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The Federal Courts and the Enforcement of Foreign Arbitral Awards

I. Introduction

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention)¹ is designed to achieve uniform interpretation of, and certainty in, the enforcement of foreign arbitral awards.² The federal courts of the United States have liberally interpreted the provisions of the Convention³ to achieve this goal, primarily through a narrow construction of its defenses. There is, however, an area of substantial confusion, because the federal courts have failed to decide if the defenses of the Federal Arbitration Act (Act),⁴ which covers domestic arbitral awards, apply in cases arising under the Convention.⁵ This uncertainty has the potential to undermine the effectiveness of the Convention.⁶

Many factors account for the narrow construction of the defenses allowed under the Convention.⁷ Courts consistently recognize that Congress has expressed a clear legislative intent to favor enforcement of foreign arbitral awards.⁸ The history of the Convention and its express language also support a liberal inter-

1. *Opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 [hereinafter cited as Convention].

2. *See* A. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958* 1 (1981) (discussing the detrimental effect which uncertainty can have on the Convention).

3. In the United States, only the federal courts have decided cases arising under the Convention because suits have either been initiated in federal court or parties have exercised their right to remove any proceeding arising under the Convention to the federal courts. *See* 9 U.S.C. § 205 (1982).

4. 9 U.S.C. §§ 1-14 (1982). The Federal Arbitration Act [hereinafter cited as Act] does not cover arbitration awards rendered outside the United States.

5. *See infra* notes 205-13 and accompanying text.

6. *Id.*

7. *See* Convention, *supra* note 1, art. V; *see also infra* notes 87-196 and accompanying text for discussion of the Convention defenses. The defenses of the Convention are found in article V.

8. *See* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974). *See infra* notes 87-191 and accompanying text.

pretation of its provisions.⁹ Finally, the federal courts recognize that parochial decisions, which undermine the effectiveness of foreign arbitral awards, might invite retaliation from the courts of other nations when they review awards rendered in the United States.¹⁰

This Comment surveys the federal court decisions on enforcement of foreign arbitral awards under the Convention.¹¹ Part II of this Comment traces the background of the Convention and outlines its major features. Part III surveys and analyzes the key federal court decisions interpreting the Convention. Part IV discusses the unresolved issues under the Convention. Part V examines the current trend in the federal courts. Part VI concludes that the Convention, despite some unresolved issues, has been an effective means to enforce foreign arbitral awards in the United States.

II. Background

A. *Why Arbitration?*

In international commercial transactions, arbitration has become an "almost universal" means of dispute resolution¹² and the Convention is the "cornerstone of this procedure."¹³ It has succeeded in establishing an attractive method for the enforcement of foreign arbitral awards. The availability of the Convention's simpler and more effective procedures has been a vital factor in the increasing use of arbitration.¹⁴

Parties to an international commercial transaction prefer resolving their difficulties through arbitration rather than resorting to the courts of one of the parties. They believe that arbitration offers a private, less expensive, and swifter method of settling disputes.¹⁵ Arbitration is also viewed as providing an amicable means of resolving problems, which is less likely to im-

9. See *infra* notes 40-52 and accompanying text.

10. See *infra* notes 87-89 and accompanying text.

11. Although the Convention covers enforcement of agreements to arbitrate, this Comment does not analyze the decisions in this area.

12. Kerr, *International Arbitration v. Litigation*, 1980 J. Bus. L. 164.

13. A. VAN DEN BERG, *supra* note 2, at 1.

14. Kerr, *supra* note 12, at 167.

15. *Id.* at 164-65.

pair future business relationships.¹⁶ The arbiters are experts in the field of international commerce and are better able to decide complex commercial issues.¹⁷ Most important, the availability of international commercial arbitration affords all parties a neutral mode of dispute resolution.¹⁸ There is no need to rely on the law of an unfamiliar forum or to fear local prejudice against a foreign litigant.¹⁹ Parties can use the services of nonpartisan private arbitration groups.²⁰

In spite of these benefits, some critics contend, however, that arbitration is not uniformly advantageous.²¹ The procedure can be costly, slow-moving and cumbersome. Arbitrators are usually individuals of stature in the field of commerce, who command substantial fees.²² Their schedules are very busy, which causes delay.²³ Most important, arbitration lacks a procedure to bring related disputes under one arbitral proceeding.²⁴

B. *The Pre-Convention Period*

During the formative period of international commercial arbitration,²⁵ domestic arbitration laws were the only source of law

16. *Id.*; Comment, *International Commercial Arbitration under the United Nations Convention and the Amended Federal Arbitration Statute*, 47 WASH. L. REV. 441, 442 (1971) (citing Gardner, *Economic and Political Implications of International Commercial Arbitration*, INT'L. TRADE ARB., 15, 16-17 (1958)) [hereinafter cited as Comment, *International Arbitration*].

17. See A. VAN DEN BERG, *supra* note 2, at 1; Kerr, *supra* note 12, at 176.

18. A. VAN DEN BERG, *supra* note 2, at 1 (suggesting that arbitration allows parties to decide in advance what procedural and substantive laws will be applied in any dispute). The author cites this as a clear advantage of arbitration. *Id.*

19. See Quigley, *Accession by the United States to the United Nations Convention on the Recognition of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1051 (1960). There is a basic fear that a court of one party's nation would be more likely to favor its own citizens. Whether this fear is justified does not matter because parties believe that favoritism exists. *Id.*

20. The two large private arbitration groups are the American Arbitration Association (AAA) located in the United States, and the International Chamber of Commerce (ICC) based in Geneva, Switzerland. Both groups have their own rules and procedures, which govern arbitrations submitted to them.

21. See, e.g., Kerr, *supra* note 12, at 164-66.

22. *Id.*

23. *Id.*

24. *Id.* at 177. Kerr notes that although it is inevitable, arbitration is not preferable to litigation. *Id.*

25. The genesis of international commercial arbitration is the start of the 20th century. A. VAN DEN BERG, *supra* note 2, at 6.

governing the enforcement of arbitral clauses and arbitral awards.²⁶ These laws were generally antiquated and unfavorable to arbitration.²⁷ They lacked uniformity and were at times, applied by courts that viewed arbitration as a rival to judicial authority.²⁸

In response to the increased use of international commercial arbitration in the post-World War I period, the League of Nations developed a multilateral treaty known as the Geneva Protocol on Arbitration Clauses of 1923 (Protocol).²⁹ The Protocol's primary objective was to provide a uniform and effective means of enforcing arbitration clauses.³⁰ Following the Protocol, the Geneva Convention on the Execution of Foreign Awards of 1927³¹ was established to regulate "the enforcement of arbitral awards made in pursuance of an arbitration agreement falling under the Geneva Protocol of 1923."³² Both of these multilateral agreements sought to encourage the use of international commercial arbitration and to standardize the procedures of enforcement.³³

The Geneva Treaties were an improvement over the patchwork of domestic arbitral laws. Nevertheless, they were inadequate because they did not facilitate international commercial arbitration as an inexpensive and predictable method of dispute resolution.³⁴ Both treaties placed the burden of proof at an enforcement proceeding on the party who had succeeded in arbitration.³⁵ Having to prove one's case twice in order to enforce an

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* The Geneva Protocol on Arbitration Clauses of 1923 was adopted Sept. 24, 1923, 27 L.N.T.S. 158 [hereinafter cited as Protocol].

30. *See*, A. VAN DEN BERG, *supra* note 2, at 6.

31. *Adopted* Sept. 26, 1927, 92 L.N.T.S. 301 [hereinafter cited as Geneva Convention].

32. A. VAN DEN BERG, *supra* note 2, at 7. For further discussion of the Geneva Treaties, see *id.* at 113-18. The United States did not accede to either treaty.

33. Quigley, *supra* note 19, at 1054-55 n.30; the Protocol only governed enforcement of arbitral clauses while the Geneva Convention governed enforcement of arbitral awards. *Id.*

34. *See* A. VAN DEN BERG, *supra* note 2, at 7. The inadequacies of these treaties were the primary reason for the drafting and ratification of the Convention. *Id.* at 113-18.

35. *See* Quigley, *supra* note 33, at 1054-55; A. VAN DEN BERG, *supra* note 2, at 7. Another limitation on the effectiveness of the Geneva Treaties was their limited scope:

arbitration award, discouraged use of the procedure.³⁶ The Convention was drafted in order to eliminate this, and other problems which had been left unresolved under the Treaties.³⁷

C. The Convention

In 1958, representatives of many nations met in New York under the sponsorship of the United Nations to devise a more effective means to enforce international arbitration agreements and awards. Ten nations signed the resulting United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.³⁸ This Convention replaced the earlier Geneva Treaties³⁹ and has subsequently been adopted by almost all of the important trading nations of the capitalist, socialist and developing spheres of the world.⁴⁰

The goal of the Convention is clear and easily stated. It

the parties had to be subject to the jurisdiction of different contracting states, and the award had to be made in a contracting state. *Id.*

36. See Quigley, *supra* note 33, at 1054.

37. See A. VAN DEN BERG, *supra* note 2, at 7. They hoped to have an arbitration process that was not governed by national laws. *Id.*

38. The 10 signatories are:

Belgium	Israel
Costa Rica	Jordan
El Salvador	Netherlands
Federal Republic of Germany	Philippines
India	Poland

39. Convention, *supra* note 1, art. VII (2) states: "The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound, and to the extent that they become bound by this Convention."

40. A. VAN DEN BERG, *supra* note 2, at 410. The adopting nations are:

Australia	Egypt	Kampuchea	South Africa
Austria	Finland	Korea	Spain
Belgium	France	Kuwait	Sri Lanka
Benin	Germany DR	Madagascar	Sweden
Botswana	Germany FR	Mexico	Switzerland
Bulgaria	Ghana	Morocco	Syrian Arab
Byelorussia	Greece	Netherlands	Thailand
Central African	Holy See	Niger	Trinidad and Tobago
Chile	Hungary	Nigeria	Tunisia
Columbia	India	Norway	Ukrainian SSR
Cuba	Israel	Philippines	USSR
Czechoslovakia	Italy	Poland	United Kingdom
Denmark	Japan	Romania	United Rep. of Tanzania
Ecuador	Jordan	San Marino	United States

strives to establish the "necessary legal framework" on an international scale to permit the successful use of commercial arbitration among foreign parties.⁴¹ The Convention sets up a simple, standard procedure to enforce foreign arbitral awards in contracting states. To achieve this goal, the Convention limits the defenses available to a party who opposes the recognition of an arbitral award.⁴² In addition, the Convention requires all contracting states to establish procedures for enforcing foreign arbitral awards that are at least as advantageous as procedures for enforcing domestic arbitral awards.⁴³

A party who opposes the recognition of an international arbitral award is limited by article V⁴⁴ of the Convention to seven defenses. The defenses are: the party was denied due process,⁴⁵ the subject of the award was a nonarbitrable matter,⁴⁶ the parties lacked capacity to agree,⁴⁷ the arbitral procedure was not in compliance with the parties' agreement,⁴⁸ the arbitral award was not binding,⁴⁹ the dispute was not properly submitted to the arbitration tribunal,⁵⁰ and a public policy of the enforcing forum prohibited enforcement of the award.⁵¹ The public policy de-

41. A. VAN DEN BERG, *supra* note 2, at 1.

42. Convention, *supra* note 1, art. V (limiting the number of defenses that are allowed under the Convention to those it enumerates). For a survey and analysis of how federal courts have interpreted these defenses, see *infra* notes 87-191 and accompanying text.

43. See Convention, *supra* note 1, art. III (requiring contracting states not to place more onerous limitations upon a party seeking enforcement of a foreign arbitral award than it would upon an arbitral award rendered within its borders).

44. Convention, *supra* note 1, art. V. Article V provides: "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnished . . . proof [of the defenses enumerated in Article V]." *Id.*

45. Convention, *supra* note 1, art. V(1)(b). See *infra* notes 99-106 and accompanying text.

46. Convention, *supra* note 1, art. V(2)(a). See *infra* notes 138-55 and accompanying text.

47. Convention, *supra* note 1, art. V(1)(a). See *infra* notes 193-94 and accompanying text.

48. Convention, *supra* note 1, art. V(1)(d). See *infra* notes 193-94 and accompanying text.

49. Convention, *supra* note 1, art. V(1)(e). See *infra* notes 123-37 and accompanying text.

50. Convention, *supra* note 1, art. V(1)(c). See *infra* notes 107-22 and accompanying text.

51. Convention, *supra* note 1, art. V(2)(b). See *infra* notes 156-92 and accompanying

fense has the greatest potential for obstructing the enforcement of arbitration awards because of its vagueness. Courts have avoided this pitfall by construing this defense strictly.⁵²

D. *The United States and the Convention*

The United States did not sign the Convention until 1970.⁵³ Before then, parties seeking to enforce foreign arbitral awards in the United States experienced great difficulty. The federal courts were able to afford only limited relief.⁵⁴ Jurisdiction over the parties to an international arbitration agreement could be asserted based on the existence of a bilateral treaty of friendship, or a commerce and navigation treaty with the nation where the arbitral award had originated.⁵⁵ The United States did not, however, have such a bilateral treaty with every country. Furthermore, although the existence of a bilateral treaty gave the federal courts subject matter jurisdiction, there were no guidelines for the resolution of disputes over the validity of the arbitral award itself. This resulted in an ad hoc method of enforcement which lacked speed and predictability.⁵⁶

The state courts did not offer a viable alternative. No state had an arbitration statute that specifically covered enforcement of an award rendered in a foreign country.⁵⁷ A party's only recourse in state court was to bring a common law action.⁵⁸ Consequently, neither the state nor the federal court systems afforded much relief to a party who wished to enforce an arbitration award granted in another country.

When the United States acceded to the Convention in

text.

52. See, e.g., *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974). See *infra* notes 161-73 and accompanying text.

53. See 9 U.S.C. § 201 (1982).

54. See generally Comment, *International Arbitration*, *supra* note 14, at 444 n.11 (citing *Oregon Pac. Forest Prod. Corp. v. Welsh Panel Co.*, 248 F. Supp. 903 (D.C. Or. 1965); *Batson Yarn & Fabrics Mach. Group Inc. v. Saurer-Allma GmbH-Allgauer Maschinentbau*, 311 F. Supp. 68 (D.S.C. 1970)).

55. Some of these treaties had provisions that provided for judicial enforcement of arbitral awards. Comment, *International Arbitration*, *supra* note 16, at 444.

56. See *id.* at 444-45.

57. See Quigley, *supra* note 19, at 1057.

58. *Id.* at 1057-58.

1970,⁵⁹ it incorporated the Convention as part of federal law.⁶⁰ In so doing, the United States invoked the only two reservations a country may use to qualify its accession.⁶¹ These reservations provide, that an enforcing state may apply the Convention solely to awards made in other contracting states, and solely to legal relationships that are defined as commercial under its own laws.⁶² The definition of commercial transactions developed in the United States excluded matters involving domestic relations and political arbitral awards.⁶³

Congress passed implementing legislation that complements the Convention⁶⁴ and establishes a flexible framework for applying its enforcement procedures in the United States.⁶⁵ The Con-

59. The United States delegates to the 1958 New York convention recommended that the United States not sign the agreement. These delegates believed that the Convention was a threat to the powers of the states in arbitration and would adversely affect the procedures of state and federal courts. Further, the delegates believed that the principles embodied in the Convention were not desirable for the United States. *Id.* at 1074-75 n.108 (citing U.S. Del. Rep. 22); *contra* 1970 U.S. Code Cong. & Ad. News 3601, 3601 (referring to opinions of the ABA, AAA, and many executive agencies, all of which called for United States accession to the Convention).

60. The Convention is codified in chapter two of the Federal Arbitration Act, 9 U.S.C. §§ 201-208 (1982).

61. *See* 9 U.S.C. § 202 (1982).

62. *See* Convention, *supra* note 1, art. I § 3. The Convention provides: "[an enforcing state] may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration." *Id.*

These restrictions qualify the broad scope of the Convention, contained in article I § 1. This section provides:

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.

Convention, *supra* note 1, art. I § 1.

63. *See* *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1, 13 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974). This was one of the first cases in the United States to interpret the Convention. For further discussion see *infra* notes 93-97 and accompanying text.

64. 9 U.S.C. § 201 (1982) states that the Convention is part of federal law. Sections 202-208 lay out the necessary framework to implement the Convention and will be discussed in the text. *See infra* text accompanying notes 65-69.

65. 9 U.S.C. § 202 (1982) states:

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a trans-

vention has a broad scope; it is inapplicable only to disputes between United States citizens who lack a reasonable relationship with a foreign state.⁶⁶ A reasonable relationship exists if the dispute concerns property located abroad, performance of a contract in another country, or any other reasonable nexus with one or more foreign nations.⁶⁷ The Convention also applies to arbitral awards rendered in the United States, which involve a disputed commercial transaction between foreign parties.⁶⁸

Congress expressed a clear policy favoring federal court jurisdiction over matters involving international commercial arbitration.⁶⁹ The federal courts have original jurisdiction over all actions arising under the Convention,⁷⁰ regardless of the amount in controversy.⁷¹ A defendant may remove any matter arising under the Convention from state court to the federal district court which has jurisdiction.⁷² By allowing liberal access to the

action, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

66. *See id.*

67. *See id.* The jurisdiction of the Convention is very open ended and leaves the courts with wide discretion in deciding whether the Convention is applicable.

68. *See infra* notes 214-24 and accompanying text. This interpretation is not uniform in the United States and is one of the few drawbacks of federal court interpretation to date. *Id.*

69. *See* 9 U.S.C. § 203 (1982). Section 203 provides:

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

Id.

70. *Id.*

71. *Id.*

72. 9 U.S.C. § 205 (1982). The section states:

Where the subject matter of an action or proceeding pending in a state court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that

federal courts, Congress effectively limited state court involvement in the field of international commercial arbitration. This preference reflects a desire to create a uniform body of law governing the recognition of foreign arbitral awards.

The venue requirements for proceedings brought under the Convention are stated in section 204.⁷³ Parties may stipulate the venue for court proceedings in their arbitration agreement. Venue may also lie in the court where disputes about the subject matter of the arbitration could have been litigated.⁷⁴

Congress also provided that the recognition and enforcement proceedings under the Convention would be governed by the Federal Arbitration Act,⁷⁵ unless its provisions conflict with the Convention.⁷⁶ The Federal Arbitration Act, which had previously applied exclusively to domestic arbitral awards, now supplies the motion procedure in federal courts for recognizing and enforcing foreign arbitral awards.⁷⁷ This simplifies enforcement and complies with article III of the Convention, which demands that enforcement of domestic and foreign awards be placed on an almost equal footing.⁷⁸

the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

Id.

73. 9 U.S.C. § 204 (1982). The section states:

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

Id.

74. *Id.*

75. 9 U.S.C. §§ 1-14 (1982). The Act is the domestic predecessor to the Convention.

76. The relevant statute states: "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States." 9 U.S.C. § 208 (1982).

77. See *id.*, Convention, *supra* note 1, art. III.

78. Convention, *supra* note 1, art. III states:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies

E. *The Procedure in the United States*

Article IV of the Convention permits a court to hear a motion requesting recognition of a foreign arbitral award⁷⁹ if the party seeking enforcement has met two requirements.⁸⁰ He must present the duly authenticated original award or a certified copy, and the original arbitration agreement or a certified copy.⁸¹ The party opposing recognition may then attempt to prove one or more of the defenses permitted under the Convention.⁸² If the party who objects to recognition fails to meet his burden of proof, the court will convert the award into a judgment.⁸³

In the United States, an arbitral award is an inchoate right until converted into a judgment by a court.⁸⁴ The Federal Arbi-

than are imposed on the recognition or enforcement of domestic arbitral awards.

"Confirmation" is the term used in the Act, 9 U.S.C. § 9 (1982), and has the same meaning that "recognition" does under the Convention. Both describe the motion practice in which arbitral awards, foreign or domestic, are converted into judicial judgments enforceable in all United States courts. "Recognition" will be the term used in this Comment because it is used in the Convention. Courts, however, use both terms interchangeably in their opinions.

79. See *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976) ("[T]he implementing legislation prescribed a summary procedure in the nature of federal motion practice to expedite petitions for confirmations of foreign arbitral awards.").

80. Convention, *supra* note 1, art. IV. Article IV states:

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Id.

81. *Id.* art. IV (1). See *supra* note 80.

82. See Convention, *supra* note 1, art. V(1) (which places burden of proof on party opposed to recognition).

83. See 9 U.S.C. § 207 (1982), which states: "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention."

84. *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975).

tration Act, which governs both foreign and domestic awards, contains the motion procedure parties must use to convert arbitral awards into judgments.⁸⁵ It is important to note that the motion procedure is strictly limited to recognition or nonrecognition of the award. It cannot be used to initiate an original action or to include counterclaims.⁸⁶

III. United States Federal Courts and Defenses of the Convention

The federal courts have consistently favored enforcement of foreign arbitral awards because they narrowly construe the defenses permitted by the Convention.⁸⁷ Motivation for this policy stems from a fear that, were American courts to proceed differently, foreign courts would respond by dishonoring arbitral awards rendered in this country.⁸⁸ The pro-enforcement policy of the federal courts is responsive to the primary goals of the Convention, which are to simplify and standardize enforcement procedures across the globe while minimizing the possibility of

This Comment discusses and analyzes the enforcement of arbitral awards in the United States. This is the final stage in the arbitration process. It is preceded by: (a) an agreement to arbitrate disputes, which arise in an international commercial transaction; (b) a dispute, which is submitted to arbitration; (c) an arbitration hearing that renders an award; (d) a successful party who seeks recovery of his award; (e) a party who is unable to recover his award through voluntary compliance and invokes the Convention's recognition and enforcement provisions. In the United States, recognition (confirmation) is the judicial process to convert an arbitral award into a judgment, which is enforceable in this country. Recognition and enforcement are available upon the filing of the appropriate motions.

85. See 9 U.S.C. § 6 (1982). This section provides: "Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided." *Id.*

86. *Fertilizer Corp. of India v. IDI Management, Inc. (FCI)*, 517 F. Supp. 948, 963 (S.D. Ohio 1981). The court reviewed the requirements of the Act, 9 U.S.C. § 6, and found that a counterclaim could not be "interposed in response to a motion. Furthermore, a confirmation proceeding is not an original action; it is, rather, in the nature of a post-judgment enforcement proceeding. In such a proceeding a counterclaim is clearly inappropriate." *Id.* This procedure is not in conflict with the Convention and therefore is applicable. See 9 U.S.C. § 208 (1982).

87. The defenses allowed by the Convention are available to parties in enforcement of arbitral clause proceedings and in hearings on recognition of foreign arbitral awards. See Convention, *supra* note 1, art. I. Part III focuses on the federal court interpretations of the defenses allowed by the Convention, as used by parties seeking to defeat recognition of a foreign arbitral award.

88. See *infra* notes 171-73 and accompanying text.

parochial prejudices.⁸⁹ To this end, the Convention established clear procedures and limited defenses.

A. *Defining Commercial Relationships*

The United States signed the Convention with the reservation that it would only apply to legal relationships that it recognized as *commercial*.⁹⁰ The claim that a relationship is not commercial is not actually a defense under the Convention. Rather, it seeks to establish that the Convention does not apply. If successful, such an assertion might leave the party seeking recognition without effective recourse in this country. Unable to seek enforcement under the Convention, he would also be denied relief through the procedures of the Federal Arbitration Act, because they apply only to domestic arbitral awards.⁹¹ Such a party could only rely on the ineffective common law causes of action that were available before the United States acceded to the Convention.⁹²

In one of the first cases in the United States under the Convention, the District Court for the Southern District of New York was called upon to define a commercial legal relationship. The district court confronted this threshold issue in *Island Territory of Curacao v. Solitron Devices, Inc.*⁹³ The case involved a contract between a manufacturer and the sovereign nation of Curacao.⁹⁴ Curacao had prevailed at arbitration⁹⁵ and sought enforcement of the arbitral award. Solitron took the position that its relationship with Curacao was not commercial because its

89. See *infra* notes 156-201 and accompanying text.

90. See *supra* notes 61-63 and accompanying text.

91. 9 U.S.C. § 1 (1982).

92. See *supra* text accompanying notes 54-58.

93. 356 F. Supp. 1 (S.D.N.Y.), *aff'd on other grounds*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974). The Second Circuit held that because the award was enforceable under N.Y. Civ. Prac. R. 53 (McKinney 1973), there was no need to decide the correctness of the district court's decision regarding the applicability of the Convention. *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1323 (2d Cir. 1973).

94. The contract was for the construction and maintenance of an electronics plant and included an arbitration clause. When a dispute arose because of a change in the Island's minimum wage scale, Solitron discontinued performance and Curacao went to arbitration. Curacao won. *Solitron*, 356 F. Supp. at 4.

95. The arbitration took place in Curacao. *Id.* at 3.

contract obligations involved performing a governmental act — construction of an industrial park.⁹⁶ The district court ruled against Solitron, holding that its contract was clearly commercial⁹⁷ and that the only awards falling outside the meaning of that term are “matrimonial and other domestic relations awards, political awards, and the like.”⁹⁸ Since *Solitron* was decided in 1973, the claim that a relationship is not commercial apparently has not been raised in the federal courts. Presumably, the district court’s broad definition of “commercial” in *Solitron* renders the possibility of success on such a claim very slim.

B. *The Due Process Defense*

The due process defense⁹⁹ incorporates the standards for due process that have been developed by the forum nation.¹⁰⁰ In the United States, the federal courts have limited this challenge to two allegations. A party may oppose recognition of an arbitral award by raising the defense that he failed to receive proper notice of the arbitration proceeding or by arguing that he lacked an opportunity to be heard by the arbiters.¹⁰¹ The Second Circuit, in a very influential decision, examined this defense in *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*.¹⁰² The party opposing recognition claimed that the arbitral tribunal improperly refused to delay its proceedings to accommodate the speaking schedule of an important witness.¹⁰³ *Parsons* held that due process was satisfied if all

96. *Id.* at 13.

97. *Id.* at 13-14.

98. *Id.* at 13.

99. Convention, *supra* note 1, art. V(1)(b) states: “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”

100. See *Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974) (The court states that article V(1)(b) of the Convention “sanctions the application of the forum state’s standards of due process.”). See also Quigley, *supra* note 33, at 1067 n.81.

101. See *Parsons*, 508 F.2d at 975. This defense was one of many that the *Parsons* court had to examine. See also *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 140 (D.N.J. 1976) (holding that the “primary elements of due process are notice of the proceedings and the opportunity to be heard thereon”).

102. 508 F.2d 969 (2d Cir. 1974).

103. *Id.* at 975.

parties had notice and an opportunity to be heard.¹⁰⁴ The Second Circuit noted that the tribunal's refusal to grant a delay did not violate the notions of fundamental fairness.¹⁰⁵ The logistical problems of scheduling hearings for parties, attorneys, and arbitrators located around the world means a participant may not be able to participate in arbitral proceedings. If this occurs, it does not constitute a reason to deny recognition and enforcement of an award.¹⁰⁶ Inability to produce a witness is a risk inherent in arbitration. A party seeking to defeat recognition on due process grounds in the federal courts confronts an almost insurmountable task. The arbitration proceeding would have to have been blatantly fraudulent to result in a denial of recognition of the award.

C. *The Submission Defense*

The submission defense¹⁰⁷ involves a claim that the arbitrator has exceeded his authority by deciding issues that the parties had not presented for determination. This defense requires that a court actually review the arbitrator's exercise of authority.¹⁰⁸ It

104. See, e.g., *id.* at 975-76; see also *Biotronik*, 415 F. Supp. at 140-41.

105. *Parsons*, 508 F.2d at 975-76. The court rejected this claim because: (a) a party gives up his courtroom rights when he agrees to arbitration; and (b) the witness' excuse for not appearing was unacceptable to the court (he or she had a prior speaking engagement). The court held there was no violation of fundamental fairness by the arbitral tribunal's decision to refuse to grant a delay. This was bolstered by the fact that the tribunal had the witness' affidavit. *Id.* at 975-76.

106. See, e.g., *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya (LIAMCO)*, 482 F. Supp. 1175, 1176 (D.D.C. 1980) (Libya refusing to participate in the arbitration based upon a sovereign immunity theory); *Ipitrade Int'l, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) (Nigeria refusing to participate in the arbitration based upon a sovereign immunity theory); *Biotronik*, 415 F. Supp. at 140-41 (Medford refusing to participate).

107. Convention, *supra* note 1, art. V(1)(c) states:

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 contain decisions on matters submitted to arbitration may be recognized and enforced

108. See, e.g., *Parsons*, 508 F.2d at 976-77 (opposing party alleged that arbitrators improperly awarded damages for loss of production); *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948, 959-61 (S.D. Ohio 1981) (opposing party alleged arbitrators improperly awarded consequential damages) [hereinafter cited as *FCI*]; *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 36-38 (S.D.N.Y. 1979)

is a direct challenge to the propriety of his judgment. By contrast, the other defenses involve a review of factors that do not pertain as directly to the substantive validity of the award.¹⁰⁹

Parties asserting the submission defense in the federal courts have not prevailed. The federal courts have consistently given this defense a narrow construction, holding that an arbitrator's decision is justified if any rational basis can be found for it.¹¹⁰ They have indicated that the pro-enforcement thrust of the Convention requires a narrow construction.¹¹¹ They also cite an identical defense provided by the Federal Arbitration Act that invites a "strict reading."¹¹²

The arbitrator's award will be recognized provided that the parties have been given a full and fair hearing, and the courts can find a colorable justification for the decision.¹¹³ A decision will be denied recognition only if it is characterized by irrationality.¹¹⁴ Thus, when faced with a challenge that the arbiter has exceeded his authority, the federal courts will generally not second guess his construction of the parties' agreement.¹¹⁵ The strong presumption that the arbitrator has acted within his authority¹¹⁶ makes it unlikely the submission defense will succeed.

(issue of arbitrator's decision awarding consequential damages for conversion and attorney's fees).

It should be noted that the submission defense has been compared to the § 10(d) defense of the Act, which involves the claim that the arbitrators have exceeded their powers. *See id.*

109. Examples of defenses involving factors peripheral to the arbitrator's findings are the due process defense of article V(1)(b), which involves the requirements of notice, and the noncommercial defense, which questions the applicability of the Convention to a recognition hearing on the enforcing nation.

110. *See Parsons*, 508 F.2d at 977; *FCI*, 517 F. Supp. at 959-61; *Amoco*, 490 F. Supp. at 36-38.

111. *Parsons*, 508 F.2d at 976. This principle was also followed by the court in *FCI*, 517 F. Supp. at 960.

112. *Parsons*, 508 F.2d at 976; *FCI*, 517 F. Supp. at 960. *See also* 9 U.S.C. § 10(d) (1982).

113. In *FCI*, the court stated that the policy of the federal courts was to avoid substituting their opinions for the conclusions of the judges chosen by the parties. *See FCI*, 517 F. Supp. at 960.

114. *See id.*; *see also Amoco*, 490 F. Supp. at 37-38.

115. *See Parsons*, 508 F.2d at 977.

116. Several decisions indicate that only if the arbitrator acts irrationally will the submission defense succeed. *See, e.g., Amoco*, 490 F. Supp. at 37-38 (holding that any colorable justification will uphold the decision of the arbitrators); *FCI*, 517 F. Supp. at 960 (following the irrationality test).

The submission defense is the only defense that permits a federal court to enforce an arbitrator's award partially by dividing it into permissible and impermissible sections.¹¹⁷ "Permissible" is defined as that portion of the award that had been properly submitted to the arbitral tribunal.¹¹⁸ Permissible issues would be issues that were explicitly included in an arbitral clause or issues submitted to arbitration with the consent of all the parties.¹¹⁹ Once a court has determined a section of an award is permissible, it is enforceable subject to the other defenses.

Allowing partial recognition of an arbitral award reflects the pro-enforcement policy of the Convention.¹²⁰ Nevertheless, no federal court has yet divided an award. The courts have instead endeavored to uphold the awards in their entirety.¹²¹ The policy behind this action is a desire to carry out the congressional intent, which was to construe procedures for enforcing foreign arbitral awards liberally.¹²² If a party opposed to the enforcement of an award should ever prove that an arbitral tribunal had exceeded its power by deciding issues not submitted, the party seeking recognition could recover at least that part of his award which had been properly submitted.

D. *The Binding Defense*

An arbitral award may not be recognized if a party opposing recognition can prove that the award is not binding on the parties "under the law of which, that award was made."¹²³ Recognition may also be denied if the award which was binding has been set aside by competent authority of the originating country or of the country whose law governed the arbitration.¹²⁴ When this

117. See *supra* note 107.

118. *Parsons*, 508 F.2d at 976.

119. See *supra* note 107.

120. Convention, *supra* note 1, art. V(1)(c).

121. See, e.g., *Parsons*, 508 F.2d at 976; *FCI*, 517 F. Supp. at 960; *Amoco*, 490 F. Supp. at 38.

122. See *Parsons*, 508 F.2d at 976; *FCI*, 517 F. Supp. at 960.

123. Convention, *supra*, note 1, art. V(i)(e). This article provides that the binding defense may be invoked if "[t]he 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." *Id.* This provision clearly authorizes the enforcing court to research the law under which the arbitral award was rendered.

124. *Id.*

defense is raised, it requires a court to identify and interpret the law of a foreign nation.

In *Fertilizer Corp. of India v. IDI Management, Inc. (FCI)*,¹²⁵ two parties entered a contract to build a nitrophosphate plant in India. After the plant was built, a dispute arose over the quantity of daily production. The dispute was submitted to the International Chamber of Commerce for settlement pursuant to an arbitration clause in the parties' original agreement.¹²⁶ The arbitrators awarded Fertilizer Corp. of India (FCI) damages. FCI then brought an enforcement proceeding in the United States. IDI argued against recognition alleging that it was not binding under Indian law because it had not yet been reviewed for errors by an Indian court.¹²⁷

After a thorough investigation of Indian law, the *FCI* court determined that the award was binding.¹²⁸ The court reasoned that an "award will be considered 'binding' . . . if no further recourse may be had to another arbitral tribunal The fact that recourse may be had to a court of law does not prevent the award from being binding."¹²⁹ This logical standard is favorable to a party seeking recognition, and it offers a helpful guideline for the courts in their difficult task of interpreting a foreign nation's civil procedure.¹³⁰ Using this simple test consistently, the federal courts will further the goal of certainty and liberal enforcement of foreign arbitral awards.¹³¹

A provision related to the binding defense is found in article VI of the Convention, which permits a federal court to adjourn its proceeding to recognize a foreign arbitral award when an application to set aside the award has been made in the originating country.¹³² This provision is a safety device because it avoids the

125. 517 F. Supp. 948 (S.D. Ohio 1981).

126. *Id.* at 949-50.

127. *Id.* at 956. IDI argued that the award was not binding until both parties exhausted all possibilities for judicial review. *Id.*

128. *Id.*

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

130. *Id.* at 956-58.

131. As of this writing, only the *FCI* court has spoken on this issue.

132. Convention, *supra* note 1, art. VI. That article states:

If an application for the setting aside or suspension of an award has been

situation of having an award which is enforceable in the United States, but no longer valid in its country of origin.

In *FCI*, an application to overturn the arbitral award was pending in India.¹³³ The party opposing recognition requested that the court adjourn its decision under article VI. Although the *FCI* court noted that article VI appeared "to be an unfettered grant of discretion,"¹³⁴ it felt constrained by the goals of the Convention and the intention of Congress. The motivation was to encourage the recognition of commercial arbitration awards by liberalizing enforcement procedures, limiting defenses, and placing the burden of proof on the party opposing enforcement.¹³⁵ Furthermore, "parochial" decisions were to be avoided because they would frustrate these purposes.¹³⁶ In spite of the strong policy favoring enforcement — thereby limiting an enforcing court's power to adjourn — the court was fearful of an inconsistent verdict. Thus it suspended its decision until the Indian courts decided the application.¹³⁷

E. *The Nonarbitrable Defense*

An issue is nonarbitrable¹³⁸ if, according to the laws of the country where enforcement is being sought, the dispute underly-

made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

"Adjourn" is defined as "to postpone action of a convened court or legislative body until another time." BLACK'S LAW DICTIONARY, 39 (rev. 5th ed. 1979).

133. 517 F. Supp. at 961-62.

134. See *id.* at 961. The court noted the lack of any previous decisions on this matter from which it could draw standards. *Id.*

135. *Id.* (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974)). *Scherk* involved a sales contract between a German citizen and an Illinois corporation. This contract contained an arbitration clause, which *Scherk* attempted to invoke when a dispute arose. *Alberto-Culver* instead began a contract action in federal court. *Scherk*, 417 U.S. at 508-09. The Supreme Court held the arbitration clause must be enforced in light of the strong congressional policy favoring enforcement. *Id.* at 520 n.15. This policy has been consistently followed. See text accompanying notes 87-90.

136. *FCI*, 517 F. Supp. at 961 (citing *Parsons*, 508 F.2d at 973).

137. *Id.* at 962.

138. The relevant portion of the Convention states that "[r]ecognition 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:

ing the arbitral award was a matter incapable of being settled by arbitration.¹³⁹ A federal court may deny recognition and enforcement of an award if the facts necessary to establish this defense are proven. A defense of nonarbitrability differs from the previous defenses discussed in two ways: first, the court may raise it sua sponte,¹⁴⁰ and second, the court focuses upon the specific dispute that was the subject of the arbitration.¹⁴¹

To be successful with this defense, a party must prove that the enforcing nation attaches a special national interest to the dispute which makes it incapable of being settled by arbitration.¹⁴² The special national interest must be more than "incidentally" involved in the dispute for the court to find the dispute was nonarbitrable.¹⁴³ For example, the mere fact that "acts of the United States are somehow implicated in a case," does not make it a case of special national interest.¹⁴⁴

A special national interest was found in *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahira (LIAMCO)*.¹⁴⁵ In *LIAMCO*, an oil company sought recognition of its arbitral award for inadequate compensation after Libya nationalized the oil holdings of the Libyan American Oil Co. (*LIAMCO*). The *LIAMCO* court stated that under article V(2)(a),¹⁴⁶ the issue for decision involved choosing the procedure

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country." Convention, *supra* note 1, art. V(2)(a).

139. See, e.g., *Parsons*, 508 F.2d at 974 (stating that an example of a nonarbitrable dispute under United States law is a dispute involving an antitrust claim).

140. *Id.*

141. *Id.*

142. *Id.* at 975.

143. *Id.* See also *American Safety Equip. v. J.P. Maguire Co.*, 391 F.2d 821 (2d Cir. 1968) (domestic arbitration case; incidental connection with national policy is not necessarily nonarbitrable).

144. *Parsons*, 508 F.2d at 975. *Parsons* involved a contract dispute which was further entangled when the Six Day War of 1967 broke out in the Middle East. The *Parsons* court rejected the nonarbitrability claim because it found that severance of relations with Egypt was not a special national interest. *Id.* The court also discussed the possibility that a dispute arising in a foreign context may require a narrower reading of nonarbitrability (which would be subject to the strong pro-enforcement policy set down in *Scherk v. Alberto-Culver*, 417 U.S. 506 (1974)) than one arising in a domestic context. See *id.*

145. 482 F. Supp. 1175 (D.D.C. 1980), *vacated without opinion*, 684 F.2d 1032 (D.C. Cir. 1981).

146. See *supra* note 138.

to use to compensate LIAMCO for its loss of assets as a result of Libya's nationalization.¹⁴⁷ There were two options available — the arbitrator's determination or the nationalization laws of Libya.¹⁴⁸ The district court held that it could not have ordered arbitration on this matter originally because "it would have been compelled to rule on the validity of the Libyan nationalization law."¹⁴⁹ When faced with deciding the legitimacy of the acts of a foreign sovereign, a federal court will invoke a long held policy of judicial abstention.¹⁵⁰ The district court refused to recognize the award because nationalization is a classic example of an issue subject to this doctrine.¹⁵¹ This decision would have been the only time that a foreign arbitral award had been refused recognition under the Convention in the United States. On appeal, however, the circuit court vacated the *LIAMCO* decision without stating a reason.¹⁵² Thus, the status of this defense is still unclear in the United States.

The nonarbitrable defense is always subject to the considerations of competing policies. On one hand, the federal courts strongly favor enforcement of foreign arbitral awards.¹⁵³ On the other hand, enforcement of awards that involve issues of special national interest cannot be resolved through arbitration.¹⁵⁴ As one court has suggested, the test for nonarbitrability will probably be "of an ad hoc nature."¹⁵⁵

147. *LIAMCO*, 482 F. Supp. at 1178.

148. *Id.* at 1179-80.

149. *Id.* These laws abrogated the prior agreements between the disputants.

150. *Id.* The court indicated that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory." *Id.*

151. *Id.*

152. *LIAMCO*, 684 F.2d 1032 (D.C. Cir. 1981), *vacating without opinion* 482 F. Supp. 1175 (D.D.C. 1980). While appeal was pending, the Libyan American Oil Co. (LIAMCO) and Libya had reached a settlement. The court of appeals under pressure from the American Arbitration Association and other groups, which had filed amici curiae briefs, vacated the lower court's decision without an opinion. See 7 Y.B. COM. ARB. 382 (1982).

153. See *Scherk*, 417 U.S. at 506.

154. See *Parsons*, 508 F.2d at 974-75.

155. *Id.* at 975.

F. *The Public Policy Defense*

The public policy defense¹⁵⁶ is the vaguest of all the defenses allowed by the Convention, and because of this it has the greatest potential to defeat the liberal enforcement policy of the Convention.¹⁵⁷ The federal courts have recognized the threat that this defense has posed¹⁵⁸ and have defined it narrowly. It includes only the very basic notions of morality and justice of the United States.¹⁵⁹ This defense has been the most frequently litigated of the defenses, which indicates that it is viewed as a means to deny enforcement of a foreign arbitral award.¹⁶⁰

The guidelines for the public policy defense, as well as for many of the other defenses, were developed by the Second Circuit in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*.¹⁶¹ In *Parsons*, an American company appealed the recognition of a foreign arbitral award rendered in favor of Societe Generale, an Egyptian representative.¹⁶² The parties had entered into a contract for the construction and management of a paperboard mill in Egypt.¹⁶³ This agreement provided for the arbitration of all disputes during the duration of the contract. A dispute arose and was submitted to an arbitration panel.¹⁶⁴ The panel decided in favor of Societe Generale and awarded damages.¹⁶⁵

In contesting enforcement of the award in the United States, Parsons alleged that its refusal to continue performance of the contract was in keeping with the foreign policy of the

156. Convention, *supra* note 1, art. V(2)(b) provides: "The recognition or enforcement of the award would be contrary to the public policy of that country."

157. Unlike the other defenses, this defense may also be raised by the court. Convention, *supra* note 1 art. V(2).

158. See *infra* text accompanying notes 161-91.

159. *Parsons*, 508 F.2d at 974.

160. See A. VAN DEN BERG, *supra* note 2, at 366. See also *infra* text accompanying notes 161-91.

161. 508 F.2d 969 (2d Cir. 1974).

162. *Id.* at 970-71.

163. *Id.* at 971.

164. *Id.* at 972. When the 1967 Arab-Israeli War began, Egypt severed ties with the United States. Parsons removed its work force and considered this a postponement of the contract which would be protected by the *force majeure* clause, which excuses a delay in performance due to causes beyond the parties' control. The Egyptians interpreted Parsons' action as a default and sought damages. *Id.*

165. See *id.* (Nearly \$400,000 was at stake.).

United States.¹⁶⁶ Parsons argued that to enforce this award would therefore contravene the public policy of the United States.¹⁶⁷ The Second Circuit held that the public policy defense should be narrowly construed and that recognition would be denied only when enforcement of the award "would violate the forum state's most basic notions of morality and justice."¹⁶⁸ The court rejected Parsons' public policy defense because it viewed severance of ties with Egypt as a matter of politics rather than public policy. It stated that the defense was not a parochial device which is available to protect the political interests of a nation.¹⁶⁹ This defense "was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.'"¹⁷⁰ This decision was based on the pro-enforcement purpose of the Convention,¹⁷¹ which was recognized by the Supreme Court in *Scherk v. Alberto-Culver Co.*¹⁷² The most important factor in *Parsons* was the fear that a restrictive decision by an American court would result in negative repercussions by foreign courts that were presented with requests to enforce arbitral awards rendered in the United States.¹⁷³

Parties opposed to recognition of a foreign arbitral award have attempted to incorporate a broad range of claims under the public policy defense. For example, in *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*,¹⁷⁴ the defendant claimed that the party who prevailed at

166. See *supra* note 164.

167. *Parsons*, 508 F.2d at 972-73.

168. *Id.* at 974.

169. *Id.*

170. *Id.*

171. See *supra* text accompanying notes 87-89.

172. 417 U.S. 506. In *Scherk*, the Supreme Court commented:

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.

Id. at 520 n.15.

173. *Parsons*, 508 F.2d at 973-74. The Second Circuit noted that "considerations of Reciprocity — considerations given express recognition in the Convention itself — counsel courts to invoke the public policy defense with caution lest foreign courts frequently accepted it as a defense to enforcement of arbitral awards rendered in the United States." *Id.*

174. 415 F. Supp. 133 (D.N.J. 1976). *Biotronik* involved a contract for the distribu-

the arbitration hearing had committed fraud in his presentation to the arbitration panel and, therefore, to recognize the award would violate the public policy of the enforcing state.¹⁷⁵ In denying the public policy defense in *Biotronik*, the district court adhered to the precedent established by *Parsons*.¹⁷⁶ Again, the paramount consideration was a fear of reprisals by foreign courts.¹⁷⁷

The public policy defense was also examined in *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co.*¹⁷⁸ The district court denied two of Marc Rich's claims that were asserted as violations of public policy. Marc Rich charged that one of the arbitrators had an improper financial relationship with Transmarine.¹⁷⁹ The court found no impropriety.¹⁸⁰ Marc Rich also alleged that there had been duress in contracting.¹⁸¹ The district court held that the existence of duress is clearly a matter of public policy, and if it were established, the court would deny recognition of an award.¹⁸² The facts, however, did not establish a valid duress defense because Marc Rich had many options available.¹⁸³

Public policy has also been asserted to cover claims of arbitrator bias,¹⁸⁴ to invoke judicial estoppel,¹⁸⁵ and to attack the in-

tion of pacemakers. The dispute arose over several shipments of the pacemakers manufactured by Biotronik and to be distributed by Medford. *Id.* at 135.

175. *Id.* at 137.

176. *Id.* at 140.

177. *Id.* at 139 (citing *Parsons*, 508 F.2d at 973, which expressed the fear that foreign courts could react against awards rendered in the United States if federal courts became reckless in their interpretations of the public policy defense).

178. 480 F. Supp. 352 (S.D.N.Y. 1979). Plaintiff was a ship owner who sued to enforce an arbitral award rendered in New York. The dispute arose over the completion of a charter agreement.

179. The allegation was that there was an income-producing relationship between the arbitrator and the winning party at arbitration. *See id.* at 357-58.

180. *Id.* at 358. The court found the alleged relationship to be too tenuous to be any cause for concern. Also, due to the nature of the maritime industry and the scarcity of experienced arbitrators in this field, some overlap was considered unavoidable. *Id.*

181. *Id.* at 358-61.

182. *Id.* at 358-59. The standard for proving duress involves showing that the party's will was overborne so as to lose his options. *Id.*

183. *Id.* at 359-61 (Marc Rich had many options open; there was no duress).

184. *See FCI*, 517 F. Supp. 948 (S.D. Ohio 1981) (in which arbitrator had previously represented the winning party).

185. *See Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (2d Cir. 1984) (recognizing awards rendered in London).

terest awarded on a recovery.¹⁸⁶ All of these claims were denied because they did not reach the very strict and unwavering standard of having threatened the most basic notions of morality and justice of the enforcing state.¹⁸⁷

This defense was successfully used in *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*¹⁸⁸ *Laminoirs* involved a sales contract for galvanized steel wire. A dispute arose over the fixing of the price and was submitted to the International Chamber of Commerce.¹⁸⁹ Southwire alleged that the "arbitrators erroneously adopted the French legal rate of interest on the amounts due" and that this violated the enforcing forum's public policy because that interest rate was excessive.¹⁹⁰ The *Laminoirs* court agreed and refused to enforce that part of the arbitrator's award, holding that an award of interest that is penal in nature clearly violates public policy.¹⁹¹

Parsons and subsequent decisions interpret the public policy defense to be a very limited one. In doing so, federal courts refuse to allow the development of a vague, standardless defense which would hinder the goals of the Convention. This restrictive interpretation, followed in all later decisions,¹⁹² has been an effective means to support the pro-enforcement policy of the Convention. Moreover, the potential "Pandora's box" found in a broad and imprecise public policy defense has never been opened by the courts.

186. See *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063 (N.D. Ga. 1980). Southwire claimed the interest on the award was usurious. Southwire had agreed to buy galvanized steel wire from Laiminoirs. The agreement had an arbitration clause. A dispute arose over the price, and it was submitted to the ICC for settlement.

187. See *Waterside*, 737 F.2d at 152; *Laminoirs*, 484 F. Supp. at 1068; *FCI*, 517 F. Supp. at 953.

188. 484 F. Supp. 1063 (N.D. Ga. 1980).

189. *Id.* at 1066.

190. *Id.*

191. *Id.* at 1069.

192. See *supra* text accompanying notes 174-91.

G. *Miscellaneous Defenses*

1. *Untapped Defenses*

Two defenses specifically enumerated in article V of the Convention have not yet been raised in an enforcement proceeding in the federal courts. One defense requires a review of whether the parties have the capacity to enter into an agreement and whether the resulting agreement is valid.¹⁹³ The other defense allows a party to question whether the composition and the procedure of the arbitration tribunal was in accordance with the parties' agreement or the law of the originating nation.¹⁹⁴ These two defenses require the enforcing court to review the process that preceded the award. When these defenses are finally raised in an enforcement hearing, it is probable that they will be strictly construed, as have all of the other Convention defenses.

2. *Reciprocity*

An imaginative defense was presented in *FCI*¹⁹⁵ by the party opposing recognition of the foreign arbitral award. This party claimed that the country where the award originated would not grant reciprocity to awards made in the United States.¹⁹⁶ It proposed that the United States should therefore refuse to recognize and enforce an award rendered in that country (India). The court examined the requirements for reciprocity

193. See Convention, *supra* note 1, art. V(1)(a). This provision states: 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.

Id.

194. See Convention, *supra* note 1, art. V(1)(d). This provision provides that "[t]he 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." *Id.*

195. 517 F. Supp. 948 (S.D. Ohio 1981).

196. *Id.* at 952. IDI argued that Indian courts would not have enforced that arbitral award if it had been in favor of IDI and rendered in the United States. IDI also alleged that the Indian courts had narrowly defined the commercial relationship requirement of the Convention. *Id.*

and denied the defense.¹⁹⁷

In general, federal courts focus upon two requirements to determine if reciprocity exists. First, the originating country must be a signatory to the Convention, and second, the legal relationship that gave rise to the dispute must be considered commercial under the law of the United States.¹⁹⁸ According to the courts, as long as these conditions are met, the necessary reciprocity is satisfied. The reason for this simple test, as always, is the fear that a parochial decision would elicit restrictive decisions from foreign courts denying enforcement of arbitral awards made in the United States.¹⁹⁹

3. *Procedural Tactics*

An alleged failure to meet the venue requirements established under the Convention²⁰⁰ has been used as an attempted means to defeat recognition.²⁰¹ The federal courts, however, find little merit in denying an award on these grounds because the venue requirements of the Convention are easily satisfied. Venue lies where provided by agreement or where it would lie normally.²⁰²

Motions for discovery have also been used in an attempt to thwart a recognition proceeding. This tactic did not succeed in *Imperial Ethiopian Government v. Baruch-Foster Corp.*²⁰³ The Fifth Circuit characterized the request for discovery in the enforcement proceeding as a bad faith attempt to freeze the recog-

197. *Id.* at 953. The court found that the requirements of reciprocity were met. The court also found that Indian courts were enforcing foreign awards made in favor of other nationalities. Finally, there was the consideration that "United States courts should construe exceptions narrowly lest foreign courts use holdings against application of the Convention as a reason for refusing enforcement of awards made in the United States." *Id.*

198. See, e.g., *FCI*, 517 F. Supp. at 950; *Audi Nsu Auto Union Aktiengesellschaft v. Overseas Motors*, 418 F. Supp. 982, 983 (E.D. Mich. 1976) (The contract involved the import of foreign cars into the United States; a dispute arose and was arbitrated in Zurich, Switzerland.).

199. See *supra* note 197.

200. See 9 U.S.C. § 204 (1982). To examine the text of the venue provision, see *supra* note 73.

201. See *Audi*, 418 F. Supp. at 983-84 (denying the effort to defeat recognition because venue was clearly proper).

202. See 9 U.S.C. § 204 (1982). To examine the text of the venue provision, see *supra* note 73.

203. 535 F.2d 334 (5th Cir. 1976).

nitition of an arbitral award.²⁰⁴

IV. Unresolved Issues

A. *Applicability of the Defenses of the Federal Arbitration Act*

One of the major difficulties faced by the federal courts is that of interpreting section 208 of title 9 which applies the Federal Arbitration Act's procedures to the enforcement of foreign arbitral awards, except to the extent that the Act conflicts with the Convention.²⁰⁵ Although the Convention controls when any conflict arises,²⁰⁶ the federal courts have not been very clear in their efforts to harmonize the Act with the Convention.

A major issue that remains to be decided is whether the defenses of the Act²⁰⁷ apply to the Convention. This ambiguity permits parties who oppose recognition to delay what is supposed to be an expedited procedure. An opposing party may introduce defenses allowed under the Act, although they are not part of the Convention at all. This procedure engenders delay, and is compounded by uncertainty surrounding the differences between the Convention and the Act.

The federal courts have not yet directly confronted this is-

204. *Id.* at 337. The opposing party failed to come forward with any evidence showing its good faith in requesting discovery at a recognition proceeding. Thus, the court surmised that this was merely a delay tactic. *Id.*

205. 9 U.S.C. § 208 (1982).

206. *See id.*

207. The Act's defenses are found in 9 U.S.C. § 10 (1982), which states:

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators' or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

sue. Rather, when a party raises one of the defenses under the Act, the court will first decide whether the facts presented constitute a defense under the Act. The courts so far have found none of the attempts to assert defenses allowed under the Act to satisfy the Act's standards. This result is demonstrated in *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*.²⁰⁸ The Second Circuit refused to imply the defense of manifest disregard of the law,²⁰⁹ which is allowed by section ten of the Act.²¹⁰ It held that the facts did not establish the defense, and therefore, the issue of whether the defense was applicable under the Convention was avoided.²¹¹ This result has been repeated in many later decisions.²¹²

Eventually, either Congress or the courts must clearly decide what defenses, if any, of the Act are included under the Convention. Avoiding the decision does not comport with the goals of providing a simple recognition and enforcement procedure. The most appropriate decision, in keeping with the pro-enforcement policy of the Convention and Congress,²¹³ would be to amend section 208 or add a new section which clearly states that no defenses outside of those enumerated in the Convention are available in a foreign arbitration enforcement proceeding. The federal courts would still be able to look to cases interpreting the defenses of the Act for guidance, but opposing parties would no longer be able to delay the recognition proceeding.

208. 508 F.2d 969 (2d Cir. 1974).

209. *Id.* at 974-76.

210. *See supra* note 207.

211. *Id.* at 977.

212. *See, e.g., Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 699 (2d Cir. 1978) (refusing to decide if failure to disclose a prior relationship between the arbitrator and the winning party was a defense under the Convention); *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 140 (D.N.J. 1976) (finding no fraud in the procurement of the award and therefore refusing to decide whether fraud is available as a defense under the Convention).

213. *See Scherk v. Alberto-Culver*, 417 U.S. 506, 520 n.15 (1974); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974).

B. *Jurisdiction over Awards Rendered in the United States.*

The federal courts have also struggled with defining the scope of the Convention's jurisdiction. Essentially the issue is whether the Convention applies to arbitral awards rendered in the United States when they involve a foreign party. The southern district of New York, in *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co.*,²¹⁴ applied the Convention to two foreign corporations who had their dispute arbitrated in New York. Yet, in the same year, another judge in the same district court did not decide this jurisdictional issue.²¹⁵ The issue seems to have been resolved, at least in the Second Circuit, by *Bergesen v. Joseph Muller Corp.*²¹⁶ which applied the Convention to an award that involved foreign entities, but was made in New York.²¹⁷ In *Bergesen*, the Second Circuit read the jurisdictional criteria of the Convention²¹⁸ broadly, holding that the Convention applies to awards "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."²¹⁹ The Second Circuit stated that its expansive interpretation was consistent with the purpose of the Convention: to encourage the recognition and enforcement of foreign arbitral awards.²²⁰ It found additional support in the legislative history of section 202 of title

214. 480 F. Supp. 352 (S.D.N.Y. 1979).

215. See *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32 (S.D.N.Y. 1979). The dispute arose under a charter agreement and the arbitration occurred in New York. The court did not decide whether the Convention or the Act applied, holding that the standards of art. V and §§ 9-10 were equivalent. *Id.* at 36. A similar result occurred in *Andros Compania*, 579 F.2d at 699 n.11. Prior to *Andros Compania*, the same circuit refused to decide the issue and confirmed an award under the Act. See *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 426 n.2 (2d Cir. 1974) (dispute over payment of freight due; court noting split over jurisdictional question).

216. 710 F.2d 928 (2d Cir. 1983).

217. See *id.* at 932. This case involved a Norwegian shipowner and a Swiss company. The dispute arose over a charter and the arbitration was held in New York. The shipowner (*Bergesen*) won and sought enforcement. The district judge held that the Convention does apply to "awards rendered in the United States involving foreign interests." *Bergesen v. Joseph Muller Corp.*, 548 F. Supp. 650, 652 (S.D.N.Y. 1983). The Second Circuit affirmed this judgment.

218. Convention, *supra* note 1, art. I.

219. *Bergesen*, 710 F.2d at 932.

220. *Id.* (citing *Scherk*, 417 U.S. at 520 n.15).

9,²²¹ which states that the Convention applies to relationships that have a "reasonable relation with one or more foreign states."²²²

At least in the Second Circuit, there is a clear way to measure the scope of the Convention's jurisdiction.²²³ In the absence of statutory guidance, other circuits would do well to follow this test. Extending the Convention to govern awards made in the enforcing state is acceptable because it adheres to the principal design of the Convention. If the other circuits do not adopt the *Bergesen* test, another problem must be addressed. The Act contains a one year statute of limitations; the Convention provides three years to enforce an award.²²⁴ Thus, if a party seeking enforcement mistakenly invokes the Convention in a circuit which will not apply its provisions, that party could lose the opportunity to enforce his award in the United States. Congress needs to act to avoid such a consequence, which is at odds with the precepts of the Convention.

V. Current Developments

In the short span of fourteen years since the Convention was adopted, the federal courts have developed clear trends in implementing this law. On the one hand, the jurisdiction and scope of the Convention has consistently been expanded. At the same time, the courts have adopted a pro-enforcement policy, narrowly construing all of the defenses allowed by the Convention.²²⁵

The expansive application of the Convention is demonstrated in several divergent situations. In *Ipitrade International, S.A. v. Federal Republic of Nigeria*,²²⁶ a federal court for the first time applied the Convention to reorganize an arbitral

221. 9 U.S.C. § 202 (1982).

222. *Bergesen*, 710 F.2d at 933.

223. See *supra* text accompanying note 219.

224. Compare 9 U.S.C. § 9 (1982) (providing one year in which to bring a proceeding) with 9 U.S.C. § 207 (1982) (providing three years to bring a proceeding).

225. See *supra* text accompanying notes 99-191.

226. 465 F. Supp. 824 (D.D.C. 1978). A dispute arose over the sale and purchase of cement. Nigeria refused to participate in the arbitration, relying upon its sovereign immunity. No other defenses were available nor were any asserted, and the award was recognized.

award rendered against a foreign sovereign. Although Nigeria had opposed recognition, relying on a defense of sovereign immunity, the *Ipitrade* court found that the sovereign's immunity had been waived by a prior agreement to arbitrate.²²⁷ The Second Circuit in *Fotochrome, Inc. v. Copal Co.*,²²⁸ determined that the power of the bankruptcy court to freeze the assets of a company did not preclude recognition of a foreign arbitral award previously rendered against that same company. *Bergeson*²²⁹ represents another step in the expanding reach of the Convention. It resolved that the Convention is applicable to arbitral awards rendered in the United States.²³⁰

In addition to an expansive interpretation of the Convention's jurisdiction, the federal courts have strictly construed its defenses to achieve liberal enforcement of arbitral awards. This approach was reinforced in *La Societe Nationale pour La Recherche (Sonatrach) v. Shaheen Natural Resources Co.*,²³¹ which considered many objections to recognition. *Sonatrach* involved a contract for the sale of crude oil to Shaheen, an Illinois corporation. When a dispute arose over payment, Sonatrach, pursuant to an arbitration clause in the contract, commenced a proceeding before the International Chamber of Commerce. The arbitrators awarded over four million dollars with interest to Sonatrach.²³²

The *Sonatrach* court began by noting that a party seeking

227. *Id.* at 825-27.

228. 517 F.2d 512 (2d Cir. 1975). The contract in *Fotochrome* involved the manufacture of cameras by Copal and the purchase and distribution of them by Fotochrome. A dispute arose with each party accusing the other of breaching the contracts. After arbitration was held in Japan, Fotochrome filed for bankruptcy in the United States. The issue in *Fotochrome* was the ability of the bankruptcy court to enjoin this enforcement proceeding. The court enforced the award because of: (1) the strong policy in favor of arbitration, *id.* at 516, (2) the lack of personal jurisdiction by the bankruptcy court over Copal, *id.*, and (3) the absence of defenses allowed by the Convention. *Id.* at 518.

For a further discussion of the conflict between the Convention and the bankruptcy courts, see Westbrook, *The Coming Encounter: International Arbitration and Bankruptcy*, 67 MINN. L. REV. 595 (1983).

229. 710 F.2d 928 (2d Cir. 1983).

230. See *supra* notes 214-24 and accompanying text.

231. 585 F. Supp. 57 (S.D.N.Y. 1983), *aff'd*, 733 F.2d 260 (2d Cir. 1984). The plaintiff, a seller of oil, sought recognition and enforcement of an arbitral award rendered in Geneva, Switzerland.

232. *Id.* at 58-60.

recognition had only to comply with minimal procedural requirements.²³³ Furthermore, the court acknowledged its limited power to review an arbitral decision.²³⁴ The focus of its analysis was two substantive defenses raised by Shaheen. Shaheen stated that the contract contained a restriction on the resale of goods. It alleged this to be a violation of the antitrust laws of the United States and therefore unenforceable as a matter of public policy.²³⁵ Following the pattern of previous cases,²³⁶ the court rejected this claim, holding that public policy had not been violated because notions of morality and justice had not been offended.²³⁷

Shaheen also asserted the reciprocity defense, claiming that an Algerian court would not have enforced an award which was in its favor.²³⁸ The court questioned whether reciprocity is a defense under the Convention but found it unnecessary to reach this issue because there was no evidence that Algeria would not enforce an arbitral award in favor of non-nationals.²³⁹ The *Sonatrach* court concluded by noting "the goal and the purpose of the Convention . . . is . . . to expedite the recognition and enforcement of arbitration awards."²⁴⁰ *Sonatrach* made a contribution to this objective: it summarized many of the pro-enforcement policies of the federal courts.

VI. Conclusion

The federal courts have interpreted and implemented the Convention in order to achieve a more favorable process through which foreign arbitral awards may be recognized and enforced in the United States. The Convention has succeeded in encourag-

233. *Id.* at 59. See *supra* notes 79-86 and accompanying text.

234. *Id.*

235. *Id.* at 60. Traditionally, antitrust claims used as a defense to a contract action have not been viewed with favor. *Id.*

236. See *id.* at 61 (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974) (strictly construes the public policy defense).

237. *Id.* The court noted that this claim did not "touch 'the forum state's most basic notions of morality and justice.'" *Id.*

238. *Id.* at 62.

239. *Id.* The court relied upon affidavits in *Sonatrach's* motions.

240. *Id.* at 13 (citing *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 335 (5th Cir. 1976)).

ing the use of international commercial arbitration as a means to settle disputes. This achievement will have even greater impact when Congress, or the courts, resolve the troublesome issues that remain.

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