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J. Stewart McClendon

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Enforcement of Foreign Arbitral Awards in the United States*

*J. Stewart McClendon***

In this article, Mr. McClendon describes the requirements and procedures for enforcing foreign arbitral awards in the United States. The author examines the provisions of both the New York Convention and the United States Arbitration Act. Mr. McClendon focuses on the substantive and procedural defenses to enforcement of foreign arbitral awards, and reviews the relevant United States case law.

I. INTRODUCTION

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of . . . [that state]"¹ and "any court having jurisdiction . . . shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement

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** Counsel, Satterlee & Stephens, New York; Member of the Minnesota, New York, and Texas Bars.

¹ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, 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 Dec. 29, 1970), reprinted in 9 U.S.C.A. in conjunction with § 201 et seq. (West Supp. 1982) [hereinafter cited as the Convention or the New York Convention]. For an excellent discussion of the Convention as applied in the United States, see Aksén, *Application of the New York Convention by United States Courts*, Y.B. COM. ARB. 341 (1979).

of the award specified in the said Convention."²

Success in litigation or arbitration is ultimately determined by successful enforcement of the judgment or award. As the quotations above from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards³ (hereinafter the New York Convention or the Convention) and the United States Arbitration Act⁴ indicate, there is broad recognition of the proposition that arbitral awards should be enforceable anywhere, regardless of where made. This is a principal advantage of arbitration over litigation because there is no similar convention or United States federal legislation on the enforcement of foreign judgments.⁵

There are several bases for the enforcement of foreign arbitral awards in the United States. The most useful is the New York Convention and its enabling legislation, Chapter 2 (Sections 201-08) of the United States Arbitration Act. In addition, there is the federal Arbitration Act of 1925, codified as Chapter 1 (Sections 1-14) of the United States Arbitration Act, which is incorporated by reference into Chapter 2 to the extent it is not in conflict with Chapter 2 or the Convention.⁶ Chapter 1 was utilized prior to 1970 and can still be used if the Convention does not apply because the foreign award was made in a country not a party to the Convention.⁷ The two chapters, therefore, should be read together. The other bases are enforcement without a treaty or statute, enforcement according to bilateral treaties, and enforcement through the recognition of a foreign judgment.

This article reviews the provisions of the New York Convention and the United States Arbitration Act applying to enforcement proceedings in the United States, particularly defenses to award enforcement, and examines the relatively few United States cases on the subject. It comments briefly on bases for enforcement of awards other than the New York Convention and on enforcement abroad. References hereinafter to "Articles" refer to the Convention; references to "Sections" refer to the United States Arbitration Act.

² United States Arbitration Act, 9 U.S.C. § 207 (1976).

³ Convention, *supra* note 1.

⁴ 9 U.S.C. § 207 (1976).

⁵ There are, however, state laws. *See infra* note 85.

⁶ 9 U.S.C. § 208 (1976).

⁷ *See infra* notes 20-23 and accompanying text.

II. PROCEDURE FOR ENFORCEMENT

One wishing to enforce an award in the United States under the Convention need only supply the authenticated original award or a certified copy thereof, the original or certified copy of the arbitration agreement, and official or sworn translations, if appropriate,⁸ within three years after the award.⁹ It is immaterial whether the award is the result of an institutional or *ad hoc* arbitration.¹⁰ United States district courts have original jurisdiction to hear applications to confirm or challenge awards,¹¹ which are then tried as motions¹² without jury trial.¹³ The court may require the deposit of security if the award is challenged,¹⁴ and a judgment of confirmation has the same force and may be enforced as a judgment in an action.¹⁵

III. CHALLENGE TO ENFORCEMENT

United States courts have many times affirmed that "the public policy in favor of international arbitration is strong."¹⁶ There are, nevertheless, two kinds of possible challenges to awards: those arising out of the limited coverage of the Convention and those provided in Article V.

A. Limits on Coverage

The Convention applies broadly to disputes between natural and legal "persons,"¹⁷ including sovereign states.¹⁸ It also applies to awards

⁸ Convention, *supra* note 1, art. IV.

⁹ 9 U.S.C. § 207 (1976). An action for confirmation of an award under 9 U.S.C. § 9 (1976), however, must be commenced within one year after the award.

¹⁰ Convention, *supra* note 1, art. I, para. 2.

¹¹ 9 U.S.C. § 203 (1976).

¹² 9 U.S.C. §§ 6, 208 (1976).

¹³ See *Audi NSU Auto Union A.G. v. Overseas Motors, Inc.*, No. 6-71054 (E.D. Mich. Mar. 15, 1977), *digested in* 1 AAA DIG. CT. DEC. 18-2 (June 1978) and in Y.B. COM. ARB. 291, 292 (1978).

¹⁴ Convention, *supra* note 1, art. VI.

¹⁵ 9 U.S.C. §§ 13, 208 (1976).

¹⁶ See *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975), *citing* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

¹⁷ Convention, *supra* note 1, art. I, para. 1.

¹⁸ The issue of whether a sovereign state is a "person" under Article I of the Convention has not been raised directly. Awards, however, have been enforced against them, either under 9 U.S.C. § 207 (1976) (*see* *Ipitrade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978)), or under 9 U.S.C. § 9 (1976) (*see* *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 505 F. Supp. 141 (D.D.C. 1981); *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980)). For other countries' treatment of the question, see references under the article I, paragraph 1 heading "Persons whether Physical or Legal (including

made in the territory of another state and to those not considered domestic in the enforcing state.¹⁹ The importance of a distinction between foreign and domestic awards, in the United States, at least, is questionable. An award made in the United States in an arbitration between foreign parties is enforceable under Section 9 if its requirements are met,²⁰ and has also been enforced under Section 207.²¹ Similarly, an award made in the United States in an arbitration between United States parties is enforceable under Section 9 and, if not a domestic concern, should be enforceable under Section 207.²² If the award is made abroad, it is by definition enforceable under Section 207 and will undoubtedly be enforceable under Section 9 as well.²³

The Convention permits a contracting state to make two reservations or limitations on applicability. One is based on reciprocity; the other limits Convention obligations to commercial disputes.²⁴ The

State as party)" in van der Berg, *Index of Court decisions New York Convention 1958*, Y.B. COM. ARB. 277, 278 (1980).

¹⁹ Convention, *supra* note 1, art. I, para. 1.

²⁰ Section 9 states:

If the parties in their agreement have agreed that a judgment . . . shall be entered upon the award . . . then at any time within one year after the award . . . any party . . . may apply to the court . . . for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9 (1976). For a discussion of Section 10 defenses, see *infra* notes 36-46 and accompanying text. See also *infra* note 79 and accompanying text with respect to the application of the requirement for an entry of judgment clause in the arbitration agreement.

²¹ *Transmarine Seaways Corp. of Monrovia v. Marc Rich*, 480 F. Supp. 352 (S.D.N.Y. 1979), *aff'd*, 614 F.2d 1291 (2d Cir. 1980). In contrast, in the earlier case of *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974), the court, in affirming a judgment on an award rendered in New York under Section 9, declined to consider whether it was enforceable under the Convention, but observed that "the commentators appear to be in disagreement" on whether the Convention applies to awards made in the United States. *Id.* at 426 n.2.

²² See *Fuller Co. v. Compagnie des Bauxites de Guinee*, 421 F. Supp. 938 (W.D. Pa. 1976), in which the court ordered arbitration between two United States companies pursuant to 9 U.S.C. § 201 *et seq.* after considering Section 202. Section 202 provides that "an agreement or award . . . which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves . . . [a] reasonable relation with one or more foreign states." 9 U.S.C. § 202 (1976).

²³ The question of whether a foreign arbitral award involving foreign parties is enforceable under Section 9 was discussed, but not resolved, in *Konstantinidis v. S.S. Taurus*, 248 F. Supp. 280, 288 (S.D.N.Y. 1965), *aff'd per curiam*, 354 F.2d 240 (2d Cir. 1965). The court noted the absence of controlling authority and cited *Danielsen v. Entre Rios Rys. Co.*, 22 F.2d 326 (D.Md. 1927), for the proposition that such an award was enforceable under Section 9, and *The Silverbrook*, 18 F.2d 144 (E.D.La. 1927), for the contrary proposition. Neither case involved award enforcement, however, since both dealt with enforcement of agreements to arbitrate. Inasmuch as the result in *The Silverbrook* appears to have been discredited, see *Batson Yarn & Fabrics Mach. Group, Inc. v. Saurer-Allima GmbH-Allgauer Maschinenbau*, 311 F. Supp. 68, 76 (D.S.C. 1970), there should be no impediment to using Section 9.

²⁴ Convention, *supra* note 1, art. I, para. 3.

United States and about thirty of the other fifty to sixty contracting states have made the "reciprocity" reservation,²⁵ which means that an award made in the territory of a country which is not a contracting state is not entitled to enforcement in the United States based on the Convention, although it may be under Section 9, as indicated above.

The United States has also made the "commercial" reservation, allowed by the Convention, which permits a contracting state to limit its application of the Convention to differences arising out of legal relationships considered commercial under its own national law. About twenty other states have done likewise.²⁶ There is no definition of "commercial" in the Convention, nor in the enabling legislation. Section 202, in describing agreements and awards falling under the Convention, incorporates by reference relevant definitions of Sections 1 and 2, which, unfortunately, are not very helpful either.²⁷ This is not generally of significance in awards against private parties because instances where their activities are not obviously commercial are relatively rare.²⁸ However, it can be of particular importance in awards involving foreign states and state agencies, as the same or similar issues may be involved in determining a state's immunity from suit under the Foreign Sovereign Immunities Act,²⁹ discussed later as an independent defense in an action for enforcement. That statute tests the commercial character of a state activity by the nature of the course of conduct, transaction, or act, rather than its purpose.

One court has observed that "[r]esearch has developed nothing to show what the purpose of the 'commercial' limitation was" and suggested that it was to "exclude matrimonial and other domestic relations awards, political awards, and the like."³⁰ Generally, however, courts find or assume a commercial transaction without discussion.³¹ There

²⁵ See United Nations, Multilateral Treaties in Respect of which the Secretary-General Performs Depositary Functions, U.N. Doc. ST/LEG/SER D/13 (1980).

²⁶ *Id.*

²⁷ Section 1 defines "commerce" as interstate and foreign commerce, excluding only employment contracts. Section 2 states that a written provision in a contract "involving commerce" to settle controversies by arbitration is valid and enforceable. 9 U.S.C. §§ 1, 2 (1976).

²⁸ In *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974), the defendant claimed that its agreement to install a factory in Curacao was not commercial; the court disagreed. In *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), the court found a consulting agreement to be in commerce under Sections 1 and 2.

²⁹ 28 U.S.C. § 1603(d) (1976).

³⁰ *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).

³¹ See *Victory Transp., Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964) (charter party with a government agency); *Birch Shipping Corp. v. Embassy of the United Republic of*

have been no cases since the United States accession to the Convention in which a United States court has declined to enforce an award against a foreign government, but in a 1976 case it was held that the activities of the Navy are not commercial, and, thus, the United States government had not waived its sovereign immunity and could not be compelled to arbitrate a salvage agreement made by the captain of a naval vessel.³²

B. Article V Defenses

The principal defenses against enforcement are contained in Article V, which permits a court to refuse to recognize and enforce an award if it finds that: (1) one of several enumerated procedural defects occurred in the arbitration, or (2) a jurisdictional problem exists in the place of enforcement.

1. Procedural Defects

Procedural defects must be raised by the party defending the enforcement action, who then has the burden of proof.³³ They are detailed in the five lettered subparagraphs corresponding to those of Article V(1).

(a) Invalidity of Arbitration Agreement: the parties were incapacitated or the agreement to arbitrate was not valid under the applicable law, being the law indicated by the parties, otherwise the law of the country where the award was made.

This may involve a determination of several things: whether there was an agreement; whether there was an agreement to be bound by an arbitrator's decision, or merely to submit the dispute to an umpire;³⁴ whether the dispute was arbitrable; whether the agreement was valid,

Tanzania, 507 F. Supp. 311 (D.D.C. 1980) (embassy bank account); *Ipitrade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978) (coal contract with government); *Jugometal v. Samincorp, Inc.*, 78 F.R.D. 504 (S.D.N.Y. 1978) (metal contract with a state agency); *Star-Kist Foods, Inc. v. Diaken Hope*, 423 F. Supp. 1220 (D.C. Cal. 1976) (charter party between private parties). See also *Libyan Amer. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980), *order vacated as moot*, Nos. 80-1207, 80-1252 (D.C. Cir. May 6, 1980) (nationalization of oil concession, but "commerce" not discussed). For a discussion of *Libyan American*, see *infra* notes 76-77 and accompanying text.

³² *B.V. Bureau Wijsmuller v. United States*, 487 F. Supp. 156 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 202 (2d Cir. 1980) (oral opinion delivered in open court).

³³ See *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334, 336 (5th Cir. 1976); *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 973 (2d Cir. 1974).

³⁴ See 6 C.J.S. *Arbitration* §§ 3, 14 (1975).

e.g., whether it was illegal or induced by fraud or duress; or whether the validity of the agreement to arbitrate can be determined independently of the validity of the main agreement.³⁵ In a challenge to an award based on Article V(1)(a), all of these questions should be determined with reference to the law governing the arbitration. If, however, the deficiency is such as to offend the forum's notions of public policy, as where the agreement to arbitrate is procured by fraud or duress, the court of the forum may invoke the provisions of Article V(2)(b) and decline to enforce the award, as discussed below.

(b) Lack of Procedural Due Process: the losing party did not have notice of the arbitration or was otherwise unable to present his case.

This defense "essentially sanctions the application of the forum state's standards of due process."³⁶ United States courts generally look at the overall result (whether the defendant got a fair hearing) and do not overturn awards because the defendant was unable to present some part of his case, such as a witness,³⁷ or could not cross-examine the other party's witness.³⁸ Nor can the defendant complain if he had notice of the hearing and failed to attend.³⁹ These defenses are similar to those in Section 10(c).⁴⁰

(c) Arbitrator Exceeds Authority: the award deals with matters not submitted or beyond the scope of the submission and these decisions cannot be separated from the rest of the award.

This provision is similar to Section 10(d), which authorizes a court to vacate an award where the arbitrators exceeded their powers or imperfectly exercised them so that no "mutual, final and definite award" on the matter submitted has been made. The perennial arguments about the courts' power to review and overturn arbitrators' decisions

³⁵ See *infra* notes 57-60 and accompanying text.

³⁶ See *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974).

³⁷ *Id.*

³⁸ See *Laminoirs—Trefileries—Cableries de Lens v. Southwire Co.*, 484 F. Supp. 1063, 1067 (N.D.Ga. 1980).

³⁹ See *Biotronik Mess und Therapiegeraete GmbH & Co. v. Medford Medical Instrument Co.*, 415 F. Supp. 133, 137 (D.N.J. 1976), where the court said that "[m]ost have held that an arbitration award is not fraudulently obtained within the meaning of [9 U.S.C.] § 10(a) . . . when the protesting party had an opportunity to rebut his opponent's claims at the arbitration hearing."

⁴⁰ 9 U.S.C. § 10(c) (1976) speaks of arbitrators' misconduct in refusing to postpone a hearing on a showing of cause or refusing to hear pertinent and material evidence or otherwise prejudicing the rights of a party.

for errors of fact or law arise under these provisions. Whatever the rules are in other countries, in the United States, there is a "powerful assumption that the arbitral body acted within its powers."⁴¹ Thus, this defense "does not sanction second-guessing the arbitrator's construction of the parties' agreement," nor constitute "a license to review the record of arbitral proceedings for errors of fact or law."⁴² This is true whether the award was made in the United States or abroad.

It has been suggested in several decisions that a domestic award made in "manifest disregard of the law" or one that is "completely irrational" will not be confirmed because there is then no "mutual, final and definite award."⁴³ None of these decisions, however, vacated the award, so it is not clear whether such a situation will ever be found. If it is, the result could be applied to international awards either by application of Section 10(d) or under the public policy defense contained in Article V(2)(b). The public policy in favor of enforcement of international awards, however, makes this result somewhat unlikely.

(d) Irregularities in Composition or Procedure of Tribunal: the composition or the procedure of the tribunal was not in accordance with the parties' agreement, or, in the absence of agreement, with the law of the place of arbitration.

Chapter 1 provisions for vacating awards procured by "corruption, fraud, or undue means" (Section 10(a)) or because of "evident partiality" of an arbitrator (Section 10(b)) might fall in this category. Such irregularities might also be found to be violations of United States public policy and thus constitute Article V(2)(b) defenses, as discussed below. Two recent federal cases, however, have held that the appearance of bias is not sufficient to raise the defense of evident partiality.⁴⁴ The strong public policy favoring arbitration, coupled with the lack of evidence of actual partiality, led the courts to conclude that enforcement of the arbitral awards would not contravene United States public policy.⁴⁵ Similarly, a technical irregularity not affecting the award might

⁴¹ See *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 967, 976 (2d Cir. 1974).

⁴² *Id.* at 977.

⁴³ See *Parsons & Whittemore Overseas Co. v. Societe Generale du Papier*, 508 F.2d 967, 977 (2d Cir. 1974); *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424, 430-32 (2d Cir. 1974).

⁴⁴ *International Produce, Inc., v. A/S Rosshavet*, 638 F.2d 548 (1981); *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (1981).

⁴⁵ *International Produce, Inc., v. A/S Rosshavet*, 638 F.2d 548 (1981); *Fertilizer Corp. of India v. IDI Management, Inc.*, 517 F. Supp. 948 (1981).

be disregarded, although the opposite result has occasionally been reached in other jurisdictions.⁴⁶

(e) Award Not Binding: the award is not 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 the award was made.

This determination will be made under rules of the forum. Different bases for enforcement have different standards for when an award is binding. Under the 1927 Geneva Convention,⁴⁷ which the New York Convention superseded,⁴⁸ the award had to be "final" in the country where made in order to be enforceable abroad. The usual commercial treaty language is "final and enforceable."⁴⁹ Either "final" or "enforceable" can cause enforcement problems. "Final" implies completion of permitted appeals. "Enforceable" means some kind of court action because arbitral awards are not self-executing. It was to avoid the problem of double *executur* that "binding on the parties" is used in the convention instead of "final" or "enforceable, or both."⁵⁰

The most troublesome area is the effect of a pending appeal at the place of arbitration, but even here United States courts are apt to interpret the "not-binding" defense narrowly. In *Landegger v. Bayerische Hypotheken Und Wechsel Bank*,⁵¹ a 1972 case which does not discuss the Convention, a German award was enforced in spite of a pending appeal in Germany of a lower court judgment refusing to vacate the award. The court avoided the necessity of deciding whether the United States-German treaty provision for enforcement of a "final and enforceable" award⁵² was applicable to this award by finding the treaty

⁴⁶ Judgment of Apr. 13, 1978, corte di Appello di Firenze, Italy, *digested in* Y.B. COMM. ARB. 294 (1979), the court refused to enforce an award made by the two party-appointed arbitrators where the arbitration clause required three arbitrators, the third to be selected by the other two. In a case before the Appellationsgericht Kanton Baselstadt, Switzerland (Judgment of Sept. 6, 1968), *digested in* Y.B. COMM. ARB. 200 (1976), the court refused to enforce an award where the arbitral agreement provided for one arbitral proceeding whereas the arbitration took place in two stages, a quality arbitration before two experts and then the arbitration hearing before three arbitrators, and where the defendant did not participate in either hearing.

In most cases where the question has been raised, however, the court has found no irregularity. See *Imperial Ethiopian Gov't v. Baruch-Foster Corp.*, 535 F.2d 334 (5th Cir. 1976).

⁴⁷ Convention for the Execution of Foreign Awards (Sept. 26, 1927), 92 LNTS 30, *reproduced in* V. WETTER, THE INTERNATIONAL ARBITRAL PROCESS: PUBLIC AND PRIVATE 304 (1979).

⁴⁸ Convention, *supra* note 1, art. VII(2).

⁴⁹ See *infra* note 81.

⁵⁰ See Paulsson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 236 (1981).

⁵¹ 357 F. Supp. 692 (S.D.N.Y. 1972).

⁵² Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. VI, para. 2, 2 U.S.T. 1839, T.I.A.S. No. 3593.

provision permissive and not limiting, and then applying New York law, which enforces foreign arbitration awards like foreign judgments.⁵³

2. Jurisdictional Defects

Article V(2) defenses may be raised by the enforcing court *sua sponte*. It can refuse enforcement if it finds that under the law of the forum: (a) the dispute is not capable of settlement by arbitration, or (b) the enforcement would be contrary to public policy.

There will be few cases where the Article V(2)(b) public policy defense will not overlap the Article V(2)(a) defense of subject matter incapable of settlement by arbitration, so discussion will concentrate on the public policy defense.

The strong public policy favoring international arbitration enunciated in the landmark case of *Scherk v. Alberto-Culver Co.*⁵⁴ would be ineffective without a readily available enforcement process. The public policy defense is, therefore, narrowly construed.⁵⁵ This in part is due to the fact that a state has no right to invoke the Convention against other states except to the extent that it itself is bound.⁵⁶

There is, in other words, an international public policy as well as a domestic one, and the two must be viewed together. Thus, although defenses available against domestic awards may also be available in international cases as violations of public policy, this will not always be so. There are several main areas that United States courts have indicated are not appropriate for arbitrators to determine as a matter of public policy.⁵⁷

One of these is contract validity. In the United States, an arbitration agreement is separable from the agreement in which it is contained for the purpose of determining the validity of the main agreement.⁵⁸

⁵³ *Landegger*, 357 F. Supp. at 692.

⁵⁴ 417 U.S. 506 (1974).

⁵⁵ See *Fotochrome, Inc. v. Copal Co.*, 517 F.2d at 512, 516 (2d Cir. 1975); *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 967, 974 (2d Cir. 1974).

⁵⁶ Convention, *supra* note 1, art. XIV; see *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*, 508 F.2d 969, 974 (2d Cir. 1975).

⁵⁷ One case that does not fall readily within these categories is *Laminoirs—Trefileries—Cableries de Lens v. Southwire Co.*, 484 F. Supp. 1063 (N.D.Ga. 1980). In *Laminoirs*, interest on an award established pursuant to French law which resulted in a rate which increased after two months was held to be an impermissible penalty and not enforceable as a matter of public policy.

⁵⁸ See *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967); *Aksen, Prima Paint v. Flood & Conklin—What Does it Mean?*, XLII ST. JOHN'S L. REV. 1 (1968). But cf. *American Safety Equip. Corp. v. J.P. McGuire & Co.*, 391 F.2d 821, 826 (2d Cir. 1968) (which declined to follow *Prima Paint* where the invalidity arose out of a statutory (antitrust) right).

Thus, an arbitrator acting pursuant to a "broad" arbitration clause which submits claims "arising out of or relating to this agreement" (as distinguished from a "narrow" clause limited to claims "arising out of this agreement") can determine whether the agreement is valid, at least if the claimed invalidity is fraud in the inducement of the agreement.⁵⁹ The question of whether the arbitration agreement is valid, however, is for the court to determine.⁶⁰ As mentioned above, either the law governing the arbitration under Article V(1)(a) or the public policy of the forum under Article V(2)(b) may be applicable in determining contract validity.

Certain statutory rights have also been held to be inappropriate for enforcement by arbitration. These include violations of provisions of the Securities Act,⁶¹ violation of antitrust laws,⁶² and patent validity or infringement issues.⁶³ This is due, in part at least, to the great public interest in these issues.⁶⁴ Such public interest, however, may not be enough to prevent an arbitrator from determining validity where there is an agreement to arbitrate a "statutory" issue after the dispute arises.⁶⁵ Nor was it sufficient to overcome the public policy in favor of international arbitration in a case involving a Securities Act question.⁶⁶

Venial or substantive misconduct, as distinguished from procedural misconduct, discussed above, may also be against public policy. Section 10 authorizes a court, on the application of a party, to vacate an award procured by "corruption, fraud or undue means" or where there was "evident partiality or corruption" of the arbitrators. United States courts have indicated that they would apply Section 10 defenses in the name of public policy to international awards procured by fraud⁶⁷ or

⁵⁹ *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *Michele Amoroso e Figli v. Fisheries Dev. Corp.*, 499 F. Supp. 1074, 1080 (S.D.N.Y. 1980), discussing fraud and illegality. In contrast, see *Transmarine Seaways Corp. of Monrovia v. Marc Rich*, 480 F. Supp. 352, 358 (S.D.N.Y. 1979), where the court said: "Agreements exacted by duress contravene . . . [U.S. public policy] and . . . duress, if established, furnishes a basis for refusing enforcement of an award under art. V(a)(b) . . ." Judicial review is not foreclosed by a finding by a majority of the arbitrators that there was no duress. The court agreed with the arbitrators that duress was not present.

⁶⁰ See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.14 (1974).

⁶¹ *Wilco v. Swan*, 346 U.S. 427 (1953).

⁶² See *Cobb v. Lewis*, 488 F.2d 41 (5th Cir. 1974); *American Safety Equip. Corp. v. J.P. McGuire & Co.*, 391 F.2d 821 (2d Cir. 1968).

⁶³ *Beckman Instruments, Inc. v. Technical Dev. Corp.*, 433 F.2d 55 (9th Cir. 1970).

⁶⁴ See *Beckman Instruments, Inc. v. Technical Dev. Corp.*, 433 F.2d 55, 63 (9th Cir. 1970); *American Safety Equip. Corp. v. J.P. McGuire & Co.*, 391 F.2d 821, 826-27 (2d Cir. 1968).

⁶⁵ See *Wilco v. Swan*, 346 U.S. 346, 438 (1953) (Jackson, J., concurring); *Cobb v. Lewis*, 488 F.2d 41, 47-48 (5th Cir. 1974).

⁶⁶ *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

⁶⁷ See *Biotronic v. Medford*, 415 F. Supp. 133, 137-38 (D.N.J. 1976).

through the partiality of the arbitrator.⁶⁸ Mere appearance, however, is not sufficient to cause enforcement of an arbitral award to rise to the level of being contrary to United States public policy.⁶⁹

Under general principles of international law, a sovereign state and its agencies have at least some immunity from suit in a foreign country.⁷⁰ Where available, the foreign sovereign immunity defense will be applied as a matter of public policy in actions for award enforcement. In the United States, the availability of this defense prior to 1976 depended on the attitude of the Executive Branch.⁷¹ The Foreign Sovereign Immunities Act of 1976 resolved these uncertainties by establishing exceptions where the defense would not be available.⁷² The principal useful exception in foreign award enforcement cases is explicit or implicit waiver,⁷³ and United States courts have found implicit and irrevocable waiver in the act of agreeing to arbitrate.⁷⁴

Another defense sometimes available to a foreign government or agency arises from the act of state doctrine, which provides that "the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."⁷⁵ In the recent *Libyan American Oil Company* case,⁷⁶ the court refused to enforce an award granting compensation for nationalization against a foreign sovereign. It found that the act of state doctrine made the dispute incapable of settlement by arbitration and therefore found an Article V(2)(a) defense.⁷⁷ The order dismissing the action to enforce the award, however, was vacated by the appellate court after the case was settled during the course of the appeal,⁷⁸ so the precedential value of the lower court's decision is questionable.

⁶⁸ See *Transmarine Seaways Corp. of Monrovia v. Marc Rich*, 480 F. Supp. 352, 357-58 (S.D.N.Y. 1979).

⁶⁹ See *supra* notes 44-45 and accompanying text.

⁷⁰ Such immunity was first recognized by the Court in *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812), and later extended in *Berizzi Brothers v. S.S. Pesaro*, 271 U.S. 562 (1926).

⁷¹ See FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976, H.R. REP. NO. 1487, 94th Cong., 2d Sess., at 7, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 6604, 6606-07.

⁷² 28 U.S.C. §§ 1330, 1602-1611 (1976).

⁷³ See 28 U.S.C. § 1605(a)(1) (1976).

⁷⁴ See *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980); *Ipitrade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978).

⁷⁵ See *Underhill v. Hernandez*, 168 U.S. 250 (1897).

⁷⁶ *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980).

⁷⁷ *Id.* at 1178-79.

⁷⁸ *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, Nos. 80-1207, 80-1252 (D.C. Cir. May 6, 1980).

As pointed out above, Chapter 1 grounds for vacating awards, contained in Section 10, in large part parallel the Convention defenses. Section 9, however, authorizes confirmation of the award only if the arbitration agreement contains a stipulation that a court judgment shall be entered on the award. Courts have been loath to apply this literally, and frequently find implied consent where a foreign award was made on an agreement not containing an "entry of judgment" clause.⁷⁹

IV. OTHER BASES FOR ENFORCEMENT

New York State courts have long enforced foreign arbitral awards like foreign judgments. This is helpful if, as in *Landegger v. Bayerische Bank*,⁸⁰ there may be a defense to enforcement under a treaty or statute.

There are eighteen bilateral treaties of friendship, commerce, and navigation between the United States and foreign countries which have arbitration provisions,⁸¹ all antedating 1970, when the United States acceded to the Convention. Seven are with countries which are not parties to the New York Convention.⁸² The other eleven⁸³ can proba-

⁷⁹ See *I/S Stavborg v. National Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974); *Audi NSU Auto Union A.G. v. Overseas Motors, Inc.*, 418 F. Supp. 982 (E.D. Mich. 1976); but cf. *Splosna Plovba of Piron v. Agrelak Steamship Corp.*, 381 F. Supp. 1368 (S.D.N.Y. 1974) (award made in a state not a party to the Convention).

⁸⁰ *Landegger v. Bayerische Hypoteken Und Wechsel Bank*, 357 F. Supp. 692, 695 (S.D.N.Y. 1972), citing *Gilbert v. Bernstine*, 255 N.Y. 348, 174 N.E. 706 (1931).

⁸¹ A typical provision in such treaties is:

No award duly rendered pursuant to such [arbitration] contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid and denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside the territories of such Party or that the nationality of one or more of the arbitrators is not of such Party.

Treaty of Amity and Economic Relations, Feb. 8, 1966, United States-Togo, art. III, para. 3, 18 U.S.T. 1, T.I.A.S. No. 6193.

⁸² Treaty of Amity and Economic Relations, Feb. 8, 1966, United States-Togo, art. III, para. 3, 18 U.S.T. 1, T.I.A.S. No. 6193; Treaty of Friendship, Establishment and Navigation, Feb. 23, 1962, United States-Luxembourg, art. III, para. 6, 14 U.S.T. 251, T.I.A.S. No. 5306; Treaty of Amity and Economic Relations, Apr. 3, 1961, United States-Republic of Vietnam, art. II, para. 3, 12 U.S.T. 1703, T.I.A.S. No. 4890 (status under review); Treaty of Friendship and Commerce, Nov. 12, 1959, United States-Pakistan, art. V, para. 2, 12 U.S.T. 110, T.I.A.S. No. 4683; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1956, United States-Nicaragua, art. V, para. 2, 9 U.S.T. 449, T.I.A.S. No. 4024; Treaty of Amity, Economic Relations and Consular Rights, Aug. 15, 1955, United States-Iran, art. III, para. 3, 8 U.S.T. 899, T.I.A.S. No. 3853; Treaty of Friendship, Commerce and Navigation, Jan. 21, 1950, United States-Ireland, art. X, 1 U.S.T. 785, T.I.A.S. No. 2155.

⁸³ Treaty of Amity and Economic Relations, May 29, 1966, United States-Thailand, art. III, para. 3, 19 U.S.T. 5843, T.I.A.S. No. 6540; Treaty of Friendship, Establishment and Navigation, Feb. 21, 1961, United States-Belgium, art. III, para. 6, 14 U.S.T. 1284, T.I.A.S. No. 5432; Convention of Establishment, Nov. 25, 1959, United States-France, art. III, para. 2, 11 U.S.T. 2398,

bly be disregarded, even though the usual treaty requirement for a "final and enforceable" award is more difficult to fulfill than the Convention requirement for a "binding" award, as the Convention will take precedence over an earlier treaty in the case of conflict.⁸⁴

Finally, if there is foreign judicial confirmation of an award, there is the possibility of an action on the foreign judgment in a state which has adopted the Uniform Foreign Money-Judgments Recognition Act or a similar state statute.⁸⁵ In this case, the plaintiff may have a choice of remedies which he can plead in the alternative.⁸⁶

V. MISCELLANEOUS ISSUES

Article III, which requires a contracting state to enforce arbitral awards in accordance with its rules of procedure, has been cited in several cases as the basis for allowing attachment in furtherance of an action to confirm a foreign award,⁸⁷ even though the courts are divided on whether pre-arbitration attachment should be allowed.⁸⁸ Inasmuch

T.I.A.S. No. 4625; Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Republic of Korea, art. V, para. 2, 8 U.S.T. 2217, T.I.A.S. No. 3947; Treaty of Friendship, Commerce and Navigation, Mar. 26, 1956, United States-The Netherlands, art. V, para. 2, 8 U.S.T. 2043, T.I.A.S. No. 3942; Treaty of Friendship, Commerce and Navigation, Oct. 29, 1954, United States-Federal Republic of Germany, art. VI, para. 2, 2 U.S.T. 1839, T.I.A.S. No. 3593; Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. IV, para. 2, 4 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, Oct. 1, 1951, United States-Denmark, art. V, para. 2, 12 U.S.T. 908, T.I.A.S. No. 4797; Agreement Supplementing the Treaty of Friendship, Commerce and Navigation, Sept. 26, 1951, United States-Italy, art. VI, 12 U.S.T. 2063, T.I.A.S. No. 2863; Treaty of Friendship, Commerce and Navigation, Aug. 23, 1951, United States-Israel, art. V, Para. 2, 5 U.S.T. 550, T.I.A.S. No. 2948; Treaty of Friendship, Commerce and Navigation, Aug. 3, 1951, United States-Greece, art. VI, para. 2, 5 U.S.T. 1829, T.I.A.S. No. 3057.

⁸⁴ See *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 518 n.4 (2d Cir. 1975); *Landegger v. Bayerische Hypoteken und Wechsel Bank*, 357 F. Supp. 692 (S.D.N.Y. 1972); *Audi NSU Auto Union A.G. v. Overseas Motors, Inc.*, 418 F. Supp. 982, 985 (E.D. Mich. 1976) (plaintiff need not exhaust remedies under treaty).

⁸⁵ Section 5304 of the New York version, N.Y. CIV. PRAC. LAW Art. 53 (McKinney), sets out the grounds for non-recognition, which do not differ greatly from those available under the Convention, except for Section 5304(a)1, which states that 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" (emphasis added).

⁸⁶ See *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F. Supp. 1 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974); *but cf.* *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 518-19 (2d Cir. 1975) (no foreign judgment).

⁸⁷ See *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1036 (3d Cir. 1974); *Metropolitan World Tankers Corp. v. P.N. Petambangan Minjakdan Gas Bumi Nasional*, 427 F. Supp. 24 (S.D.N.Y. 1975).

⁸⁸ Compare *Andros Compania Maritima, S.A. v. Andre & Cie., S.A.*, 430 F. Supp. 88 (S.D.N.Y. 1977) (permitting pre-arbitration attachment), and *Carolina Power & Light Co. v. Uronex*, 451 F. Supp. 1044, 1049-52 (N.D. Cal. 1977) (permitting pre-judgment attachment), with

as an order confirming an award has the effect of a judgment in an action,⁸⁹ execution should be an appropriate enforcement remedy.⁹⁰ If the losing party is a foreign government, the implied waiver of the sovereign immunity defense resulting from the agreement to arbitrate will apply to allow execution on property used for commercial purposes.⁹¹

Counterclaims are generally not appropriate in actions to enforce awards and are normally disallowed,⁹² although in one case the respondent was permitted to offset awards in his favor in other arbitrations held at about the same time.⁹³

VI. ENFORCEMENT IN OTHER COUNTRIES

It is beyond the scope of this article to do more than touch briefly on award enforcement in countries other than the United States. The defenses against enforcement abroad under the Convention will by definition be the same as those discussed above.⁹⁴ Article V(2) defenses (inappropriate subject matter and violation of public policy) are determined by the law of the enforcing forum, which could well follow different precepts than United States courts. Similarly, in the case of the Article V(1)(b) (procedural due process) defense, United States courts have applied their own notions of fairness and foreign courts should do the same.

As for enforcement in the foreign country where the arbitration takes place, the Yearbooks of the International Council for Commercial Arbitration contain resumés of various countries' arbitration laws and practice. These indicate that, in addition to the defenses available under the Convention, courts of some countries are permitted much more latitude than are United States courts in overturning awards for procedural defects, errors of law, and even for arbitrariness of fact-

Metropolitan World Tankers v. P.N. Pertamina Minjakdan Gas Bumi Nasional, 427 F. Supp. 24 (S.D.N.Y. 1975) (refusing pre-judgment attachment).

⁸⁹ See *supra* note 15 and accompanying text.

⁹⁰ See *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980).

⁹¹ *Id.* at 312. Note also that the Foreign Sovereign Immunities Act permits attachment and execution on such property only if it is connected with the claim, or the foreign state waives its immunity explicitly or by implication, 28 U.S.C. § 1610 (1976), but is not permitted on deposits with certain international organizations and foreign central bank accounts unless there is an explicit waiver and property used for military activities, 28 U.S.C. § 1611 (1976).

⁹² See *Audi NSU Auto Union A.G. v. Overseas Motors, Inc.*, 418 F. Supp. 982 (E.D. Mich. 1976).

⁹³ *Jugometal v. Samincorp, Inc.*, 78 F.R.D. 504 (S.D.N.Y. 1978).

⁹⁴ See von der Berg, *Index of Court Decisions, New York Convention 1958*, Y.B. COM. ARB. 277 (1980), for an index to cases interpreting the Convention, article by article.

finding.⁹⁵

Two recent cases provide an insight into the unevenness of enforcement treatment from country to country. In the *Libyan American Oil Company* arbitration, brought against Libya for nationalization of the former's oil concessions, the arbitrator awarded damages after hearings in Switzerland at which Libya did not appear. Enforcement was attempted in Switzerland, Sweden, the United States, and France. The Swiss court declined to permit an attachment based on the award, saying that in order to overcome the defense of sovereign immunity the state's activity must have a relationship with Switzerland and that in this case the only Swiss relationship was the arbitrator's decision to conduct the arbitration there, which was an insufficient nexus.⁹⁶ If the arbitrator had chosen London or Paris as the place of arbitration, the Swiss court might have had more difficulty in refusing to issue an attachment because Switzerland is a party to the Convention. On the other hand, an intermediate appellate court in Sweden rejected Libya's claim of sovereign immunity and ordered enforcement of the award, saying that agreeing to arbitration is waiver of the defense.⁹⁷ The decision was appealed, but after settlement the appeal was withdrawn. In the United States, the district court, in taking jurisdiction, found that Libya waived its sovereign immunity defense by agreeing to arbitrate, but refused to enforce the award on the ground of act of state. This order was later vacated, however.⁹⁸ In France, *execuatur* was granted, but efforts to overcome the foreign sovereign immunity defense to actions for attachment were unsuccessful up to the time of settlement, when they were dropped.

The matter of *Gotaverken* against the Libyan National Shipping Company involved an arbitration in Paris under ICC rules over the failure of the shipping company to accept and pay the Swedish shipyard for three oil tankers. The Swedish Supreme Court affirmed a lower court decision ordering enforcement of the award in spite of pendency of an appeal of the award in France.⁹⁹ Six months later, the French court dismissed the appeal, saying that ICC rules authorize the

⁹⁵ See, e.g., Briner, *Switzerland National Report*, Y.B. COM. ARB. 181, 201-02 (1978).

⁹⁶ Judgment of June 19, 1980, Federal Supreme Court, Switzerland, P627/79/ha. The court vacated an attachment order, a seizure of bank accounts, and a writ to pay the arbitral award issued by the Zurich District Court.

⁹⁷ Judgment of June 18, 1980, SVEA Ct. App., Sweden, Decision No. I: SO48.

⁹⁸ See *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, 482 F. Supp. 1175 (D.D.C. 1980).

⁹⁹ Judgment of Aug. 13, 1979, Sup. Ct., Sweden, Decision No. SO1462, reprinted in Paulsson, *supra* note 48, at 244.

arbitrator to determine the procedures to follow and therefore French procedural law would not apply.¹⁰⁰

VII. CONCLUSION

United States courts have a strong bias in favor of enforcement of arbitral awards. For instance, the courts find that an agreement to arbitrate contains an implied agreement for judgment to be entered on the award. This bias is also evident in the willingness of courts to find an alternative basis for enforcement if there is a defect in one of the available procedures. At least since *Scherk*, this bias is particularly strong in international cases.¹⁰¹ The New York Convention limits the defenses to enforcement essentially to two: lack of procedural due process at the hearing, and a result which is offensive to the forum's public policy. These defenses are construed narrowly, and the burden is on the party seeking to overturn the award.

In conclusion, it may be observed that in spite of the number of defenses available in the United States to the enforcement of foreign arbitral awards and the many pages of opinion discussing these defenses, there is no case yet arising under the Convention in which a United States court declined to enforce the award.

¹⁰⁰ Judgment of Feb. 21, 1980, Cour d'appel, Paris, 1980 D.S. Jur. 568.

¹⁰¹ See Aksen, *International Arbitration Received Favorably in U.S.*, N.Y.L.J., Nov. 5, 1976, at 1, col. 1.