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Enforcement of Arbitral Awards Under the New York Convention— Practice in U.S. Courts

by
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and Laurie Genevro*

I INTRODUCTION

Courts in the United States pursue a consistent, well-articulated policy of recognizing and enforcing awards rendered in both domestic and foreign arbitrations.¹ The same fundamental policies motivating U.S. courts to enforce agreements to arbitrate also motivate courts to recognize and enforce domestic and foreign arbitral awards.² These policies are consistent with the popular view of arbitration as a particularly suitable means for resolving disputes arising from international commercial transactions.³ U.S. courts consistently uphold the arbitral process because it offers many attractive features

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1. Holtzmann, *National Report—United States*, II Y.B. COM. ARB. 116, 138 (1977). See also Hoellering, *Arbitration in the United States*, in ARBITRATION & THE LAW 124 (1983). "The [U.S.] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24–25 (1983).

2. A recent example of the favorable attitude with which U.S. courts view arbitration is *Dean Witter Reynolds, Inc. v. Byrd*, 726 F.2d 552 (9th Cir. 1984), *rev'd*, 53 U.S.L.W. 4222 (U.S. Mar. 4, 1985). In *Dean Witter*, the United States Supreme Court resolved a classic split among the circuits concerning the arbitrability of pendent state claims that arise out of the same transaction and are sufficiently related factually and legally to federal nonarbitrable claims. The Court concurred with opinions of the Sixth, Seventh, and Eighth Circuits which concluded that the Federal Arbitration Act "both through its plain meaning and the strong federal policy it reflects, requires courts to enforce the bargain of the parties to arbitrate, and 'not substitute [its] own views of economy and efficiency' for those of Congress." 53 U.S.L.W. at 4223, *citing* *Dickinson v. Heinold Securities, Inc.*, 661 F.2d 638, 646 (7th Cir. 1981). Consequently, district courts are compelled to sever pendent, arbitrable claims when one of the parties seeks such relief. The preeminent concern of Congress in adopting the Act "was to enforce private agreements into which parties had entered, and require. . . [rigorous enforcement of] agreements to arbitrate, even if the result is 'piecemeal' litigation." 53 U.S.L.W. at 4224.

3. See, e.g., M. DOMKE, *COMMERCIAL ARBITRATION* § 44:00 (rev. ed. 1984) [hereinafter cited as *DOMKE*]; A.J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958*

not generally available to parties litigating through the court system. At its best, arbitration is less expensive, less time-consuming, and more efficient than litigation. Arbitrators can be selected because of a special skill or knowledge of the subject matter in dispute, a choice which is not normally available in the traditional court system. Moreover, arbitral proceedings are confidential and are not open to public scrutiny. A pro-enforcement arbitration policy also encourages trade, since parties are less vulnerable to the uncertainties of foreign litigation and the hazards of international business such as currency fluctuations and governmental shifts. Finally, arbitral proceedings offer another attractive feature: they are recognized and enforced in U.S. courts more readily than are foreign judgments. Merchants can depend upon a judicial system whose courts uphold and enforce contractual provisions to arbitrate commercial disputes. Judicial reluctance to recognize more than a very few exceptions to the voluntary arbitration policy likewise strengthens the commercial system.

While the majority of arbitral awards are satisfied through the voluntary compliance of the parties involved,⁴ on some occasions a party must invoke external authority to enforce a losing party's obligation and collect the damages awarded.⁵ Such external authority to enforce an arbitral award resides in the national courts. Since an arbitral award is not the legal equivalent of a judicial judgment, however, it must be converted into a judicial judgment in the United States before an order or writ of execution can be issued to enforce the award.

U.S. courts follow a pro-enforcement policy for arbitral awards arising from transactions between parties of different nationalities. This pro-enforcement policy is primarily governed by the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the New York Convention or the Convention) to which the United States acceded in 1970.⁶ As one author explains:

Current international commercial arbitration cannot function without the assistance of the national courts. The New York Convention is built upon this

1 (1981) [hereinafter cited as VAN DEN BERG]; Bagner, *Enforcement of International Commercial Contracts by Arbitration: Recent Developments*, 14 CASE W. RES. J. INT'L L. 573 (1982).

4. DOMKE, *supra* note 3, at § 36:01.

5. "An essential element in a successful international or national system of effective commercial arbitration is the ease and efficiency with which awards are enforced." *Id.* at § 46:00.

6. Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as New York Convention]. Adoption and implementation of the New York Convention by the United States is found at 9 U.S.C. § 201 (1982). Article II of the New York Convention also provides for the enforcement of agreements to arbitrate. Those provisions, however, are beyond the scope of this paper. Decisions on actions to compel arbitration are discussed to the extent that they interpret Convention provisions that also apply to enforcement of awards.

principle. It can even be said that the Convention effectively derives its authority from the national courts. The manner in which they interpret and apply the Convention is the main source of its effectiveness.⁷

This Article examines the pro-enforcement policy of U.S. courts under the New York Convention, which recognizes only seven defenses, interpreted narrowly by U.S. courts, to enforcement of an arbitral award. Following a discussion of the Convention and judicial interpretation of its seven defenses, this Article describes briefly some of the enforcement mechanisms available to courts outside of the Convention, including multilateral treaties, bilateral Friendship, Commerce and Navigation treaties, and traditional principles of comity among States.

II THE NEW YORK CONVENTION

The New York Convention resulted from an international effort to make arbitration a more certain and efficient means of resolving international disputes. As the U.S. Supreme Court described it:

The 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 in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.⁸

Since the New York Convention became available for ratification in 1958, sixty-eight nations have ratified or acceded to it.⁹ These nations represent all parts of the world and many different levels of commerce and development. Almost all the major international trading nations are parties to the New York Convention.¹⁰

7. VAN DEN BERG, *supra* note 3, at 5 (footnote omitted). The author refers specifically to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See *supra* note 6. His comments, however, are fairly applied to the matter of arbitral awards in general.

8. Scherk v. Alberto-Culver, 417 U.S. 506, 520 n.15 (1973).

9. See generally U.S. DEP'T OF STATE, TREATIES IN FORCE 208 (July 1985). The following States are party to the Convention:

Australia, Austria, Belgium, Benin, Botswana, Bulgaria, Central African Republic, Chile, Colombia, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Ecuador, Egypt, Finland, France, German Dem. Rep., German Fed. Rep., Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kampuchea, Korea, Kuwait, Luxembourg, Madagascar, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Philippines, Poland, Romania, San Marino, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Rep., Tanzania, Thailand, Trinidad & Tobago, Tunisia, U.S.S.R., United Kingdom, United States, Uruguay, and Yugoslavia.

Id.

10. Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (Spring 1979) [hereinafter cited as *Twenty Years' Review*]. See also list of nations in *supra* note 9.

A. General Provisions of the New York Convention

Article I of the New York Convention sets out its scope:

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.¹¹

Article I also provides two reservations which a nation may adopt when acceding to the Convention. The first allows a nation to apply the New York Convention on the basis of reciprocity, so that it need only recognize awards made in another State which has ratified the Convention.¹² The second reservation allows a nation to apply the New York Convention only to those transactions considered "commercial" under its own national law.¹³ Forty-three States have made the first reservation; twenty-four States have made the second.¹⁴ The United States acceded to the New York Convention with both reservations.¹⁵

Article III of the Convention requires a Contracting State to "recognize arbitral awards as binding" and to enforce the awards according to the State's own rules of procedure. A State may not impose "more onerous conditions or higher fees or charges" for the recognition or enforcement of awards under the New York Convention than it would impose for a domestic award.¹⁶ The procedure for obtaining enforcement of an award is straightforward under Article IV of the Convention. The party seeking enforcement must supply the court with a "duly authenticated original award" and either the original or certified copies of the arbitration agreement.¹⁷

11. New York Convention, art. I(1).

12. *Id.* at art. I(3). This reservation does not mean that a nation will not recognize an award made in a State which has not ratified the Convention, but only that it may refuse to apply the provisions of the Convention in its recognition of the award. It is also important to note that the reciprocity provision considers the State where the award was made, not the native States of the parties to the arbitration.

13. *Id.*

14. The States making the first reservation are:

Austria, Belgium, Botswana, Bulgaria, Central African Rep., Cuba, Cyprus, Czechoslovakia, Denmark, Ecuador, France, German Dem. Rep., German Fed. Rep., Greece, Guatemala, Holy See, Hungary, India, Indonesia, Ireland, Japan, Korea, Kuwait, Luxembourg, Madagascar, Morocco, Netherlands, New Zealand, Nigeria, Norway, Philippines, Poland, Romania, Switzerland, Tanzania, Trinidad & Tobago, Tunisia, United Kingdom, and United States.

Those States making the second reservation are:

Botswana, Central African Rep., Cuba, Cyprus, Denmark, Ecuador, France, German Dem. Rep., Greece, Guatemala, Holy See, Hungary, India, Indonesia, Korea, Madagascar, Nigeria, Philippines, Poland, Romania, Trinidad & Tobago, Tunisia, and United States.

See TREATIES IN FORCE, *supra* note 9, at 208.

15. 9 U.S.C. § 201 (1980).

16. New York Convention, art. III.

17. *Id.* at art. IV.

The continued strength of the New York Convention lies in Article V, which recognizes only seven grounds for refusing enforcement of an arbitral award.¹⁸ A party wishing to block the enforcement of an award bears the burden of proving that one of the seven grounds for refusing enforcement exists.¹⁹

B. Implementation of the New York Convention in the United States

The United States acceded to the New York Convention in 1970 and implemented its provisions by enacting Chapter 2 of the Federal Arbitration Act.²⁰ This legislation provides that U.S. federal district courts shall have original jurisdiction over actions arising under the Convention.²¹ Jurisdiction of the federal courts is not exclusive, however, since state courts may also hear actions arising under the Convention.²² A defendant in such a state court action to enforce an award under the New York Convention has the prerogative of removing the case to federal court.²³ A party must, within three years of obtaining an arbitral award, seek confirmation of the award under the New York Convention.²⁴ This limit compares very favorably with the one year limit imposed on a party seeking confirmation of a domestic award.²⁵

Section 207 of the implementing legislation provides that the court "shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the awards specified in the . . . Convention."²⁶ This provision makes clear that the grounds for refusing enforcement of an award enumerated in Article V of the Convention will be considered exhaustive under U.S. law.

Section 208 provides that the other chapters of the Federal Arbitration Act shall apply to actions brought under the New York Convention when such chapters do not conflict with the Convention or the implementing legislation.²⁷ Inconsistencies between section 208 of the Federal Arbitration Act and Article III of the Convention, which provides that awards shall be enforced according to the forum State's procedural rules, have created some problems under U.S. law. For example, domestic law requires arbitration agreements to include an "entry of judgment" clause in which the parties consent that a judgment of a court with jurisdiction over the matter shall be

18. *Id.* at art. V.

19. VAN DEN BERG, *supra* note 3, at 9.

20. Federal Arbitration Act, 9 U.S.C. § 201-208 (1980).

21. 9 U.S.C. § 203.

22. Aksén, *Application of the New York Convention by the United States Courts*, IV Y.B. COM. ARB. 341, 345 (1979) [hereinafter cited as Aksén].

23. 9 U.S.C. § 205.

24. *Id.* § 207. A party could bring an action, however, simultaneously in multiple countries.

25. *Id.* § 9.

26. *Id.* § 207.

27. *Id.* § 208.

entered on the award. No such requirement exists under the New York Convention. Several commentators suggest that this provision of domestic procedural law not be grafted onto the Convention's procedural requirements since it would impose additional obstacles to enforcement.²⁸ On the other hand, procedures "incidental" to the enforcement of awards, such as discovery and attachment, are governed by U.S. law through the interaction of section 208 and Article III to the extent they are not covered by the Convention.²⁹ Courts have found that grants of post-award, pre-judgment interest, for example, are permissible under the Convention.³⁰

The enforcement procedures of the Convention do not govern an arbitral award that has been confirmed by a foreign court and already converted into a judgment. The Second Circuit, for example, has held that the Convention applies only "to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards."³¹ The reason foreign judgments are excluded, it has been argued, is that drafters of the Convention sought to deter domestic litigation which might only duplicate litigation already conducted abroad.³²

The provisions of the New York Convention are generally consistent with U.S. policy regarding arbitration under both federal and state law. Courts have frequently noted that the result of a particular case would be the same whether the New York Convention or the Federal Arbitration Act were applied.³³ Under both regimes, the tendency of the courts is to enforce the arbitral award.

Any discussion of the provisions of the Convention concerning enforcement of arbitral awards would be premature without prior discussion of the liberal federal policy recognizing arbitral provisions in contracts. The Supreme Court in 1974 rendered an opinion which controls the interpretation of the New York Convention with respect to the recognition of arbitral provisions. In *Scherk v. Alberto-Culver Co.*,³⁴ a U.S. corporation, Alberto-Culver,

28. See, e.g., VAN DEN BERG, *supra* note 3, at 243; Aksent, *supra* note 22, at 357.

29. VAN DEN BERG, *supra* note 3, at 240. Discovery is at the discretion of the court and has been denied to a party challenging an award. "The loser in an arbitration cannot freeze the confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery." *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 337 (5th Cir. 1976). Pre-award attachment of property has created a problem in some instances. Some cases have suggested that attachment defeats the New York Convention's goal of certainty in the course of international business dealings and should not be allowed. See, e.g., *Cooper v. Ateliers de la Motobecane, S.A.*, 57 N.Y.2d 408 (1982); *McCreary Tire & Rubber Co. v. CEAT*, 501 F.2d 1032 (3d Cir. 1974).

30. *In re Arbitration Between Waterside Ocean Navigation and International Navigation Ltd.*, 737 F.2d 150 (2d Cir. 1984).

31. *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1319 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

32. See Note, *Foreign Judgments Based on Foreign Arbitral Awards: The Applicability of Res Judicata*, 124 U. PA. L. REV. 223, 226 (1975).

33. See, e.g., *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691 (2d Cir. 1978); *Diapulse Corp. of America v. Carba A.G.*, 626 F.2d 1108 (2d Cir. 1980).

34. 417 U.S. 506 (1974).

contracted with Scherk, a German citizen, for the transfer of business enterprises and trademark rights held by Scherk to Alberto-Culver. The contract included an agreement to arbitrate any claim that might arise from the transaction. After the transfer, Alberto-Culver claimed it had discovered that the trademark rights were subject to undisclosed encumbrances. Scherk refused to rescind the contract, and Alberto-Culver brought suit in U.S. district court, alleging that Scherk had violated U.S. securities laws. Scherk tried to stay the litigation by relying on the arbitration clause. The district and circuit courts denied Scherk's attempt to stay the litigation, relying on the Supreme Court's decision in *Wilko v. Swan*.³⁵ In that case, the Court held that agreements to arbitrate claims covered by federal securities law were invalid, because the Securities Act of 1933 was designed to provide investors with special protection.

The Supreme Court in *Scherk*, however, found the *Wilko* precedent factually inapplicable and therefore upheld the arbitration provisions. The distinction between *Scherk* and *Wilko*, the Supreme Court noted, concerned the truly international nature of "Alberto-Culver's contract to purchase the business entities belonging to Scherk Such a[n international] contract involves considerations and policies significantly different from those controlling in *Wilko*."³⁶ Agreements to select a forum and governing law play a crucial role in international business transactions by providing certainty for the parties. National courts, according to the Supreme Court, should not subvert these goals, but rather should consider the broader implications of their actions: "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages."³⁷ Finally, the Court noted that its ruling must be consistent with the goals of the New York Convention.³⁸

The guidelines established in *Scherk* have helped reduce judicial reluctance to enforce international arbitration agreements. Recently, Denmark benefited from the guidelines in its successful motion to dismiss an action for a declaratory judgment brought by an American manufacturer of military hardware, McDonnell Douglas Corporation.³⁹ In that case, Denmark sought the enforcement of the arbitration provision in its contract with McDonnell Douglas. The district court granted Denmark's motion to dismiss, finding that the alleged damages caused by the misfiring of a missile fell within the broad scope of the arbitration provision.

35. 346 U.S. 427 (1953).

36. *Scherk*, 417 U.S. at 515.

37. *Id.* at 516-517.

38. *Id.* at 520 n.15.

39. *McDonnell Douglas Corp. v. Kingdom of Denmark*, 607 F. Supp. 1016 (E.D. Mo. 1985).

Although the United States modified its accession to the New York Convention by its adherence to the optional "reciprocity" and "commercial" reservations,⁴⁰ U.S. courts have construed these reservations narrowly. Consequently, application of the reservations has not provided a formula for parties to subvert the broader goals underlying the Convention. For example, "reciprocity" was narrowly construed to permit enforcement of an award under the New York Convention in *Fertilizer Corp. of India v. IDI Management, Inc.*⁴¹ Fertilizer Corp. of India (hereinafter FCI), which was wholly-owned by the government of India, entered into a contract with IDI Management, Inc. (hereinafter IDI), a U.S. corporation, to build a fertilizer plant near Bombay. After completion of the plant, a dispute arose and was submitted to arbitration in India pursuant to provisions in the contract. The arbitration resulted in a net award in favor of FCI that FCI sought to enforce in the U.S. federal courts. IDI challenged the enforcement by claiming, among other grounds, an absence of reciprocity. Although India was a party to the New York Convention, IDI claimed that India had "adopted various evasive devices . . . to avoid enforcement of awards adverse to Indian parties."⁴² The court found that the reciprocity envisaged by the New York Convention required only that India be a signatory to the Convention.⁴³ In short, "reciprocity" did not apply to the adoption or interpretation of the "commercial" reservation, nor to the judicial enforcement policies of the Contracting State where the award was issued.⁴⁴

The scope of the "commercial" reservation has also been narrowly defined. Section 202 of the implementing legislation provides as follows:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract or agreement described in section 2 of this title, falls under the Convention.⁴⁵

In *Sumitomo Corp. v. Parakopi Compania Maritima*,⁴⁶ two Japanese corporations brought an action in U.S. district court to compel Parakopi, a Panamanian corporation with its principal place of business in Greece, to abide by the arbitration clause of their ship construction contract. Parakopi challenged

40. See *supra* notes 12-13 and accompanying text.

41. 517 F. Supp. 948 (S.D. Ohio 1981), *reh'g denied*, 530 F. Supp. 542 (S.D. Ohio 1982).

42. *Id.* at 952.

43. *Id.* at 953.

44. Without basing its decision on lack of reciprocity, another court denied enforcement of an award because the party seeking enforcement had not secured a judgment on the award according to the laws of Great Britain, the State where the award was rendered. After relying on that reasoning, the court also noted that Great Britain was not at that time a signatory to the New York Convention. *Splosna Plovba of Piran v. Agrelak Steamship Corp.*, 381 F. Supp. 1368, 1371 (S.D.N.Y. 1974). The United Kingdom acceded to the New York Convention in 1975. See *supra* note 9.

45. 9 U.S.C. § 202 (1985). The reference to section 2 of the Federal Arbitration Act brings "maritime transactions and contracts evidencing a transaction involving commerce" within the scope of the New York Convention. *Id.* at § 2.

46. 477 F. Supp. 737 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980).

the jurisdiction of the district court, claiming that because both parties were foreign to the United States, the dispute was not a "commercial" transaction under U.S. law. The court rejected Parakopi's argument, concluding that the definition of "commerce" under the Federal Arbitration Act⁴⁷ could not be applied to limit the application of the New York Convention.⁴⁸ The court reasoned 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."⁴⁹

Apart from the reciprocity and commercial reservations, the Convention itself provides grounds for denying enforcement of arbitral awards in certain circumstances. Article V establishes seven grounds on which enforcement of an award may be challenged:

1. 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 to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II 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; or

(b) 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; or

(c) The 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. 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:

47. 9 U.S.C. § 1. The Act defines "commerce" as "commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation." *Id.*

48. *Sumitomo*, 477 F. Supp. at 741. See 9 U.S.C. § 208. This section allows the application of Chapter 1 to Chapter 2 proceedings only to the extent that they do not conflict with the provisions of Chapter 2 or the New York Convention.

49. *Sumitomo*, 477 F. Supp. at 741.

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of the country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.⁵⁰

Challenges based on the grounds stated in paragraph one must be brought by the party contesting the award.⁵¹ The two grounds set forth in paragraph two may be raised by the court on its own motion, as well as by the challenging party.⁵²

United States courts recognize Article V as the exclusive source from which authority to deny enforcement of a foreign arbitral award may be drawn under the New York Convention.⁵³ This recognition is consistent with the Convention's implementing legislation, which states that a "court shall confirm the award unless it finds one of the grounds specified in the said Convention."⁵⁴ U.S. judicial interpretations of the Convention place the burden of proving that the award should not be enforced on the party seeking to prevent enforcement in the United States.⁵⁵ According to at least one commentator, this burden discourages contesting enforcement of an award.⁵⁶

Of the seven grounds set out in Article V, the claim that an award violates the public policy of the State where enforcement is sought has evoked the most discussion. Accordingly, the interpretation of this defense by U.S. courts shall be considered first. Discussion of the remaining six defenses, characterized as either substantive or procedural, will follow.

1. Substantive Exceptions to Arbitral Enforcement Under Article V

Article V(2)(b). The provision of a "public policy" defense to enforcement of an arbitral award under Article V(2)(b) might appear to have created a major loophole in the New York Convention's pro-enforcement policy. While concern about this possibility has been expressed,⁵⁷ precedent has shown that U.S. courts will uphold this defense only where enforcement would violate the "most basic notions of morality and justice."⁵⁸

50. New York Convention, art. V.

51. *Id.*

52. *Id.*

53. *Ipirtrade Int'l, S.A. v. Federal Rep. of Nig.*, 465 F. Supp. 824, 826 (D.D.C. 1978). See also *Parsons & Whittemore Overseas Co. v. Société General de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974).

54. 9 U.S.C. § 207 (emphasis added).

55. See, e.g., *Parsons & Whittemore*, 508 F.2d at 973; *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976).

56. Note, *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 (1983-84).

57. See Note, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, 7 *CALIF. W. INT'L L.J.* 228, 228-29 n.1 (1977) and authorities cited therein.

58. *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975); *Parsons & Whittemore*, 508 F.2d at 974.

*Parsons & Whittemore v. RAKTA*⁵⁹ provided the first comprehensive discussion of the public policy defense. The controversy arose when Parsons & Whittemore (hereinafter P&W), a U.S. corporation, withdrew its work crew from Egypt. The work crew had been in Egypt to construct a paperboard mill for RAKTA, an Egyptian corporation. The Arab-Israeli Six Day War and deteriorating United States-Egyptian relations prompted P&W to depart. To excuse its delay in completing the project, P&W invoked the "force majeure" clause of its contract with RAKTA. RAKTA disagreed with this position, demanded arbitration of the dispute, and obtained an arbitral award for damages resulting from the breach of contract. P&W then sought a declaratory judgment in the United States to block RAKTA from enforcing the award. The court refused to grant the judgment and instead issued an order confirming RAKTA's award.⁶⁰

P&W raised several defenses to the enforcement of the award, one of which was the obligation of an American citizen in Egypt to abandon the construction of the mill when United States-Egyptian relations were severed. The court did not accept this interpretation of the defense: "[t]o read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility."⁶¹ The court explicitly noted that the defense must be limited if the New York Convention were to be effective:

The general pro-enforcement bias informing the Convention . . . points toward a narrow reading of the public policy defense. An expansive construction of this defense would violate the Convention's basic effort to remove pre-existing obstacles to enforcement . . . We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.⁶²

This language has become the standard by which attempts to invoke the public policy defense are judged.⁶³

The public policy defense has rarely been successful before U.S. courts,⁶⁴ despite the variety of claims challengers have tried to bring within its scope. The defense has most recently been examined by the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁶⁵ *Mitsubishi*, like *Scherk*, involved the pre-enforcement stage of the arbitral process, namely the determination of the arbitrability of the dispute. The controversy arose under an arbitration agreement between a Japanese party and a U.S.

59. *Parsons & Whittemore Overseas Co. v. Société General de l'Industrie du Papier (RAKTA)*, 508 F.2d at 969 (2d Cir. 1974).

60. *Id.*

61. *Id.* at 974.

62. *Id.* at 973-74 (citations omitted).

63. See, e.g., *In re Arbitration Between Waterside Ocean Navigation and Int'l Navigation Ltd.*, 737 F.2d 150, 152 (2d Cir. 1984); *Fotochrome, Inc. v. Copal Co., Ltd.*, 517 F.2d 512, 516 (2d Cir. 1975).

64. See VAN DEN BERG, *supra* note 3, at 366.

65. 723 F.2d 155 (1st Cir. 1983), *modified*, 53 U.S.L.W. 5069 (U.S. July 2, 1985).

party. Although the agreement provided for arbitration of disputes in Japan, the U.S. party filed a claim in U.S. district court under the federal antitrust laws. The First Circuit concluded that the antitrust exception created by some circuit courts made antitrust claims non-arbitrable.⁶⁶ As statutory support, the court cited Article II(1) of the Convention which, it noted, removed such claims from arbitration since they were "not capable of settlement by arbitration."⁶⁷

Citing to *Scherk*, the first case enunciating the federal policy of interpreting Convention defenses restrictively, the United States Supreme Court reversed the First Circuit and reaffirmed its strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions. The Court stated that "[h]ere, as in *Scherk*, that presumption is reinforced by the emphatic federal policy in favor of arbitral dispute resolution."⁶⁸ Moreover, the Court rejected arguments that antitrust claims were inappropriate for arbitration. The Court concluded 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 enforcement of transnational agreements to arbitrate.⁶⁹

In other contexts, "public policy" defenses have been rejected because of the U.S. courts' narrow interpretation of Article V(2)(b). *In re Fotochrome*,⁷⁰ for example, illustrates this practice. While involved in an arbitration in Japan, Fotochrome, a U.S. company, filed for bankruptcy. The U.S. Bankruptcy Court issued a stay of all actions by the company's creditors. The

66. See, e.g., *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *American Safety Equip. Corp. v. J.P. McGuire & Co.*, 391 F.2d 821 (2d Cir. 1968).

67. *Mitsubishi*, 723 F.2d at 164-66.

68. *Mitsubishi*, 53 U.S.L.W. at 5074.

69. *Id.* at 5073-74. The Court noted that even if a matter were nonarbitrable in a domestic context, where international agreements are involved, the interests of international commerce may require enforcement of an agreement to arbitrate. *Id.* In its *amicus curiae* brief filed in support of *Mitsubishi*, the American Arbitration Association (hereinafter the AAA) argued that the arbitration should proceed in the first instance, and that domestic law considerations should be addressed by a court only in subsequent enforcement actions. If in fact an arbitral award is offensive to the competitive policy embodied in U.S. antitrust laws, the brief argued, then the "safety valve" of Article V(2)(b) would take effect at the enforcement stage. Neither the implementing legislation of Chapter 2 of the U.S. Arbitration Act, nor the legislative history of Chapter 2 "contain any suggestion of an antitrust exception." Brief of the American Arbitration Association as *Amicus Curiae* in Support of Petition #83-1569 in the Supreme Court of the United States at 10 (December 17, 1984) [hereinafter cited as Brief] (available in the office of the International Tax and Business Lawyer). Policy grounds for not recognizing an antitrust exception are numerous. Failure to reverse the decision of the First Circuit, the AAA argued, would undermine the certainty of international arbitration agreements and burden the federal court system with antitrust proceedings (which are often complex and lengthy) with what are essentially contract claims. Brief at 17-22. The Court agreed with this perspective; it stated that "the national courts of the United States will have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed." *Mitsubishi*, 53 U.S.L.W. at 5076.

70. 377 F. Supp. 26 (E.D.N.Y. 1974).

Japanese arbitration nonetheless proceeded and resulted in an award against the U.S. company. The Bankruptcy Court subsequently refused to recognize this award. The district court, however, reversed on the grounds that the Bankruptcy Court did not have the power to disturb the findings of a foreign arbitration begun before the commencement of bankruptcy proceedings. Emphasizing both the Supremacy Clause, which makes treaties part of the supreme law of the United States, and the importance of laws affecting international trade, the district court criticized the U.S. company's attempt to avoid final and binding judgment abroad through filing of a bankruptcy petition.⁷¹

The Court of Appeals for the Second Circuit affirmed the district court's decision, but did not specifically decide whether U.S. bankruptcy law was a "public policy" that precluded enforcement of foreign arbitral awards.⁷² The court noted that the New York Convention is silent on the subject of bankruptcy, providing no indication of whether bankruptcy should fall under the public policy rubric. Citing the *Parsons & Whittemore* standard, the court asserted that "[t]he public policy in favor of international arbitration is strong," and thus the public policy defense should be construed narrowly.⁷³ Since the award was a valid determination on the merits of the dispute, it was not reviewable by the Bankruptcy Court. While the district court suggested that a Bankruptcy Court would have authority to stay a domestic arbitration (and therefore an award made in violation of the stay would not be enforceable), it concluded that the New York Convention mandated enforcement of the foreign award.⁷⁴

Even the judicial distaste for inconsistent testimony has been subordinated to the strong policy of enforcing arbitral awards. In *Waterside Ocean Navigation*,⁷⁵ the party against whom arbitral awards had been rendered in London, International Navigation Ltd. (hereinafter INL), challenged enforcement of the awards in the U.S. courts on the grounds that the awards were based on inconsistent sworn testimony by a witness for the prevailing party. INL argued that confirming the awards would violate U.S. public policy, a policy which favors protecting the value of the testimonial oath. The district court rejected INL's claim, and the Second Circuit affirmed that decision. The appellate court noted that the public policy defense "must be construed in light of the overriding purpose of the Convention," and that the Convention's purpose is to encourage enforcement of foreign arbitral awards.⁷⁶ The court reasoned that since the arbitrators were aware of the alleged inconsistencies in the testimony, and that since no allegation of

71. *Id.* at 30-32.

72. *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975).

73. *Id.* at 516.

74. *Id.*

75. *In re Arbitration Between Waterside Ocean Navigation and International Navigation Ltd.*, 737 F.2d 150 (2d Cir. 1984).

76. *Id.* at 152.

perjury was made, a confirmation of the award would not violate public policy. It found that "the assertion that the policy against inconsistent testimony is one of our nation's 'most basic notions of morality and justice' goes much too far."⁷⁷ To view as persuasive INL's claim that confirmation of the awards would impair the integrity of the U.S. judicial system, the court continued, would hinder the operation of the New York Convention and would be contrary to its purposes. Confirmation of the awards against INL was therefore affirmed.

A public policy defense based on grounds that the award was made by arbitrators with undisclosed connections to the prevailing party has also been rejected in two different cases. *Fertilizer Corp. of India*⁷⁸ involved a challenge to an arbitrator selected by the prevailing party, FCI. Though only one of three arbitrators on the panel, FCI's chosen arbitrator had acted as FCI's counsel at previous arbitrations. IDI, the opposing party, alleged that this violated the U.S. policy that arbitrators be not only neutral, but also free from any appearance of bias. The district court found that nondisclosure of the relationship between FCI and its chosen arbitrator did not taint the award so as to justify denial of its enforcement. While agreeing that disclosure of the relationship would have been preferable, the court decided that the "stronger public policy . . . is that which favors arbitration, both international and domestic. . . ."⁷⁹ In *Baruch-Foster Corp.*,⁸⁰ the challenge to an arbitrator's neutrality was rejected as being both unsubstantiated and in bad faith. The arbitrator at issue was internationally known and respected in the field of comparative law. Without any further support for the complaining party's claim for disqualification, the challenge was found groundless and the award confirmed.⁸¹

An open question remains as to whether one can invoke the public policy defense to block enforcement of awards obtained by fraud. In *Biotronik*,⁸² a federal district court was directly confronted with the question of whether the defense of fraud applied to the New York Convention under U.S. law by reason of section 208 of the implementing legislation.⁸³ The court found that the alleged underlying conduct did not constitute fraud and expressly declined to answer the question presented.⁸⁴

Another court summarily dismissed a claim that fraud violated U.S. public policy and that evidence of fraud barred enforcement of a foreign arbitral award under the New York Convention. This court rejected the defense

77. *Id.*

78. *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 955 (S.D. Ohio 1981), *reh'g denied*, 530 F. Supp. 542 (S.D. Ohio 1982).

79. *Id.*

80. *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976).

81. *Id.* at 337.

82. *Biotronik Mess und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133 (D.N.J. 1976).

83. 9 U.S.C. § 208. See *supra* notes 27-29 and accompanying text.

84. *Biotronik*, 415 F. Supp. at 140.

of inconsistent testimony and stressed the narrow scope of the public policy defense.⁸⁵

The Article V public policy defense has been partly successful, however, in at least one U.S. court.⁸⁶ That case involved a purchase agreement for steel wire between a French seller (hereinafter LTCL) and an American buyer (hereinafter Southwire), both of whom were bound by an arbitration clause and a clause providing that the agreement would be governed by the laws of Georgia to the extent that they did not conflict with the laws of France. When a dispute arose over the price to be paid by Southwire, the issue was arbitrated according to the terms of the agreement, and an award was made in favor of LTCL. The arbitration panel, relying on French law, awarded LTCL interest on payments due.⁸⁷ The initial rates were 10 ½ percent and 9 ½ percent, respectively, and were increased to 15 ½ percent and 14 ½ percent, respectively, two months after the notification of the award. These rates were selected as the maximum permissible under French law. During enforcement proceedings in U.S. federal court, Southwire, invoking Article V(2)(b) of the Convention, argued against enforceability of the award because the rates were usurious and against public policy. The court found the initial interest rates acceptable, even though they were higher than what Georgia law generally allowed. In upholding enforcement of an award, the court observed that the United States “cannot have trade and commerce in world markets and international waters exclusively on [its] terms, governed by [its] laws, and resolved in [its] courts.”⁸⁸ Separately analyzing the issue of escalated interest, however, the court concluded that the interest rates did not reflect actual damages. Instead, they constituted a penalty, which U.S. law disfavors. Citing Article V(2)(b), the court refused to enforce the escalated interest rate on the award.⁸⁹

Dicta in one U.S. case suggests that if an agreement to arbitrate has been secured under duress, a U.S. court may recognize another exception to the general pro-enforcement policy and refuse to enforce a resulting award. The court stated that “[a]greements exacted by duress contravene the public policy of the nation, . . . and accordingly duress, if established, furnishes a basis for refusing enforcement of an award under Article V(b)(2) [sic] of the Convention.”⁹⁰ This principle has not yet risen to the status of binding precedent, however, since the court that made the statement did not find duress in the making of the agreement and confirmed the disputed award.⁹¹

85. *Waterside Ocean Navigation*, 737 F.2d at 151–52.

86. *Laminoirs-Trefileries-Cableries de Lens v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980).

87. *Id.* at 1065.

88. *Id.* at 1069.

89. *Id.*

90. *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co.*, 480 F. Supp. 352, 358 (S.D.N.Y. 1979) (citation omitted).

91. *Id.* at 359, 361.

Article V(2)(a). Closely related to the public policy defense of Article V(2)(b) is the nonarbitrable subject matter provision of Article V(2)(a): if the grounds of a dispute cannot be settled by arbitration under domestic law, a court may refuse to enforce an award granted through arbitration abroad. Although traditionally nonarbitrable under U.S. law,⁹² disputes over patent rights are now arbitrable under recent legislation.⁹³ Similarly, agreements to arbitrate alleged violations of U.S. racketeering laws arising from international transactions will not be enforced under the New York Convention.⁹⁴

The Article V(2)(a) defense was successfully invoked to deny enforcement of an arbitral award against Libya in the *LIAMCO* case.⁹⁵ In 1973–74, Libya nationalized LIAMCO's rights under petroleum concessions that it had granted nearly twenty years before. Dissatisfied with the compensation for its interests and equipment, LIAMCO pursued arbitration as provided in the agreements; an award was rendered in Geneva in LIAMCO's favor. When LIAMCO tried to enforce the award in the United States, Libya opposed it by claiming sovereign immunity and, alternatively, by claiming that nationalization was not subject to arbitration.

The court denied Libya's sovereign immunity claim on the grounds that, by agreeing to arbitration governed by foreign law, Libya had waived its sovereign immunity.⁹⁶ But the court accepted Libya's argument that the subject matter of the dispute was the oil concession nationalization, an act of state, and that the nationalization laws abrogated all terms of the concessions. The court reasoned that since it could not have compelled arbitration in this instance, because the arbitration would necessarily review the validity of the nationalization and thus violate the "act of state doctrine," it could not enforce the award.⁹⁷ LIAMCO appealed the district court's decision, but

92. See VAN DEN BERG, *supra* note 3, at 369.

93. Patent Law Amendments Act of 1984, Pub. L. 98–622, § 105, 98 Stat. 3383–85 (1984) (amending 35 U.S.C. § 135).

94. *S.A. Mineracao de Trindade-Samitri v. Utah Int'l, Inc.*, 576 F. Supp. 566 (S.D.N.Y. 1983), *modified*, 579 F. Supp. 1049 (1984), *aff'd*, 745 F.2d 190 (2d Cir. 1984). However, in a case involving RICO claims in a domestic context, one federal court recently held that RICO claims are arbitrable, reasoning that RICO grants an explicit private right of action and does not include a non-waiver provision. *Ross v. Mathis*, [1985 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,343 (N.D. Ga. Sept. 11, 1985).

95. *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175 (D.D.C. 1980); *vacated without op.*, 684 F.2d 1032 (D.C.Cir. 1981) [hereinafter cited as *LIAMCO*].

96. *LIAMCO*, 482 F. Supp. at 1178. See also *Ipitrade Int'l S.A. v. Federal Rep. of Nig.*, 465 F. Supp. 824 (D.D.C. 1978).

97. *LIAMCO*, 482 F. Supp. at 1178–79. Legislation was subsequently introduced in the United States Senate which would bar U.S. courts from invoking the act of state doctrine in order to deny enforcement of an otherwise valid arbitration award. S. Res. 2813, 97th Cong., 2d Sess., 128 CONG. REC. 9953–55 (1982). No action was taken by the 97th or the 98th Congress, and similar legislation has not yet been introduced in the 99th Congress.

before the appeal was decided, the parties settled, and the appeal was dismissed.⁹⁸ *Amici curiae* in the matter succeeded in vacating the district court order.⁹⁹

The defense of nonarbitrable subject matter is unique in that it has met with some success in U.S. courts. However, the defense may be limited to a few areas, such as nationalization decrees, and thus cannot demonstrate a general policy on the part of U.S. courts against enforcement of arbitral awards. As *Scherk* demonstrated, U.S. courts have recognized and enforced arbitral awards arising out of a type of dispute which would not be arbitrable under national law.

Article V(1)(a). A party may claim that an arbitral award should not be enforced because the parties did not have the capacity to make the arbitration agreement or because the agreement was invalid under applicable law. The governing law will be chosen by the parties or, if that choice is not clear, by the law of the State where the award is made. The Article V(1)(a) defense includes challenges to the validity of the consent to the terms of the agreement.¹⁰⁰ Litigation of an Article V(1)(a) defense, however, has not been reported in any U.S. court.¹⁰¹

Article V(1)(c). Under the New York Convention, enforcement of an arbitral award may be denied if the award is outside the scope of the matters submitted to arbitration. Although Article V(1)(c) has been cited as the most infrequently invoked of the seven grounds for denying enforcement, some U.S. courts have considered it.¹⁰²

The *Parsons & Whittemore* court provided the most comprehensive interpretation of the defense: “[t]his defense to enforcement of a foreign award, like the others already discussed, should be construed narrowly. Once again a narrow construction would comport with the enforcement-facilitating thrust of the Convention.”¹⁰³ The *Parsons & Whittemore* court read Article V(1)(c) very narrowly and enforced the arbitrator’s award for loss of production even though the contract stated that “[n]either party shall have any liability for loss of production.”¹⁰⁴ The court determined that the arbitration panel had not ignored that provision, but had simply not interpreted it to deny its own jurisdiction. In denying the defense of Article V(1)(c), the court

98. *Libyan American Oil Co. v. Socialist People’s Libyan Arab Jamahirya*, 221 U.S. App. D.C. 510 (D.C. Cir. 1981).

99. *Libyan American Oil Co. v. Socialist People’s Libyan Arab Jamahirya*, 684 F.2d 1032 (D.C. Cir. 1981).

100. See VAN DEN BERG, *supra* note 3, at 287.

101. *Id.* at 288.

102. *Id.* at 313; see e.g., *Parsons & Whittemore Overseas Co. v. Société General de l’Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974).

103. *Parsons & Whittemore*, 508 F.2d at 976.

104. *Id.*

characterized other challenges to the damages awarded as “attempt[s] to secure a reconstruction . . . of the contract—an activity wholly inconsistent with the deference due arbitral decisions on law and fact.”¹⁰⁵

2. *Procedural Exceptions to Arbitral Enforcement Under Article V*

Article V(1)(b). Enforcement of an arbitral award may be denied if a party was not given proper notice of the arbitration or was unable to present its case. As one U.S. court interpreted it, “[t]his provision essentially sanctions the application of the forum state’s standards of due process.”¹⁰⁶ This interpretation indirectly links the Article V(1)(b) defense to the Article V(2)(b) public policy defense. However, the public policy defense accords challengers to the enforcement proceedings a greater chance of success,¹⁰⁷ since the Article V(1)(b) defense, though often raised, has rarely been given judicial sanction.¹⁰⁸

The due process exception, like other Article V defenses to enforcement of arbitral awards, has been narrowly construed. In *Parsons & Whittemore*,¹⁰⁹ P&W raised the procedural defense based on the arbitrators’ refusal to delay the proceedings to accommodate the speaking schedule of a P&W witness. The court found that the refusal did not infringe P&W’s due process rights under the United States Constitution. A speaking engagement did not justify the rearrangement of an international arbitration, according to the court. Also, “inability to produce one’s witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration.”¹¹⁰ Since the witness provided the arbitrators with an affidavit covering most of his proposed testimony, P&W could not claim that the matter was decided without considering that witness’s particular evidence of its defense. The court held that the arbitrators acted within their power in refusing to delay the proceedings.

In *Biotronik*,¹¹¹ the party seeking to block enforcement of the award claimed it was “unable to present its case” under Article V(1)(b), because its rights and liabilities under the disputed agreement had not matured. The court held that this argument misconstrued the intent of the due process exception, which primarily guarantees notice and an opportunity to be heard. Neither of these protections was impaired in the case, and therefore Article V(1)(b) did not bar enforcement of the award.¹¹²

105. *Id.*

106. *Id.* at 975.

107. Note, *The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards*, *supra* note 57, at 231–34.

108. VAN DEN BERG, *supra* note 3, at 297.

109. *Parsons & Whittemore*, 508 F.2d at 969.

110. *Id.* at 975.

111. *Biotronik*, 415 F. Supp. at 133.

112. *Id.* at 140–41.

Article V(1)(d). If the arbitral panel was not selected in accordance with the arbitration agreement (or, if not covered by the agreement, with the law of the State where the arbitration was held), or if the arbitration procedure was not in accord with the terms of the agreement, enforcement may be denied under Article V(1)(d). The losing party in one arbitration relied on this sub-section of the Convention to challenge, in *Imperial Ethiopian Government v. Baruch-Foster Corporation*,¹¹³ enforcement of an arbitral award. After the arbitration panel made the award, the losing party, Baruch-Foster, discovered that the third arbitrator (selected by the arbitrators appointed by each side) had previously drafted the Civil Code for the Ethiopian government, the prevailing party. Baruch-Foster claimed the selection violated the arbitration agreement, which provided that the third arbitrator should have no direct or indirect connection with either party. The district court confirmed enforcement of the award, finding that Baruch-Foster had waived any objection to the composition of the panel. Baruch-Foster, however, appealed and claimed that the district court had erred in denying the motion for discovery directed at the alleged connection between the third arbitrator and the Ethiopian Government. The court of appeals affirmed enforcement of the award on the grounds that Baruch-Foster's allegations were unsubstantiated and that the district court correctly denied any discovery on the issue.¹¹⁴

Article V(1)(e). The final ground for refusing enforcement under paragraph 1 of Article V is based on the current procedural status of the award. To be enforceable, the award, according to the law under which it was made, must be binding on the parties, and it must not have been set aside or suspended.¹¹⁵ Only a court of the country in which the award was made or the country whose law governs the arbitration may set aside an award.¹¹⁶ The Article V(1)(e) defense was raised by IDI in *Fertilizer Corp. of India*.¹¹⁷ IDI argued that since the case was under appeal in an Indian court, the award could not be considered binding in the United States. The court rejected this argument and found that a pending court appeal did not alter the "binding" effect of the award for purposes of the New York Convention. Under the Convention, "binding" means that no further arbitral appeals are available. Were it to hold otherwise, the court would be validating a means by which a

113. 535 F.2d 334 (5th Cir. 1976).

114. *Id.* at 337.

115. The term "binding" rather than "final" was consciously chosen by the New York Convention for historical reasons. For a discussion of this change, see Sanders, *supra* note 10, at 272-73.

116. *Id.* at 276; VAN DEN BERG, *supra* note 3, at 349-50.

117. *Fertilizer Corp. of India*, 517 F. Supp. at 948. See *supra* note 41 and accompanying text.

losing party could evade enforcement of an award by bringing in a foreign court a post-arbitral action to set the award aside.¹¹⁸

3. Other Judicial Interpretations of the New York Convention

U.S. courts have interpreted other provisions of the New York Convention with the same pro-enforcement policy with which they have interpreted Article V. Although Article VII provides that the Convention does not have any effect on a State's other international agreements regarding arbitration,¹¹⁹ one U.S. court went so far as to state that when both parties to a bilateral Friendship, Commerce, and Navigation treaty are also signatories to the New York Convention, the provisions of the Convention shall control the enforcement of an arbitral award.¹²⁰

Article I enlarges the pool of those seeking to enforce arbitral awards under the Convention. Article I, which provides for enforcement of an arbitral award "not considered as domestic,"¹²¹ has led one U.S. court to enforce an arbitral award rendered in the United States between two foreign parties. The court interpreted the provision to:

denote awards which are subject to the Convention not because made abroad, but because they were 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 We 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.¹²²

As the bulk of these cases based on the Convention demonstrate, U.S. courts have clearly enunciated a policy advocating routine enforcement of arbitral awards pursuant to the New York Convention. By strictly construing the defenses afforded by Article V, as well as by broadly interpreting other provisions of the Convention which sustain the intent of the drafters,

118. *Id.* at 958 (quoting Aksen, *American Arbitration Accession Arrives in the Age of Aquarius: United States Implements United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 SW. U.L. REV. 1, 11 (1971)).

119. New York Convention, art. VII. Article VII(1) provides as follows:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the treaties of the country where such award is sought to be relied upon.

120. *Fotochrome*, 517 F.2d at 518.

121. New York Convention, art. I. Article I(1) provides as follows:

This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

122. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983) (citations omitted).

the courts have promoted the New York Convention's paramount purpose of ensuring a large measure of certainty and security in international commercial transactions.

III ENFORCEMENT OF FOREIGN AWARDS OUTSIDE THE NEW YORK CONVENTION

Both before and after ratification of the New York Convention, U.S. courts have enforced foreign arbitral awards in accordance with other multilateral treaties, bilateral treaties, and traditional principles of comity. Indeed, reliance on these treaties and principles takes precedence when the Convention cannot properly be invoked. As explained at the outset of this Article, the Convention does not apply in two circumstances: first, when the award is made in a State which has not ratified the Convention; and second, when the transaction underlying the dispute is not "commercial."¹²³ The Convention is similarly rendered inapplicable when parties to an arbitration agree to be bound by rules other than the Convention with regard to enforcement of the award. In these principal situations, means other than the New York Convention will be employed to enforce a foreign arbitral award.

A. Multilateral Treaties

The United States is a party to at least one other treaty governing international arbitration: the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (hereinafter the ICSID Convention).¹²⁴ The application of the ICSID Convention is limited in that it only governs disputes arising from investments between Contracting States and nationals of other States. Furthermore, both parties must agree in writing to be governed by the ICSID Convention and to have their dispute settled by the International Centre for Settlement of Investment Disputes (hereinafter ICSID), a body created by the ICSID Convention.¹²⁵

As a Contracting State, the United States is bound to enforce an award made under the ICSID Convention.¹²⁶ U.S. law provides that the Federal Arbitration Act does not apply to the enforcement of ICSID awards and that the federal district courts have exclusive jurisdiction over enforcement actions. In addition, ICSID awards will be treated as final judgments under U.S. law.¹²⁷

123. See *supra* notes 12-14 and accompanying text.

124. *Opened for signature*, March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159 [hereinafter cited as ICSID Convention].

125. *Id.* at art. 1.

126. *Id.* at art. 54.

127. 22 U.S.C. § 1650a (1982).

In interpreting the ICSID Convention, U.S. courts have respected the limits that the terms of the ICSID Convention impose upon its own application. Under the ICSID Convention, ICSID has a "full legal international personality."¹²⁸ Relying on this provision, one U.S. court has found that a contractual obligation to submit disputes to an ICSID arbitration does not constitute a foreign State's waiver of sovereign immunity, even though the foreign State knew that it would probably submit to arbitration in the United States.¹²⁹ U.S. courts do not have jurisdiction over sovereign States to enforce *ex parte* awards made in a non-ICSID arbitration to which the sovereign State did not consent.¹³⁰

B. FCN Treaties

United States bilateral Friendship, Commerce and Navigation treaties (hereinafter FCN treaties) frequently contain provisions permitting enforcement of arbitral awards even if the arbitration was conducted abroad. Typically, the party seeking enforcement must satisfy three conditions: first, the other party must be a citizen of a signatory country; second, the award must be "final and enforceable" according to the laws of the country where it was made; and third, enforcement proceedings must be brought before the proper court.¹³¹ A typical FCN treaty provides for enforcement of an arbitral award unless the award contravenes the public policy of the forum.¹³²

The arbitration provision of the FCN treaty between the United States and West Germany was expansively read by one U.S. district court. In *Landegger v. Bayerische Hypotheken und Wechsel Bank*,¹³³ an arbitration award had been made in Germany and was appealed in the German courts. When the prevailing party tried to enforce the award in the United States, the other party attempted to stay the enforcement pending the German appeal. The court found that the treaty did not limit U.S. courts to enforcing only "final and binding" awards; it simply mandated the enforcement of those awards without excluding others. Accordingly, the court held the award was enforceable and noted that its judgment could be reopened if, on appeal, the German court vacated the award.¹³⁴

128. ICSID Convention, art. 18.

129. *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1104 (D.C. Cir. 1982). Under U.S. foreign sovereign immunity law, a sovereign's agreement to arbitrate in a foreign state, or to be governed by foreign law, constitutes a waiver of the sovereign's immunity in the designated jurisdiction. See 28 U.S.C. § 1605(a)(1) (1982). This point is discussed in Note, *The Validity of the Foreign Sovereign Immunity Defense*, *supra* note 56, at 323.

130. *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094 (D.C. Cir. 1982).

131. Note, *Enforcing International Commercial Arbitration Agreements and Awards Not Subject to the New York Convention*, 23 VA. J. INT'L L. 75, 98 (1982) (citing various conditions based on FCN treaty provisions).

132. *Id.* at 86 (citing the Treaty of Friendship, Commerce and Navigation, October 29, 1954, United States-West Germany, 7 U.S.T. 1840, 1845, T.I.A.S. No. 3593).

133. 357 F. Supp. 692 (S.D.N.Y. 1972).

134. *Id.* at 696.

C. Other Arbitral Award Enforcement Theories

In the absence of any specific enforcement provision, U.S. courts will often honor valid foreign arbitral awards. There are both federal and state court decisions enforcing arbitral awards even where no convention or bilateral treaty applies. Reciprocity as a condition for enforcing an agreement or an award is generally not required.¹³⁵

A classic statement of this pro-enforcement policy of U.S. courts is found in *Gilbert v. Burnstine*.¹³⁶ In that case, the New York State Court of Appeals held that an agreement to arbitrate in a foreign forum does not violate public policy, and that an award properly made under the forum's laws should be enforced, so long as the arbitral proceedings did not conflict with U.S. public policy.¹³⁷

Generally stated, a U.S. court will enforce a foreign arbitral award if it is rendered in compliance with the law of the State where awarded.¹³⁸ This standard requires that the arbitral tribunal have personal jurisdiction over the challenging party and provide notice of the proceeding and an opportunity to be heard.¹³⁹

D. Foreign Judgments

A foreign arbitral award may be converted into a judgment in another forum before enforcement is sought in the United States. Such circumstances are discussed briefly at the outset of this article and highlight the fact that federal laws governing the enforcement of foreign arbitral awards do not apply.¹⁴⁰ Rather, state laws will govern when a party seeks to enforce a foreign money judgment. Although a discussion of the application of the Uniform Foreign Money Judgments Recognition Act,¹⁴¹ enacted by several states, is beyond the scope of the present work, one point should be noted: the federal law implementing the New York Convention does not supersede state law governing enforcement of foreign judgments. If an arbitral award has been converted into a judgment, enforcement of that judgment in the United States will likely be governed by state law.¹⁴²

135. Holtzmann, *supra* note 1, at 139.

136. 255 N.Y. 348 (1931).

137. *Id.* at 357-58.

138. RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 220 (1969).

139. *Id.*

140. *See supra* notes 31-32 and accompanying text.

141. 13 U.L.A. 417 (1962).

142. *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

IV CONCLUSION

Judicial enforcement of foreign arbitral awards is generally rare in any country, since, for the most part, arbitral awards are satisfied through voluntary compliance. Parties typically contract to arbitrate disputes in order to avoid the courts and to maintain amicable relationships with their commercial partners. Nevertheless, parties so contracting must be confident that, if necessary, means will be available to enforce arbitral awards. The history of enforcement of foreign arbitral awards in U.S. courts provides that assurance.

The pro-enforcement policy of U.S. courts is consistently applied notwithstanding the variety of legal enforcement mechanisms. U.S. courts will continue to construe the terms of the New York Convention so as to achieve a uniformity and direction indicative of the precedent set by *Scherk* and confirmed by *Mitsubishi*. As a Contracting State to the ICSID Convention, the United States binds its courts to enforce awards rendered by the terms of that Convention as well. In addition, bilateral treaties will be interpreted in a manner consistent with U.S. public policy favoring international arbitration. There is every reason to believe that U.S. courts will follow the firmly established liberal federal policy favoring the enforcement of foreign arbitral awards, and that they will continue to resolve any doubts about the construction of arbitration provisions in favor of compelling arbitration and enforcing the awards resulting therefrom. Indeed, this pro-arbitration policy will influence courts even in circumstances where no formal obligation to recognize an award controls.