
181. *Id.* at 1143.
182. *Id.*
183. *Id.* at 1144.
184. *Id.*
185. Schoenamsgruber v. Hamburg American Line, 294 U.S. 454 (1935).
186. *Id.* at 458.

have often applied this principle to divest themselves of jurisdiction to hear orders refusing to stay proceedings.[187] However, noting the strong pro-enforcement philosophy of American courts and the demise of the intertwining doctrine, the Court of Appeals in *Sedco* assumed jurisdiction and compelled arbitration.[188] With this decision, the Court of Appeals removed another obstacle to arbitration and further signaled their continuing expansion of arbitration jurisdiction.

The demise of the intertwining and *Schoenamsgruber* doctrines, and the consequent increase and expansion of issues determined to be "arbitrable", can also be viewed as a natural extension of the Supreme Court decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* [189] In that case, the Supreme Court affirmed the Court of Appeals' reversal of an order denying arbitration and a stay of judicial proceedings.[190] The federal District Court's denial was based upon the court's desire to avoid multiple proceedings to resolve federal and pendant state claims.[191] The Supreme Court, however, did not find this to be a legitimate reason to deny arbitration.[192] The Supreme Court stated that the fact that Moses H. Cone Memorial Hospital would be forced to resolve the issues of the case in different forums "occurs because the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement."[193]

This desire to arbitrate certain isolated issues of a case despite resultant multiple proceedings again reinforces the trend in federal courts to abide by the purpose and goal of the United States Arbitration Act and the Convention. Through the *Moses Cone* opinion, the Supreme Court confirmed the absence of any judicial discretion to deny arbitration in the presence of a valid arbitration agreement. The *Moses Cone* opinion will allow federal courts to compel arbitration and enforce awards concerning disputes other than those involving securities where the intertwining doctrine would be inapplicable.

The most recent major development in the courts' reduction of the number of issues considered inappropriate for arbitration involves antitrust disputes. Until the Supreme Court decision in *Mitsubishi Motors*

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187. *Sedco*, 767 F.2d at 1148 n. 21.

188. *Id.* at 1147-48.

189. Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983).

190. *Id.* at 4.

191. *Id.* at 13.

192. *Id.* at 20.

193. *Id.*

Corp. v. Soler Chrysler-Plymouth,[194] antitrust disputes had been considered within the exclusive jurisdiction of the judicial system.[195] Despite adherence to this principle by higher courts, the United States District Court for the District of Puerto Rico ordered arbitration of the antitrust and unfair competition claims and counterclaims of both Mitsubishi, the Japanese manufacturer plaintiff, and Soler, the Puerto Rican dealer defendant.[196] On appeal by Soler, the Court of Appeals for the First Circuit reversed the District Court's order compelling arbitration and upheld the traditional view that cases involving antitrust are solely within the domain of the courts.[197] Criticizing this traditional view, the Supreme Court held that despite their complexity and importance, antitrust disputes are proper issues for arbitration.[198] With regard to the complexities of antitrust, the Court noted that the flexibility of arbitration allowed panel members to be chosen from a variety of fields of expertise, maximizing the chances of competent resolution.[199] Discussing the relative importance and impact of antitrust suits, the Court recognized that judicial review of an arbitral panel's decision would ultimately be available at the enforcement stage.[200] With their decision in *Mitsubishi*, the Supreme Court once again affirms the trend of judicial recognition of the value of arbitration in minimizing the difficulties and resolving the complexities arising in international trade disputes.[201]

As the previous cases illustrate, the defense of nonarbitrability in actions involving confirmation and enforcement of arbitral awards has lost most of its vitality. Even where precedent is favorable to such a defense, a party must realize that courts have regularly departed from precedent in order to promote arbitration. Overall, this makes the de-

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194. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 105 S. Ct. 3346 (1985).

195. This characterization of federal antitrust issues had been uniformly applied by the Courts of Appeals in accordance with American Safety Equipment Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

196. *Mitsubishi*, 105 S. Ct. at 3351. These allegations were raised under Puerto Rican antitrust and unfair competition statutes.

197. *Mitsubishi*, 723 F.2d at 155. The Court of Appeals upheld the doctrine of *American Safety* in reversing the district court. *See supra* note 195.

198. *Id.* at 3357-61.

199. *Id.* at 3358.

200. *Id.* at 3360.

201. *Id.* at 3355. "As in *Scherk v. Alberto Culver Co.*, [*see supra* note 12] . . . , [the court] conclude[d] that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement . . . ." *Id.*

fense of nonarbitrability unattractive in most cases.

7. *Public Policy*

The second defense listed in Article V (2) of the Convention that may be raised by a party or by the court sua sponte revolves around the public policy of the forum country. Article V (2)(b) states that recognition and enforcement of an arbitral award may be refused if such enforcement would be "contrary to the public policy of . . . [the enforcing] country."[202] However, the importance of this defense has been questioned. As one author has commented, "[t]he public policy defense has [great] potential for obstructing the enforcement of arbitration awards because of its vagueness."[203] To avoid this problem, the federal courts have construed this defense very narrowly, allowing the defense to be successful in only three out of one hundred recent cases.[204]

The major case interpreting the "public policy" defense is *Parsons & Whittemore Overseas v. Societe Generale DeL'Industrie Du De L'Industrie Papier.*[205] Parsons, seeking to obtain an order reversing the district court's confirmation of an arbitral award in favor of an Egyptian corporation, argued that the enforcement of the award was against United States public policy.[206] Due to the eruption of the Arab-Israeli Six Day War, Parsons' employees stopped work on a project in Egypt and returned home upon the severance of American - Egyptian relations.[207] With the severance of these relations, the Agency for International Development, which had been financially supporting the Egyptian corporation, withdrew all assistance.[208] Parsons argued that this action by a United States agency required Parsons, "as a loyal American citizen, to abandon the project"[209] and any "[e]nforcement of an award predicated on the feasibility of [Parsons] returning to work in defiance of these expressions of national policy would therefore allegedly contravene United States policy."[210]

The court dismissed Parson's argument criticizing its equation of

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202. *Convention, supra* note 2, at 42, art. V(2)(b).

203. Comment, *supra* note 78, at 156-57.

204. Sanders, *A Twenty Years' Review of the Convention the Recognition and Enforcement of Arbitral Awards*, 13 INT'L LAW. 269, 271 (1979).

205. *Parsons*, 508 F.2d at 969.

206. *Id.* at 973. For other discussion regarding *Parsons*, *see supra* notes 140-43 and accompanying text.

207. *Id.* at 972.

208. *Id.*

209. *Id.* at 974.

210. *Id.*

national policy and public policy as "plainly miss[ing] the mark."[211] The court held that such an equation would severely undermine the Convention, reasoning that the "public policy" envisioned by the framers of the Convention did not include all the "vagaries of international politics."[212] In a statement now considered to be the standard for judging such defenses, the court concluded that "[e]nforcement of foreign arbitral awards may be denied on [a public policy] basis only where enforcement would violate the forum state's most basic notions of morality and justice."[213]

Because of the difficulties in meeting this standard enunciated in *Parsons*, parties seeking to defend against enforcement and recognition of an arbitral award utilizing the "public policy" objection have generally been unsuccessful. This has been illustrated in two separate cases before the United States District Court for the Southern District of New York in 1976 and in 1983. In both *Antco Shipping Co. v. Sidermar*[214] and *La Societe Nationale v. Shaheen Natural Resources*,[215] defendants argued that the enforcement of an arbitral award against them would contravene the public policy of the United States due to alleged restrictive trade clauses contained in their contracts with the plaintiffs.[216] In *Antco Shipping*, Antco, the charterer of a vessel owned by Sidermar, argued that the exclusion in the charter contract of Israeli ports from those to which the charterer was to sail was a violation of the United States policy of free unrestricted trade practices toward friendly nations.[217] In *La Societe Nationale*, Shaheen argued that the exclusive consignment of crude oil covered by its contract with La Nationale to the buyer's installations was an "illegal location restriction of the resale of goods."[218] Applying the *Parsons* standard, the District Court rejected both arguments. The court concluded that both issues failed to reach a level that contravened the public policy of the United States.[219]

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211. *Id.*

212. *Id.*

213. *Id.*

214. Antco Shipping Co. v. Siderman, 417 F. Supp. 207 (S.D.N.Y. 1976) *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977).

215. *La Societe Nationale*, 585 F. Supp. 57.

216. Respectively, *Antco Shipping Co.*, 417 F. Supp. at 211 and *La Societe Nationale*, 585 F. Supp. at 63.

217. *Antco Shipping Co.*, 417 F. Supp. at 211.

218. *La Societe*, 585 F. Supp. at 63.

219. *Antco Shipping Co.*, 417 F. Supp. at 215-217, *La Societe Nationale*, 585 F. Supp. at 63. *See also*, Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150 (2d Cir. 1984) and in *Fertilizer Corp. of India*, 530 F. Supp. at

Despite the overwhelming lack of success parties have encountered when raising the "public policy" defense, one party has successfully invoked the defense. In *Laminoirs-Trefileries-Cablemies de Leus v. Southwine Co.*,[220] the District Court for the Northern District of Georgia refused to enforce that portion of an arbitral decision awarding interest. The interest rates utilized in the calculation were characterized by the court as being so high that they were penal rather than compensatory and as "bear[ing] no reasonable relation to any damage resulting from delay in recovery of the sums awarded."[221] The court therefore concluded that these rates were against public policy based upon this country's lack of legal recognition of penalties in calculating damages.[222] This case represents one of the few reported successful invocations of the "public policy" defense.

8. *Inapplicability of the Convention*

Because of the lack of success that parties have encountered in raising the defenses just summarized, a few parties have turned to another avenue of defense in attempting to block enforcement of an arbitration award. These parties have attempted to prove that the Convention simply does not apply in their particular circumstances. This line of argument is based on the two reservations with which the United States ratified the Convention.[223] The first such reservation allows a contracting state to apply the Convention only on the basis of reciprocity of ratification of the Convention.[224] Under this reservation, the contracting state need only recognize arbitral awards rendered in other states that have also ratified the Convention. The second reservation

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220. *Laminoirs*, 484 F. Supp. at 1063.

221. *Id.* at 1069.

222. "A foreign law will not be enforced if it is penal only and relates to the punishing of public wrongs as contradistinguished from the redressing of private injuries." *Id.* (citing Southern Railway Co. v. Decker, 5 Ga. App. 21, 25, 62 S. E. 678 (1908).

223. One issue that has not been properly addressed by the courts is the utilization by these parties of defenses contained within Chapter One of the United States Arbitration Act, but not included within Article V of the Convention. To date, courts have sidestepped the issue by initially deciding that the facts of the case do not support the defense even under Chapter One of the act. *See* Comment, *supra* note 78 at 178-79; *Parsons*, 508 F.2d at 977. It is probable that when the courts do address this issue they will find that the Chapter One defenses will be inapplicable under the purpose of the Convention and the United States implementing legislation.

224. McLaughlin & Genevro, *supra* note 1, at 252 interpreting Article (1) of the Convention.

allows a nation to apply the Convention only to those transactions considered "commercial" by the enforcing nation.[225] Parties seeking to defend against enforcement proceedings under either of these reservations have argued that since the United States has only adopted the Convention subject to both reservations, the courts should narrowly construe the scope of the Convention and broadly construe the reservations and subsequent defenses.[226] However, despite the fact that the Convention would have a broader application without the two reservations, this line of argument has not been accepted.[227]

In reviewing allegations arising under the first reservation of lack of ratification reciprocity, the federal courts have announced a few simple standards. First, it has been consistently held that the country of the award is the sole determinative of reciprocity, with the nationalities of the parties involved to be irrelevant.[228] If the country of award is a contracting state of the Convention, then other contracting states must enforce the award, absent a valid defense.[229] Additionally, it is irrelevant whether or not the contracting state in which the award was made would actually enforce a similar award from the other contracting state in which enforcement is sought.[230] Because of these standards, most parties raising this first reservation have met with little success.[231]

Parties seeking to utilize the second reservation have also met with little success. In *Island Territory of Curacao*, Solitron, the defendant opposing confirmation of the award, objected that the legal relationship at the source of the dispute was not "commercial."[232] The District Court for the Southern District of New York noted that there were no

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225. *Id.*

226. *See e.g.*, *Bergesen*, 710 F.2d at 932-33.

227. In fact, the courts have construed the two reservations as narrowly as the seven defenses listed in the Convention. *See* McLaughlin & Genevro, *supra* note 1, at 256. ("Consequently, application of the reservations has not provided a formula for parties to subvert the broader goals underlying the Convention.")

228. *See La Societe Nationale*, 585 F. Supp. at 64.

229. *Id.*

230. *See* Fertilizer Corp. of India v. IDI Management, 517 F. Supp. 948 (S.D. Ohio 1981) "[T]he issue of reciprocity goes only to whether a state has signed the Convention and made a good faith attempt to abide by its rules and not to whether it has actually enforced awards against its own citizens." *Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 VA. J. INT'L. L. 75, 82 (1982) (*citing Fertilizer Corp. of India*, 517 F. Supp. at 952-53 and Leigh, *Judicial Decision, Fertilizer Corp. of India v. IDI Management, Inc.*, 76 AM. J. INT'L L. 166 (1982).

231. *See e.g.*, *Fertilizer Corp. of India*, 517 F. Supp. at 948, *La Societe Nationale*, 585 F. Supp. at 64; *Rhone*, 555 F. Supp. at 485.

232. *Island Territory of Curacao*, 356 F. Supp. at 12.

judicial guidelines to indicate the purpose of this limitation.[233] However, the court speculated that it was "to exclude matrimonial and other domestic relations awards, political awards and the like."[234] The court ultimately concluded that under any test a contract with a commercial manufacturer to build and operate a plant would constitute a commercial relationship.[235]

Whether the party is one attempting to prove that the Convention simply does not apply due to the United States reservations or is a party raising any of the seven defenses previously summarized, little success has been achieved when trying to block recognition and enforcement of arbitral awards under the Convention. It would seem that no surer case could be bought than one seeking such enforcement and recognition.

III. CONCLUSION

The reluctance of United States federal courts to allow any objection or defense to undermine the Convention or the aim of international arbitration is indicative of the present pro-enforcement philosophy within the United States. It is, as if, in the years since the United States ratification of the Convention and the passage of the United States Arbitration Act in 1925, present courts have become as protective of arbitration and its field of application as previous courts were protective of their own jurisdictional territory at the turn of the century. The federal judicial system has realized that continuing international business dealings would be impossible without an efficient means of dispute resolution and that only with judicial protection and enforcement of arbitration could such an efficient means be fostered. As the Supreme Court has noted, in looking toward the future,

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial re-

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233. *Id.*

234. *Id.* at 13.

235. *Id.* The court held that "[i]n the case of the United States' reservation it seems clear that the full scope of 'commerce' and 'foreign commerce,' as those terms have been broadly interpreted, is available for arbitral agreements and awards." *Id.* (*quoting* Quigley, *Convention on Foreign Arbitral Awards*, 58 A.B.A.J. 821, 823 (1972)).

> lations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration," . . . and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.[236]

The federal courts have certainly followed this view and will, in the future, continue to do so by enforcing and confirming the great majority of arbitral awards brought before them.

Diana G. Richard

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236. *Mitsubishi*, 105 S. Ct. at 3360.