

Comments

The Enforcement of Arbitral Awards under Conventions and United States Law

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The process of arbitration is often chosen by parties to resolve disputes arising in international commerce because it permits them to resolve differences in a neutral setting outside the domestic legal system of any particular country. As neither party to an international commercial agreement wishes to be at a disadvantage if a dispute arises with respect to that agreement, arbitration, whether on an *ad hoc* basis or through an international arbitration institution such as the Court of Arbitration of the International Chamber of Commerce (ICC),¹ the International Centre for the Settlement of Investment Disputes (ICSID),² or the World Arbitration Institute associated with the American Arbitration Association (AAA),³ offers the opportunity to resolve the controversy in a setting that the parties believe will be fair to both sides. Moreover, arbitration proceedings are often more flexible, less expensive and less time-consuming than ordinary litigation.

Unlike judgments entered in most litigation, however, arbitration

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1. The ICC, located in Paris, administers non-specialized international arbitrations. See J. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE* 145-230 (1979).

2. The ICSID is a commercial arbitration organization developed under the auspices of the World Bank. The Centre administers *ad hoc* arbitrations, which generally are held in World Bank facilities in either Washington or Paris. The Centre's arbitration mechanism is available to states which have acceded to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965. See J. WETTER, *supra* note 1, at 139-44.

3. The AAA is a non-profit organization, incorporated under the laws of New York, established to promote voluntary dispute resolution. It has regional offices in numerous United States cities. The World Arbitration Institute was formed in 1983 under the auspices of the AAA to encourage the arbitration of international commercial disputes in New York. See J. WETTER, *supra* note 1, at 120-30.

awards cannot be enforced by the panels which render them.⁴ Arbitrators have no legal authority to compel any particular actions by the losing party. While history reveals that most participants in international commercial arbitration, whether they are private parties or states, comply with arbitration awards, some losing parties do not. In such circumstances, the successful party must seek means outside of the process of arbitration to secure enforcement of the award.

This Comment will discuss the enforcement of arbitral awards through judicial systems with particular emphasis on enforcement in the courts of the United States. It will also describe the framework of multilateral conventions, particularly the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention),⁵ which have greatly encouraged judicial enforcement of international arbitral awards. By providing for mutual recognition and enforcement of arbitral awards by the Contracting States, as well as by limiting defenses to confirmation of an award, the New York Convention seeks to eliminate wasteful, duplicative litigation following an arbitration.⁶ This Comment will then examine how the U.S. courts have treated arbitral enforcement requests under the various Conventions and analyze in detail how defenses to enforcement have been reviewed. In addition, it will discuss the conditions under which certain interim awards may be enforceable, or other interim relief may be available. Finally, it will suggest drafting techniques to assist parties in avoiding the few difficulties which have occurred in having awards successfully enforced in United States courts.

I. Enforcement of International Awards

There are a number of bases for judicial enforcement of international arbitral awards, some of which are applicable internationally, and some of which are specific to the U.S. judicial system.

A. *New York Convention*

The New York Convention,⁷ which has been ratified or acceded to by nearly 70 countries,⁸ provides the legal basis for the enforcement of most

4. De Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42, 47 (1982).

5. June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective for the United States on December 29, 1970) *codified at* 9 U.S.C. §§ 201-208 (1982).

6. De Vries, *supra* note 4, at 56-58.

7. New York Convention, *supra* note 5.

8. The New York Convention has been ratified or acceded to by Australia, Austria, Belgium, Benin, Botswana, Bulgaria, Byelorussian Soviet Socialist Republic, Central African

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international commercial arbitration awards. The United States acceded to the Convention in 1970, when Congress passed the necessary implementing legislation.⁹

The operative section of the Convention is Article III, which provides that "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. . . ." ¹⁰ The Convention applies by its terms to "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," as well as to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."¹¹

This last provision represents a compromise between the common law and civil law nations which drafted the Convention. The common law nations had sought a strict territorial approach, such as that adopted in the first clause. The civil law nations, however, had argued that factors other than the actual location of the arbitration, such as the law to be applied, should be taken into account in determining the situs of an award. As a result, the Convention applies to a broader range of arbitral awards than would have been the case if either of the two approaches alone had been adopted.¹²

Article II of the Convention provides that Contracting States shall recognize any written agreement to arbitrate, and shall refer the parties to arbitration, unless the agreement to arbitrate is "null and void, inoperative or incapable of being performed."¹³ In addition, it provides that any

Republic, Chile, Colombia, Cuba, Cyprus, Czechoslovakia, Denmark, Djibouti, Ecuador, Egypt, Federal Republic of Germany, Finland, France, German Democratic Republic, Ghana, Greece, Guatemala, Haiti, Holy See, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Khmer Republic, Kuwait, Luxembourg, Madagascar, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Philippines, Poland, Romania, San Marino, South Africa, South Korea, Spain, Sri Lanka, Sweden, Switzerland, Syrian Arab Republic, Tanzania, Thailand, Trinidad and Tobago, Tunisia, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Kingdom, United States, Uruguay and Yugoslavia. See 9 U.S.C. § 201 (1982) and 84 DEP'T OF ST. BULL. No. 2087, p. 86 and No. 2093, p. 90.

9. Pub. L. No. 91-368 § 1, 84 Stat. 692 (1970) (codified at 9 U.S.C. §§ 201-208 (1982)).

10. New York Convention, *supra* note 5, art. III.

11. *Id.* art. I.

12. See *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 931 (2d Cir. 1983).

13. New York Convention, *supra* note 5, art. II(3). Article II contains the requirement that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship. . . concerning a subject matter capable of settlement by arbitration." *Id.* art. II(1). The issue whether, in an international contract, this language permits the United States to refuse to require arbitration of antitrust issues impli-

member state may, at the time of its signing, ratification or accession to the Convention, declare that it will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State or to differences arising out of legal relationships "considered as commercial under the national law of the State making such declaration."¹⁴

In establishing a *prima facie* case for enforcement under the Convention, the party seeking to uphold an award is required only to supply the original or certified copy of both the award and the arbitral agreement. The burden of proving the invalidity of the award rests upon the defendant, who may raise one of the five grounds for refusal of enforcement that are detailed in Article V of the Convention: (1) absence of a valid arbitration agreement; (2) lack of a fair opportunity to be heard; (3) an award in excess of the scope of the submission to arbitration; (4) improper composition of the arbitral tribunal or improper arbitral procedure; or (5) an award that has not yet become binding or has been stayed.¹⁵ In addition, courts may refuse to enforce an award if the subject matter of the arbitration is not capable of settlement by arbitration under the law of the country in which enforcement is sought, or if it would be contrary to the public policy of that country.¹⁶

B. *Panama Convention*

The Inter-American Convention on International Commercial Arbitration (the Panama Convention),¹⁷ which was promulgated in 1975, is essentially a carbon copy of the New York Convention on a regional scale. It has been ratified by Chile, Costa Rica, El Salvador, Honduras, Mexico, Panama, Paraguay and Uruguay. The United States signed the Panama Convention in 1980.¹⁸ The Senate, however, has not yet ratified it. Several other countries besides the United States are parties to the

cated in an international contractual dispute is now before the Supreme Court of the United States in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155 (1st Cir. 1983), cert. granted, 105 S. Ct. 291 (Oct. 15, 1984) (No. 83-1733).

14. New York Convention, *supra* note 5, art. I(3). The United States adopted both reservations. See 9 U.S.C. § 201 (1982).

15. New York Convention, *supra* note 5, art.V(1). Other principal sections of the New York Convention provide for: a discretionary stay by the court from which enforcement is being sought if the party has applied to set aside or suspend the award (art. VI); the continuing validity of other bilateral and multilateral treaties concerning the recognition and enforcement of arbitral awards (art. VII); and allowing parties seeking enforcement to take advantage of only those provisions of the Convention adopted by the Contracting State to which they belong (art. XIV).

16. *Id.* art. (V)(2).

17. Jan. 30, 1975, 42 O.A.S.T.S. 4.

18. See 1 THE INTER-AMERICAN SYSTEM: TREATIES, CONVENTIONS & OTHER DOCUMENTS 455 (F. Garcia-Amador ed. annot. 1983).

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New York Convention but not the Panama Convention.¹⁹

The provisions of the Panama Convention are essentially the same as those of the New York Convention. The former, however, does not distinguish between foreign and domestic awards. Rather, it provides that “[a]n agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid.”²⁰ Its operative section, Article 4, provides that any arbitral decision that is not appealable under the applicable law or procedural rules may be executed or recognized “in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.”²¹

Most importantly, Article 5 of the Panama Convention allocates the burden of proof in the same manner and provides for the same defenses as Article V of the New York Convention.²² Additionally, the Panama Convention requires the use of the rules of procedure of the Inter-American Commercial Arbitration Commission in the absence of an express agreement between the parties to the contrary.²³

C. *Federal Statutes*

The implementing legislation for the New York Convention²⁴ provides subject matter jurisdiction for any action or proceeding “falling under the Convention.”²⁵ This is defined to include “an arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial”²⁶ The statute excludes from such jurisdiction any agreement or award resulting from a relationship entirely between citizens of the United States, unless that relationship has some “reasonable relation with one or more foreign states,” such as agreements involving property located abroad or requiring performance or enforcement abroad.²⁷

Other sections of the statute provide for removal of a case from state courts up until the commencement of a trial,²⁸ for an order to compel

19. Other Western Hemisphere nations that are parties to the New York Convention but not the Panama Convention are Colombia, Ecuador, Cuba, and Trinidad and Tobago.

20. Panama Convention, *supra* note 17, at art. I.

21. *Id.* art. 4.

22. *Id.* art. 5. *See also*, New York Convention, *supra* note 5, at Art. V.

23. Panama Convention, *supra* note 17, at art. 3.

24. 9 U.S.C. §§ 201-208.

25. *Id.* § 203.

26. *Id.* § 202.

27. *Id.*

28. *Id.* § 205.

arbitration or the appointment of arbitrators,²⁹ and for the confirmation of any award falling under the Convention unless one of the specified grounds for refusal or deferral of recognition or enforcement of the award exists.³⁰ In addition, to the extent that the provisions of the Federal Arbitration Act³¹ are not in conflict with the Convention or its enabling legislation, they are incorporated by reference. Thus, decisional law developed under the Federal Arbitration Act is usually applicable to cases arising under the Convention.³²

D. *New York Law*

The law of New York State is another relevant basis for discussion of the enforcement of arbitral awards, since New York City is a center of international commercial activity and frequently the situs for international commercial arbitration. The courts of New York have proved hospitable towards the enforcement of foreign arbitral awards,³³ treating such awards as if they were foreign judgments.³⁴

Furthermore, according to New York civil procedure,³⁵ if there is a foreign judicial confirmation of an award, New York law provides that the judgment is enforceable in the courts of New York. The law also provides certain grounds for non-recognition, which are essentially similar to those in the New York Convention, but which are more concerned with jurisdiction and procedural fairness. An example is the statutory provision for non-recognition if "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."³⁶

29. *Id.* § 206.

30. *Id.* § 207.

31. 9 U.S.C. §§ 1-14 (1982).

32. R. von Mehren and Patterson, *Recognition and Enforcement of Foreign Country Judgments in the United States*, 6 LAW AND POL. INT'L BUS. 37, 76-79 (1974).

33. Landegger v. Bayerische Hypotheken und Wechsel Bank, 357 F. Supp. 692, 695 (S.D.N.Y. 1972); Von Engelbrechten v. Galvoni & Navy Bros., Inc., 59 Misc. 2d 721, 300 N.Y.S. 2d 239 (N.Y. Civ. Ct. 1969), *aff'd*, 61 Misc. 2d 959, 307 N.Y.S. 2d 381 (1970); Coudenhove-Kalergi v. Dieterle, 36 N.Y.S. 2d 313 (Sup. Ct. 1942); Gilbert v. Burnstine, 255 N.Y. 348 (1931).

34. The law of New York is not typical of that of all American states. Generally, states which have substantial connections to international transactions and sophisticated commercial activities tend to be more hospitable to the concept of arbitration than states that do not have such connections. Thus, it is important to review the applicable state law where it may play a significant role in construing the arbitration clause of the agreement. If a party finds itself in a state court that is inhospitable to enforcement of arbitral awards, however, and the subject matter of the action relates to an arbitration or award falling under the New York Convention, the action may be removed to federal court at any time before trial. 9 U.S.C. § 205.

35. N.Y. CIV. PRAC. LAW § 5301-08 (McKinney 1984).

36. *Id.* § 5304(a).

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II. Enforcement of Final Awards and Particular Defenses

As noted above, the New York Convention provides that in order to make out a *prima facie* case for recognition and enforcement of an award, a party need only present to the court the original award and arbitration agreement, or certified copies of those documents. A party opposing recognition or enforcement of the award bears the burden of proof on the defenses specified in Article V of the Convention.

In general, U.S. courts have long favored enforcement of arbitration awards. As the Second Circuit noted in *Diapulse Corp. of America v. Carba, Ltd.*,³⁷ a case decided under the Federal Arbitration Act,

[t]he purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings. . . . Accordingly, it is a well-settled proposition that judicial review of an arbitration award should be, and is, very narrowly limited.³⁸

As another court has expressed this view, “[i]t is not the function of a district court to review the record of an arbitration proceeding for mere errors of law or fact.”³⁹

These public policy concerns apply with even greater strength to enforcement of foreign awards under the Convention. In *Scherk v. Alberto-Culver Co.*,⁴⁰ the Supreme Court observed:

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.⁴¹

Thus, courts must not only take into account the strong public policy favoring arbitration, but also must adopt standards and define defenses in a manner that can be uniformly applied on an international scale.

Because of these strong policy considerations, any defenses to the enforcement or recognition of an award are construed narrowly.⁴² The presumption in any case must always be in favor of enforcing the award, unless the party opposing enforcement is able to demonstrate one of the few, narrowly construed defenses. The availability of such defenses, in-

37. 626 F.2d 1108 (2d Cir. 1980).

38. *Id.* at 1110.

39. *Dunda Shipping and Trading Co. v. Stravelakis Bros. Ltd.*, 508 F. Supp. 1000, 1003-04 (S.D.N.Y. 1981).

40. 417 U.S. 506 (1974).

41. *Id.* at 520 n.15.

42. *See, e.g., Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1974).

cluding those specific to U.S. law or policy as well as those set out in the Convention itself, will now be examined in detail.

A. *Jurisdiction*

The scope of a federal court's jurisdiction over foreign arbitral awards is broad, and a defense based on a lack of jurisdiction will rarely prevent enforcement of an award. Section 203 of the implementing legislation for the New York Convention grants subject matter jurisdiction to the federal courts in any action or proceeding falling under the Convention, regardless of the amount in controversy.⁴³ Courts have held that they may also enforce awards entered pursuant to arbitration clauses in contracts that were executed prior to the accession by the United States to the Convention.⁴⁴ In addition, an award rendered in a foreign country may be enforced pursuant to Article I of the Convention, regardless of the nationalities of the parties.⁴⁵

Moreover, a recent decision by the Second Circuit upheld a federal district court's jurisdiction to confirm an award which was entered in the United States but involved only foreign entities. In *Bergesen v. Joseph Muller Corp.*,⁴⁶ a Norwegian owner of three cargo vessels sought to confirm an arbitral award rendered in New York in its favor against a Swiss charterer. Because the charterer had successfully resisted enforcement of the award in Switzerland, shortly before the expiration of the three-year limitations period provided in section 207 of the Federal Arbitration Act the owner filed a petition for confirmation of the award in federal court.⁴⁷ The Court of Appeals acknowledged that the award was not a foreign award as defined in Article I(1) of the Convention, because it was not rendered outside the nation where enforcement was sought. Nonetheless, it found that the award qualified under the Convention because it was "not considered as domestic" within the United States.⁴⁸ The court de-

43. 9 U.S.C. § 203 (1982).

44. See *Fertilizer Corp. of India v. IDI Management Inc.*, 517 F. Supp. 948, 951-52 (S.D. Ohio 1981); *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976); *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975).

45. See e.g., *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F. Supp. 737 (S.D.N.Y. 1979) *aff'd mem.*, 620 F.2d 286 (2d Cir. 1980) (both parties foreign); *Iptrade International S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) (both parties foreign); *Rhone Mediterranee Compania Francese di Assicurazioni e Riassicurazioni v. Lauro*, 555 F. Supp. 481 (D. V.I. 1982) (both parties foreign); *Fertilizer Corporation of India v. IDI Management*, 517 F. Supp. 948 (S.D. Ohio 1981) (one foreign, one domestic party); *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982) (one foreign, one domestic party); *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974) (one foreign, one domestic party).

46. 710 F.2d 928 (2d Cir. 1983).

47. 9 U.S.C. § 207 (1982).

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

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clared that such a broad reading was necessary in order to fulfill the purpose of bringing as many awards as possible within the scope of the Convention.⁴⁹ The court concluded:

We adopt the view that awards 'not considered as domestic' denotes awards which are subject to the Convention not because made abroad, but because made within the legal framework of another country, e.g., pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction.⁵⁰

In a case involving a motion to compel arbitration, a court has even held that the Convention applies to an agreement made between two citizens of the United States to submit disputes to arbitration in the United States. In *Fuller Co. v. Compagnie des Bauxites de Guinée*,⁵¹ the court compelled arbitration between two American companies because the contract involved a "reasonable relationship with one or more foreign states."⁵² The court cited the substantial amount of performance of the contract that had taken place in Guinea; the fact that the arbitration was originally to occur in Geneva, Switzerland; and the location of an important third party in Brussels, Belgium.⁵³ Of course, an award entered in an arbitration between two American parties rendered in the United States may also be enforceable under Section 9 of the Federal Arbitration Act, so long as the jurisdictional requirements of that act are met.⁵⁴

B. Reservations

A party opposing enforcement or recognition of an award may also attempt to demonstrate that the award falls within one of the two reservations on the applicability of the Convention that the United States adopted when it acceded to the Convention. One reservation provides that an award made in the territory of a country that is not a Contracting State is not entitled to enforcement in the United States based upon the Convention.⁵⁵ In *Fertilizer Corp. of India v. IDI Management, Inc.*,⁵⁶ the court rejected a claim by the American party, against whom enforcement

49. *Id.*

50. *Id.*

51. 421 F. Supp. 938 (W.D. Pa. 1976).

52. *Id.* at 941.

53. *Id.* at 944.

54. See, e.g., *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980). The Act does not by itself provide for federal jurisdiction, so the ordinary prerequisites for federal jurisdiction — i.e., diversity of citizenship and an amount of at least \$10,000 in controversy — must be met. 9 U.S.C. §§ 1-14.

55. Where the jurisdictional requirements of the Federal Arbitration Act are met, however, such an award may be enforceable under Section 9. See *Fuller Co. v. Compagnie des Bauxites de Guinée*, 421 F. Supp. 938, 942-43 (W.D. Pa. 1976).

56. 517 F. Supp. 948, 953 (S.D. Ohio 1981).

was sought, that the court could not apply the Convention. The American party contended that India, although a Convention signatory, had narrowly defined the term "commercial" to exclude many legal relationships from the scope of the Convention, and that an Indian court would not enforce a similar award entered in the United States in favor of an American party. Therefore, it argued, the award should not be viewed as having been made in the territory of a Contracting State.⁵⁷ The court held that the test for reciprocity was not so complex as to require analysis of enforcement of the awards in each Contracting State. Rather, it declared, "it is undisputed that India is a signatory to the Convention; therefore, the reciprocity of the first sentence [of Article I] is satisfied."⁵⁸ This outcome appears correct. If a court had to engage in analysis of the decisions of a foreign country each time enforcement was sought, it would clearly undermine the Convention's purpose of avoiding needless litigation. Rather, the reservation was simply intended to limit automatic recognition or enforcement to only those awards made in the territory of another Contracting State.

A party may also seek to prevent enforcement on the grounds that the legal relationship in question was not "commercial." Generally, U.S. courts have assumed without discussion that the transaction in question is commercial in nature.⁵⁹ In *Island Territory of Curacao v. Solitron Devices, Inc.*,⁶⁰ the court rejected defendant's claim that its agreement to install a factory in Curacao was not commercial, noting that "[r]esearch has developed nothing to show what the purpose of the 'commercial' limitation was."⁶¹ It added, "[w]e may logically speculate that it was to exclude matrimonial and other domestic relations awards, political awards, and the like."⁶² This interpretation also appears to be correct; since the Convention was intended to apply to as many awards as possible, one may assume that "commercial" was intended to be broadly construed. Thus, any contract or legal relationship that involves commerce in any manner should fall within the scope of the Convention.⁶³

57. *Id.* at 952.

58. *Id.* at 953.

59. *See, e.g.,* *Iptrade International v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978).

60. 356 F. Supp. 1.

61. *See Curacao*, 356 F. Supp. at 13.

62. *Id.*

63. *But see, B.V. Bureau Wijsmuller v. United States*, 487 F. Supp. 156 (S.D.N.Y. 1979), *aff'd mem.*, 633 F.2d 202 (2d Cir. 1980). The court refused to compel arbitration of a salvage agreement made by the captain of a naval vessel, holding that the activities of the United States Navy were not commercial and that the United States Government had therefore not waived its sovereign immunity. Nevertheless, no United States court has refused to recognize an arbi-

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C. *Sovereign Immunity*

1. Waiver

Sovereign immunity is another defense which may be raised, although it is limited to awards sought to be enforced against foreign governments. The Foreign Sovereign Immunities Act of 1976 provides immunity from suit in U.S. courts to a foreign government unless one of several exceptions applies.⁶⁴ In the context of international arbitration, the most relevant provision is section 1605 (a)(1), which denies immunity to a foreign state in any case

in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.⁶⁵

The required waiver may be inferred from an agreement to which the foreign state is a party.⁶⁶ A series of cases has therefore held that, where a government has agreed to arbitration in another country or where a government has agreed that the law of a particular foreign country should govern a contract, its sovereign immunity is implicitly waived.⁶⁷

In *Maritime International Nominees Establishment v. Republic of Guinea*,⁶⁸ the parties had agreed to arbitrate before a panel selected by the "President of the International Court of Settlement of International Disputes [sic] in Washington"⁶⁹ any dispute arising out of a contract between them providing for the creation of a "mixed economy company."⁷⁰ After a dispute developed, the parties signed a form purporting to present their differences for ICSID arbitration.⁷¹ Because of a technical deficiency in the consent form, neither it nor any other request for arbitration was ever filed with ICSID. Three years after the first consent form was signed, Maritime International Nominees Establishment (MINE) filed a petition in federal district court to compel arbitration under Section 4 of the Federal Arbitration Act.⁷² An arbitration was

tration award under the Convention on the grounds that a contract with a government does not, per se, involve commerce.

64. 28 U.S.C. §§ 1602-1611 (1982).

65. *Id.* at § 1605(a)(1). Other exceptions are enumerated in 28 U.S.C. § 1605(a)(2)-(5) (1982).

66. *See* *Ohntrup v. Firearms Center, Inc.*, 516 F. Supp. 1281, 1284 (E.D.Pa. 1981).

67. *See, e.g., Birch Shipping*, 507 F. Supp. 311; *Ipirade International*, 465 F. Supp. at 826; *See also Sperry International Trade, Inc.*, 532 F. Supp. at 908-09 (Israel explicitly waived sovereign immunity with respect to an arbitration award).

68. 693 F.2d 1094 (D.C. Cir. 1982), *cert. denied*, 104 S. Ct. 71 (1983).

69. *Republic of Guinea*, 693 F.2d at 1096.

70. *Id.* at 1095.

71. *Id.* at 1096.

72. *Id.*

held, not through ICSID, but under the auspices of the American Arbitration Association.⁷³ The district court confirmed an award in excess of \$25 million against Guinea.⁷⁴

The U.S. Court of Appeals for the District of Columbia Circuit reversed the lower court, apparently reasoning that Guinea had never agreed to arbitration before the AAA in the event that ICSID arbitration was unavailable; thus there was no agreement "to arbitration in another country" that would waive sovereign immunity under the Foreign Sovereign Immunities Act.⁷⁵ The court also reasoned that the agreement did not foresee any role for courts in compelling arbitration, since the ICSID clause was supposed to be self-executing.⁷⁶ The implicit waiver of sovereign immunity claimed by MINE was thus found not to exist, at least in part because of the international status of ICSID. If the arbitration clause had provided for arbitration in New York before the AAA,⁷⁷ the implication is that the Court of Appeals would probably have affirmed the trial court's finding of such a waiver.

The decision explicitly left open the question whether Guinea's signing of the ICSID treaty waived its immunity from a proceeding enforcing an ICSID award, since this action sought to enforce an award rendered by the AAA. The court noted that the Convention on the Settlement of Investment Disputes provides that ICSID arbitrations normally shall be conducted in Washington, D.C.,⁷⁸ that consent to arbitration under the Convention "shall be deemed consent to arbitration to the exclusion of any other remedy,"⁷⁹ and that ICSID awards shall be enforced by each Contracting State.⁸⁰ The enabling statute for the Convention provides that any pecuniary obligation imposed by an ICSID award "shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction" of the United States.⁸¹ In light of these provisions, it certainly seems that a government's consent to an ICSID arbitration waives its sovereign immunity.⁸²

73. *Id.* at 1097.

74. *Id.* at 1097-98.

75. *Id.* at 1103.

76. *Id.* at 1103-04; *see also Ohntrup*, 516 F. Supp. 1281, in which the court held that the Turkish Government as sole owner of a Turkish corporation had not waived its sovereign immunity in agreeing to arbitrate disputes before the ICC in Paris, because such agreement did not indicate a willingness to submit to the jurisdiction of the United States courts.

77. *See* 693 F.2d at 1103 n.14.

78. *Id.* at 1100-01.

79. *Id.* at 1103.

80. *Id.* at 1103 n.14.

81. 22 U.S.C. § 1650(a) (1982).

82. Of course, where the contract is to provide for ICSID arbitration, if the non-state party

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2. Commercial Activity

Sovereign immunity may also be waived under the Foreign Sovereign Immunities Act where:

the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that causes a direct effect in the United States.⁸³

The term “commercial activity” is defined elsewhere in the Act as:

either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.⁸⁴

A commercial activity is carried on in the United States by a foreign state if it has “substantial contact with the United States.”⁸⁵

The court in *Republic of Guinea*, in which neither party to the contract was American, held that while the activity contemplated by the contract in that case was clearly commercial in nature, it did not have substantial contact with the United States so as to fall within the scope of section 1605(a)(2).⁸⁶ While performance of the contract took place in the United States, the court found that it was conducted either by MINE, a Liechtenstein corporation, or by an American third party, which was not acting pursuant to authorization by Guinea.⁸⁷ The court noted that in some circumstances the activities of another party may be attributed to the foreign state in order to provide jurisdiction but that no such attribution was possible in this case.⁸⁸ On this point, the Court of Appeals seems to have been correct, for while there was evidence of some performance of the contract in the United States, there was scant proof that Guinea participated in any of the activities in this country or authorized others to act on its behalf. Moreover, the activities did not have any direct effect on the United States, since the only effect was upon a third company,

can obtain an explicit waiver of sovereign immunity, such a clause will provide even greater protection.

83. 28 U.S.C. § 1605(a)(2) (1982).

84. *Id.* § 1603(d) (1982).

85. *Id.* § 1603(e) (1982).

86. 693 F.2d at 1105-09.

87. *Id.* at 1106-09.

88. *Id.* at 1107-08. *See also* *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 312 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

not a party to the contract.⁸⁹

In *Ohntrup v. Firearms Center, Inc.*, by contrast, the court held that the sale of pistols by a foreign corporation, wholly owned by its government, to an American corporation for resale in the United States, provided sufficient contacts with the United States to waive sovereign immunity under section 1605(a)(2).⁹⁰ The court found that the seller, a Turkish corporation, intended that the pistols be imported into the United States for sale there.⁹¹ It was thus not a situation where goods were sold outside of the United States and then imported by a means beyond the control of the foreign governmental instrumentality.⁹² The court's ruling in *Ohntrup* indicates that where one party to the commercial contract is American, the requirements of Section 1605(a)(2) should usually be satisfied.⁹³

D. *Act of State Doctrine*

A separate rule of judicial restraint, the "act of state" doctrine, complements the rules concerning foreign sovereign immunity. In general terms, this doctrine requires courts to abstain from determining the validity of the public acts of a foreign sovereign recognized by the United States. The Supreme Court has explained the rationale for this doctrine in the following manner:

Every 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. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.⁹⁴

The most important and most frequently arising controversies in which an act of state has been at issue have involved expropriations or nationalizations of alien-owned property within the foreign state.⁹⁵

89. 693 F.2d at 1109-12. For a further discussion of these problems, see R. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. OF TRANSNAT'L L. 33 (1978).

90. *Ohntrup*, 516 F. Supp. at 1285-87.

91. *Id.* at 1286.

92. *Id.*

93. See *id.* at 1287. See also *Birch Shipping Corporation*, 507 F. Supp. at 312, in which the court held that a checking account maintained by the Embassy of Tanzania was used for commercial activity.

94. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). See also *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

95. Congress limited the act of state doctrine through the Hickenlooper Amendment to the Foreign Assistance Act of 1964, which provided that unless the President, for foreign policy reasons, suggests otherwise, courts must not decline on the ground of the act of state doctrine to decide the merits of a "claim of title or other right to property . . . based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in viola-

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Unlike sovereign immunity, which applies whenever a foreign state or its instrumentality is named as a party to litigation, the act of state doctrine focuses on the action taken by that state. It determines not whether a court may assert jurisdiction over a foreign sovereign, but whether it can examine and decide on the merits claims relating to the acts of a foreign sovereign. It is thus a doctrine which comes into play only when a court has already determined that it has jurisdiction over the defendant.⁹⁶

The act of state doctrine should not apply either to the process of arbitration itself or to the enforcement of an arbitral award. Arbitration is a private, consensual procedure; it does not involve any examination by the “judicial branch,” or any other organ of the state, into the validity of the actions of any other foreign state. Moreover, neither the New York Convention⁹⁷ nor the Federal Arbitration Act⁹⁸ permits a reexamination by the courts during an enforcement action of the merits of the dispute which was before the arbitrators. Therefore, the act of state doctrine should be given no application in or with respect to arbitration.

Nevertheless, at least one U.S. court has held that the act of state doctrine means that, despite the existence of a valid agreement to arbitrate and even of an explicit waiver of sovereign immunity, a private party may not confirm or enforce an arbitration award entered against a foreign government involving certain types of activity, such as an expropriation or nationalization. In *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*,⁹⁹ the court found that the provisions of the Hickenlooper Amendment¹⁰⁰ did not apply because the contract rights did not constitute property within the meaning of the Amendment, and the repudiation of contractual obligations was thus not a confiscation or other taking within the meaning of the statute.¹⁰¹ The court also held that the nationalization provisions of Libyan law were not in violation of

tion of the principles of international law . . . ” 22 U.S.C. § 2370(e)(2) (1982). In *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 695 (1976), four Justices declared that the act of state doctrine should not “include the repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.” Four Justices, however, expressly rejected this proposed commercial exception, *see id.* at 724-30 (Marshall, J., dissenting) and the ninth Justice reserved judgment on the exception, *see id.* at 715 (Powell, J., concurring). The resolution of this case thus does not represent a definitive statement on whether a commercial exception exists to the American act of state doctrine.

96. The two doctrines also differ in that the act of state exemption may be invoked by a private litigant, while sovereign immunity may be pleaded only by the state itself. *Williams v. Curtiss-Wright Corp.*, 694 F.2d 300, 302-03 (3rd Cir. 1982).

97. New York Convention, *supra* note 5.

98. 9 U.S.C. §§ 1-14 (1982).

99. 482 F. Supp. 1175 (D.D.C. 1980).

100. *See supra* note 95.

101. *LIAMCO*, 482 F. Supp. at 1178-79.

international law since they provided means by which the Libyan American Oil Co. (LIAMCO) could recover its investment.¹⁰² Although these findings were not supported by a close examination of the record, on the basis of the act of state doctrine the court refused to enforce the *LIAMCO* award.¹⁰³ For this reason and because the act of state doctrine should not be applied in arbitration, the district court's opinion in *LIAMCO* was incorrect; fortunately, it was vacated after the parties reached a settlement.¹⁰⁴ The decision should not, therefore, carry any precedential value.¹⁰⁵

E. *Article V Defenses*

Finally, U.S. courts have generally been quite reluctant to overturn an award on the basis of any of the defenses provided in Article V of the New York Convention. In order to maintain the public policy in favor of enforcement of arbitral awards, these defenses have been construed very narrowly.

1. Absence of a Valid Arbitration Agreement

The defense of the absence of a valid arbitration agreement is seldom raised, since the existence of an arbitration clause in a valid contract is difficult to rebut. Claims that the agreement was illegal or induced by fraud or duress are occasionally made, but with little success.¹⁰⁶ The validity of the arbitration agreement must be determined with respect to the law governing the contract, which is usually either the law chosen by the parties, the law of the country where the award was made, or the law of the country where the contract was executed.

2. Lack of a Fair Opportunity to be Heard

Article V(1)(B) of the Convention provides that enforcement may be denied if the defendant can prove that he was "not given proper notice . . . or was otherwise unable to present his case." As one court has noted, this provision "essentially sanctions the application of the forum state's standard of due process."¹⁰⁷ The courts have not, however, de-

102. *Id.* at 1179.

103. *Id.* at 1178-79.

104. 684 F.2d 1032 (D.C. Cir. 1981).

105. For a full discussion of the *LIAMCO* arbitration, see R. von Mehren and Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AM. J. INT'L L. 476 (1981).

106. See *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co., A.G.*, 480 F. Supp. 352 (S.D.N.Y. 1979).

107. *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974).

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mandated that all of the requirements of United States due process be met. So long as a party opposing confirmation of an award received a fair hearing, courts have generally upheld the award. For example, in *Parsons & Whittemore*, the court held that a United States corporation's due process rights were not infringed by the tribunal's decision not to reschedule a hearing for the convenience of the corporation's witness. The court stated that inability to produce the witness "is a risk inherent in an agreement to submit to arbitration," since arbitration does not contain protections such as the right to subpoena witnesses which a litigant may have in court.¹⁰⁸ Similarly, in *Biotronik Mess-und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, the court refused to overturn an award when the U.S. party received notice of the arbitral tribunal's proceedings but did not participate in the hearings.¹⁰⁹ Inability to cross-examine fully the other party's witness has also been held insufficient to refuse enforcement of an award.¹¹⁰

3. Award Exceeding the Arbitrator's Authority

The defense that an award exceeds the arbitrator's authority has also not proved very useful for parties opposing enforcement of awards. Courts have held that the Convention "does not sanction second-guessing the arbitrator's construction of the parties' agreement,"¹¹¹ nor would it be proper for a court "to usurp the arbitrator's role."¹¹² Thus they will not permit parties to relitigate matters already decided by the arbitrators, and will confirm awards even where there may be errors of fact or of law.¹¹³

With respect to domestic awards, some courts have indicated that a court may overturn such an award on the limited ground of "manifest disregard of the law."¹¹⁴ In no case, however, does a court appear to have actually overturned an award on this basis. Courts thus usually find an adequate basis for confirming the arbitrator's award. As one court noted, "all reasonable efforts [must] be made to find a ground on which to sustain" the arbitrator's award.¹¹⁵ Thus, in *Andros Compania Maritima v. Marc Rich & Co.*,¹¹⁶ the court held that where the arbitral award

108. *Id.*

109. 415 F. Supp. 133, 140 (D.N.J. 1976).

110. *Laminaires-Trefileries-Cableries de Lens v. Southwire Co.*, 484 F. Supp. 1063, 1067 (N.D. Ga. 1980).

111. *Parsons & Whittemore*, 508 F.2d at 977.

112. *Id.*

113. *See Curacao*, 356 F. Supp. at 13.

114. *See I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 430-32 (2d Cir. 1982).

115. *Sperry International Trade Inc. v. Government of Israel*, 689 F.2d 301, 306 (2d Cir. 1982) (construing New York law).

116. 579 F.2d 691 (2d Cir. 1978).

took cognizance of every adverse argument presented by the party opposing confirmation of the award, the award had to be confirmed.¹¹⁷

4. Improper Composition or Procedure of the Arbitral Tribunal

Parties frequently question the qualification or impartiality of one of the arbitrators, but this defense has had no more success generally than the others provided under Article V. In *International Produce, Inc. v. A/S Rosshavet*,¹¹⁸ for example, the court held that absent a claim of bias or animosity, a neutral arbitrator did not have to be disqualified because he was also a non-party witness in another arbitration dispute involving the law firm representing one of the parties in the arbitration in question, particularly where the arbitrator revealed the relationship at the first hearing. Courts have similarly refused to overturn awards where there has been only the appearance of bias.¹¹⁹

These decisions are certainly correct, for parties to arbitration desire knowledgeable arbitrators. In many fields, such as maritime law and other specialized areas, there are only a limited number of potential arbitrators. It is common for them to know one another, as well as to know the parties involved in the industry. To require that there be no prior contacts between an arbitrator and a party would thus often pose an insurmountable obstacle to finding a knowledgeable arbitrator.

5. Award Not Binding

Courts have not required that all appeals in the country in which the award was entered be exhausted before an arbitration may be enforced. The Convention avoided the terms "final" and "enforceable", which would have implied that such appeals must have been taken. Rather, an arbitral award becomes binding when it has resolved all of the issues before the tribunal, and no further recourse may be had to another arbitral tribunal.¹²⁰ Thus, the court in *Fertilizer Corp. of India v. IDI Management*¹²¹ rejected a challenge to the arbitral award asserting that Indian courts had not yet ruled on the award.¹²² Similarly, in *Island Territory of Curacao v. Solitron Devices* the court held that the possibility of future arbitration between the parties did not undermine the binding na-

117. *Id.* at 703-04.

118. 638 F.2d 548 (2d Cir. 1981), *cert. denied*, 451 U.S. 1017 (1981).

119. *See, e.g., Transmarine Seaways Corp.*, 480 F. Supp. 352; *Fertilizer Corp. of India v. IDI Management*, 517 F. Supp. at 955. *But see Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) (award overturned because arbitrator failed to disclose a significant financial relationship with one party).

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

121. 517 F. Supp. at 948.

122. *Id.* at 955-58.

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ture of the award that had been entered.¹²³

6. Public Policy Defenses

In addition to the defenses available under Article V(1), there are two defenses under Article V(2). These essentially merge together into one defense, that enforcement of an award would be contrary to public policy. This defense has been construed narrowly. According to the court in *Parsons & Whittemore*, “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 accept it as a defense to enforcement of arbitral awards rendered in the United States.”¹²⁴ The court added, “[e]nforcement 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.”¹²⁵ It therefore rejected an American company’s defense that it had abandoned the project in dispute because of the severance of American-Egyptian relations.¹²⁶

In one case, the public policy defense was used to strike a portion of an arbitrator’s award. In *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*,¹²⁷ the court held that Georgia’s policy concerns did not bar the adoption of the French legal rate of interest on amounts due, where the agreement was to be governed by the laws of Georgia insofar as they were in accordance with French law.¹²⁸ The arbitrators, however, had also awarded an additional 5% interest commencing two months from the date of the award in conformity with French laws.¹²⁹ The court held that the imposition of the additional 5% interest amounted to a penalty, and did not bear any reasonable relation to any damage resulting from the delay in the recovery of the sums awarded. It therefore refused to enforce or recognize that portion of the award which awarded the additional interest.¹³⁰

III. Interim Enforcement

Enforcement may also be available for certain types of interim arbitral

123. *Curacao*, 356 F. Supp. at 12.

124. 508 F.2d at 973-74 (footnote omitted).

125. *Id.* at 974.

126. See also *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975); *Biotronik Mess- und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 140 (D.N.J. 1976).

127. 484 F. Supp. at 1067.

128. *Id.*

129. *Id.* at 1068-69.

130. *Id.* at 1069.

awards. There may be times when, for security or other reasons, a party to an arbitration agreement requests that certain actions be taken, either by the arbitral tribunal or by a court, before a final resolution of the dispute. For example, if a purchaser of goods that decline in value over time appears to be about to repudiate a contract providing for the purchase of those goods in regular installments, the seller may wish to petition the arbitral tribunal for interim awards as each installment becomes due, in order to mitigate its damages. In other circumstances, a party may wish to secure an attachment or other form of interim relief in order to provide security for recovery of any final awards by an arbitral tribunal. Courts have generally been willing to enforce such awards only under special circumstances.¹³¹

A. *Enforceability of Interim Awards*

The general rule is that interim awards are not enforceable.¹³² The recent decision in *Sperry International Trade, Inc. v. Government of Israel*,¹³³ however, indicates that under certain circumstances, American courts will confirm or enforce an "interim" award which they view as final and separable. In that case, the district court confirmed an arbitral award requiring Sperry and the Government of Israel to place, in a joint escrow account, the amount of the proceeds of a letter of credit that had been opened in Israel's favor. The arbitrators had not reached the ultimate issues of liability for breach of contract and damages, but they had rejected Israel's attempt to draw down the letter of credit at the time.¹³⁴

In the district court, Israel had argued that the arbitral award did not purport to determine finally the merits of the conflicting breach of contract claims between the parties and, consequently, that the award was interlocutory and could not be confirmed.¹³⁵

The district court rejected this contention and held that while the arbitrators had not definitely resolved all of the issues submitted for arbitration, they had reached a final decision with respect to the proceeds of the letter of credit. The court concluded that this was a "clearly severable

131. See, e.g., *Compania De Navegacion y Financiera Bosnia v. Nat'l Unity Marine Salvage Corp.*, 457 F. Supp. 1013 (S.D.N.Y. 1978).

132. See, e.g., *Puerto Rico Maritime Shipping Authority v. Star Lines, Ltd.*, 454 F. Supp. 368, 374-75 (S.D.N.Y. 1978) (vacating interim order for payment of funds received during 60-day period before date set for final resolution of all claims against party found to be liable by the arbitrator). Cf. *Michaels v. Mariforum Shipping*, 624 F.2d 411 (2d Cir. 1980) (holding district courts have no power to review an interlocutory ruling provided by an arbitration panel).

133. 532 F. Supp. 901 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982).

134. 532 F. Supp. at 909-10.

135. *Id.* at 909.

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issue” and therefore “clearly subject to confirmation by this court.”¹³⁶ On appeal, Israel abandoned its argument that the award was an interim decision and not yet ripe for confirmation; however, the Second Circuit appeared to approve of the district court’s reasoning on that issue.¹³⁷

While there have not been many decisions concerning the enforcement of interim awards, the decision in *Sperry* conforms with certain other decisions that have permitted the enforcement of interim awards so long as they relate to issues that are separable from the issues which remain to be decided. In *Puerto Rico Maritime Shipping Authority v. Star Lines, Ltd.*,¹³⁸ for example, the court held that it could confirm an interim award where the arbitrators had reached a final determination as to the issues involved in the award. While the court stated the general rule that only final awards may be confirmed, it noted an exception to that rule where an award is valid in part and invalid in part, and the valid portion concerns claims that are “separable” from and “non-dependent” on claims covered by the invalid portion.¹³⁹ In that case, the valid portion of the award may be confirmed, notwithstanding the absence of an award that finally disposes of all the claims that were submitted to arbitration.¹⁴⁰ The court in *Star Lines*, however, refused to confirm the award in question because the arbitrators had not finally resolved the issue at hand, which involved the payment of certain freight monies received by the respondent as an agent for the claimant.¹⁴¹

The decision of the Second Circuit in *Michaels v. Mariforum Shipping, S.A.*¹⁴² also demonstrates the reluctance of courts to become involved in arbitration proceedings until they are final. In *Michaels*, the court rejected a challenge by one party to an interim arbitral award on certain issues of liability. It held that under the Federal Arbitration Act, a district court does not have the authority to review an interlocutory ruling by an arbitration panel.¹⁴³ Had it held otherwise, the court would have become in effect an appellate tribunal sitting in judgment on each ruling during the arbitration process. This would unduly delay and interrupt the proceedings, which are, after all, designed to circumvent just such litigation.¹⁴⁴ Since the arbitration award in the *Michaels* case did not

136. *Id.*

137. 689 F.2d at 304 n.3.

138. 454 F. Supp. 368, 372 (S.D.N.Y. 1978).

139. *Id.* at 372.

140. *Id.* citing *Moyer v. Van-Dye-Way Corp.*, 126 F.2d 339 (3d Cir. 1942).

141. 454 F. Supp. at 372.

142. *Mariforum Shipping*, 624 F.2d at 414.

143. *See id.* at 414.

144. *See id.* at 414-15. Prior to the passage of the English Arbitration Act of 1979, *see* J. WETTER, *supra* note 1 at 532, such review of arbitration awards by courts was a common

purport to be final but was merely the first step in deciding all of the liability claims,¹⁴⁵ the court held that it could not consider the losing party's petition to vacate the arbitration award.

The logic of this decision is correct, since the court cannot allow parties to an arbitration to repair to it with each interim decision. Nevertheless, as in the *Sperry* decision, when an interim award by an arbitration panel fully resolves particular issues which are separable from the final judgment which will eventually be rendered, interim awards promote the efficiency of the arbitration process and assist the parties in reaching a prompt resolution of the dispute. Courts should thus confirm such interim awards.

B. *Availability of Interim Court Remedies*

A party to an arbitration agreement may also wish to seek certain interim remedies which can be gained only through a court proceeding. Such remedies include attachment, injunctive relief, replevin, the appointment of a temporary receiver, or the filing of a lien. Of these, attachment is most frequently sought, because it is a means of ensuring that any final award a party wins in arbitration will be satisfied.

United States courts have, however, generally refused to permit pre-arbitration attachment. The leading case is a decision by the Third Circuit in *McCreary Tire & Rubber Co. v. CEAT, S.P.A.*¹⁴⁶ In that case, McCreary sued CEAT, an Italian corporation, for alleged breaches of a distributorship contract. After the case was removed to federal court, CEAT moved to dissolve an attachment that had been entered against its funds and to compel arbitration. The contract provided for arbitration pursuant to the Rules of Arbitration and Conciliation of the International Chamber of Commerce in Brussels, Belgium. The court dissolved the attachment order, holding that by seeking the attachment, McCreary had attempted to bypass the agreed method of settling disputes. It held that "[s]uch a bypass is prohibited by the [New York] Convention if one party to the agreement objects."¹⁴⁷ The court noted the language of Article II(3) of the Convention, which provides that the court of a Contracting State shall "refer the parties to arbitration," and not just "stay the trial of the action."¹⁴⁸ It found that this language indicated a lack of

practice in England. One of the principal objectives of the English legislation was to prevent this practice.

145. 624 F.2d at 414.

146. 501 F.2d 1032 (3d Cir. 1974).

147. *Id.* at 1038.

148. *Id.*

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discretion on its part to take any action with respect to the dispute except to compel arbitration. It therefore held that the attachment violated *McCreary's* agreement to arbitrate the dispute, and that the court was obliged to enforce that agreement by vacating the attachment.¹⁴⁹

The *McCreary* case has been followed in two other major decisions, *I.T.A.D. Associates, Inc. v. Podar Brothers*¹⁵⁰ and *Cooper v. Ateliers de la Motobecane, S.A.*¹⁵¹ In *Cooper*, the court held that permitting attachments in judicial proceedings prior to arbitration would create exactly the kind of uncertainty that arbitration is designed to prevent.¹⁵² Moreover, a foreign business entity would be subject to foreign laws with which it is unfamiliar—precisely what it had hoped to avoid by agreeing to resolve any disputes through arbitration.¹⁵³ The court also pointed out that, as an alternative to unilateral attachment actions, the parties are free to include security clauses, such as performance bonds or escrow accounts, in their agreements to arbitrate.¹⁵⁴

The rule in *McCreary* has not, however, gone unchallenged. In *Carolina Power & Light Co. v. Uranex*,¹⁵⁵ the court rejected the reasoning of *McCreary*. It pointed out that the Convention makes no reference to prejudgment attachment. The court reasoned that the use of the general term “refer the parties to arbitration” in the Convention does not completely strip the court of jurisdiction.¹⁵⁶ The Federal Arbitration Act permits prejudgment attachment for domestic agreements, and this does not undermine the arbitration process.¹⁵⁷

The *Carolina Power* court also found little merit in the Third Circuit's argument that the purpose of providing removal jurisdiction in the implementing statutes for the Convention was to prevent “vagaries” of state law from impeding the Convention's full implementation.¹⁵⁸ The court noted that the Federal Arbitration Act also provides for removal jurisdiction, and, more importantly, that federal courts must employ the procedures and remedies of the state where they sit, so that removal does not in fact eliminate reference to state law.¹⁵⁹ The court in *Carolina Power* thus held that the Convention did not bar attachment pending arbitra-

149. *Id.*

150. 636 F.2d 75 (4th Cir. 1981).

151. 57 N.Y. 2d 408, 442 N.E. 2d 1239, 456 N.Y.S. 2d 728 (N.Y. 1982) (4-3 decision).

152. *Id.* at 411, 442 N.E. 2d at 1240, 456 N.Y.S. 2d at 729.

153. *Id.* at 412-13, 442 N.E. 2d at 1240-41, 456 N.Y.S. 2d at 729-30.

154. *Id.* at 415, 442 N.E. 2d at 1242, 456 N.Y.S. 2d at 731.

155. 451 F. Supp. 1044 (N.D. Cal. 1977).

156. *Id.* at 1051-52.

157. *Id.* at 1051.

158. *Id.* at 1052.

159. *Id.*

tion, and it permitted the attachment to continue.¹⁶⁰

IV. Drafting an Arbitration Clause

At the time parties are drafting agreements, they often try to avoid thinking about what may occur should problems eventually arise. Nevertheless, preparation for such circumstances is as important a part of any contract as its other provisions. As this Comment has shown, enforcement of arbitral awards is relatively easy. No party should ever lose its right to recover its hard-earned award because it failed to take proper precautions in the initial drafting of the contract.

First and most important in avoiding problems in the enforcement of arbitral awards, the lawyer must take great care in drafting the arbitration clause in any contract. This clause is usually added without much thought, after the parties have devoted most of their time to wrangling over the substance of the contract. Any such neglect, however, can cause those problems that have led to the few occasions when courts have refused enforcement of an arbitral award.

The clause should provide that all disputes arising from or related to the contract shall be settled by arbitration, so that there can be no later dispute about the parties' intention to arbitrate. It should specify the rules under which the arbitration shall be conducted and whether the arbitration shall be *ad hoc* or conducted under the auspices of an arbitration organization, such as the International Chamber of Commerce, the International Centre for the Settlement of Investment Disputes, or the American Arbitration Association. Of course, the lawyer should make sure that the country where the arbitration will be held is a signatory to the New York Convention, or possibly the Panama Convention, in order to assist in possible enforcement. If there is any doubt whether the nature of the legal relationship is commercial, a provision should be added to the contract to make clear that it is, in order to provide a defense to any argument that the contract falls outside the scope of the relevant convention.

Arbitration clauses in contracts with foreign governments or governmental instrumentalities must be even more carefully drawn. The lan-

160. *Id.* Pre-arbitration attachment has also been upheld in certain maritime cases. These cases, however, relied on Section 8 of the Federal Arbitration Act, 9 U.S.C. 8 (1982), which provides that claimants in admiralty actions may seize the vessel or other property of the other party. See *Andros Compania Maritima v. Andre & Cie*, 430 F. Supp. 88 (S.D.N.Y. 1977); *Atlas Chartering Services, Inc. v. World Trade Group, Inc.*, 453 F. Supp. 861 (S.D.N.Y. 1978). The court in *Andros* held that this provision of the Federal Arbitration Act did not conflict with the purposes of the Convention, 430 F. Supp. at 92-93.

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guage of the arbitration clause should make clear that the government is waiving its sovereign immunity. This may be accomplished either through an explicit waiver, such as that which was included in the contract in dispute in the *Sperry* case,¹⁶¹ or by creating an implicit waiver by providing that any award entered by the arbitral tribunal shall be enforceable in another country. The agreement should clearly provide for arbitration in another country, not just for an *ad hoc* arbitration at a place to be determined later; otherwise, as in the *Republic of Guinea case*,¹⁶² the court might hold that there was no implicit waiver of sovereign immunity. A provision in which the foreign government agrees to make the governing law different from that of its own country can also function as a waiver.

It is not possible for a government to waive the act of state doctrine, and it has been argued above that the doctrine should not apply to arbitration. In a particular context, however, it might be helpful to emphasize that the government's activities with respect to the contract are commercial, even though such activities are not *ipso facto* removed from the doctrine. Under certain circumstances it might also be useful for the contract to create property rights, in an attempt to come within the scope of the Hickenlooper Amendment.

Parties should also consider whether they might desire any interim relief in the course of any future dispute. This aspect of dispute resolution is usually neglected entirely at the contract-drafting stage, but careful planning can make future relief significantly easier to obtain. For example, if the contract provides for performance in several discrete installments, the contract should make as clear as possible that each portion of the contract's performance is separate and distinct from the others. Indeed, the arbitration clause might be drafted to permit final interim awards with respect to each installment. The combination of such provisions should make available enforcement of any interim awards by U.S. courts, as in the *Sperry* case.¹⁶³ Similarly, the contract could specifically provide for security clauses such as performance bonds or escrow accounts. Provisions might also be included which allow a party to refer to the courts to secure interim relief such as attachment.

Conclusion

The lesson of American judicial proceedings is that courts in the

161. *Sperry*, 532 F. Supp. 901.

162. *Republic of Guinea*, 693 F.2d 1094.

163. 532 F. Supp. 901.

United States are quite hospitable to the enforcement of international arbitration awards. They have recognized, particularly since this country's accession to the New York Convention, that enforcement of such awards is necessary in order to maintain the stability of an important aspect of the international commercial system. By supporting international arbitration, U.S. courts have increased the attractiveness of this dispute resolution mechanism to international business concerns. They have provided reasonable assurance that participants will be able to recover whatever damages may be awarded in arbitration.